THE CORPORATE RESPONSIBILITY TO PROTECT HUMAN RIGHTS

The Evolution from Voluntarism to Mandatory Human Rights Due Diligence

Lia Heasman

ACADEMIC DISSERTATION

To be presented, with the permission of the Faculty of Law of the University of Helsinki, for public defense in Pieni Juhlasali, Main Building, on 15 June 2018, at 12 noon.

Helsinki 2018
ACKNOWLEDGEMENTS

We like to think we are the solemn heroes of our stories. It is important to note that this work demanded a village of people and nothing is ever achieved without others.

I want to express my deepest gratitude to Professor Tuomas Ojanen. Working with such a professional and respected professor has given me inspiration towards my own academic work. Most importantly he answered every email and always had time for all my questions. He also believed in my idea when I wanted to write a Master’s thesis on the subject and it was him who recommended I continue to a PhD. Without his encouragement I would have never even thought to write a dissertation. I am thankful for all his valuable help and for our working relationship.

During my research I was fortunate enough to attend the European University Institute for two semesters. I wish to thank Professor Martin Scheinin for his assistance during my stay. I also wish to thank the League of European Research Universities and the University of Geneva for my research stay in Geneva. I would also like to thank Professor Maya Hertig Randall for not only offering assistance in Geneva, but also providing some key insight to a life of a woman in academia. I would like to offer gratitude to the University of Helsinki for financially assisting me in the last months to finish my PhD.

There are many people who along the way have given me professional inspiration and ideas through our discussions. These people include (in alphathetical order) Minna Aila, Jani Alenius, Andrew Clapham, Marja Hanski, Doctor Sakari Helminen, Tuomas Haikka, Doctor Robert McCorquodale, Doctor Merja Pentikäinen, Professor Jarna Petman, Linda Piirto and Kent Wilska. There are a number of other individuals who I have had interesting conversations and exchanges of ideas on the topic to all whom I also grateful and thankful for.

On a personal level the greatest thank you goes to my family. This work would have never even started without parents. Nothing gives you a better foundation in life than parents who believe in you whole heartedly. And nothing helps you as an adult as much as grandparents wanting to look after their grandchild. My mother, Mia Ojanen, always reminded me that women should be heard and not just seen. She encouraged me to follow my ambitions and to let my talent shine through in my work. As far as female role models go my mother continues to be mine. My father, Aki Ojanen, told me to listen to the advice of other people and then to always decide for myself what do with it. He has inspired me to believe that education and hard work are never wasted, but always open new doors to new opportunities. Many would be lucky to have such a mentor – let alone such a father.
This work would have never continued without support from my husband. Corey Heasman was the everyday support and encouragement I needed to continue with my work. He told me to follow my academic dreams to start a PhD and then to follow them around Europe, even when it meant him staying in Helsinki in rainy October. Similarly he travelled with me to a conference to look after our daughter so I could attend so I would not have to leave our daughter for a night. Most importantly he was the kind of partner and father that all working mothers dream of. Without him I would have probably needed to choose a dream, but he gave me the greatest gift by allowing me to do it all at once. I got very lucky.

Most importantly this work would have never been finished without my daughter. Ava, my love and my everything, you act as my inspiration to make the world a little bit better every day and I will try to make it right for you.

Helsinki, May 2018.

Lia Heasman
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<tbody>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>ATS</td>
<td>Alien Tort Statute</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of all Forms of Discrimination Against Women</td>
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<tr>
<td>CEDAW</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>COP</td>
<td>Communication on Progress</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<td>DODD-FRANK</td>
<td>Dodd-Frank Wall Street Reform and Consumer Protection Act</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>GLOBAL</td>
<td>United Nations Global Compact</td>
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<td>GRI</td>
<td>Global Reporting Initiative</td>
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<td>GUIDING</td>
<td>United Nations Guiding Principles on Business and Human Rights</td>
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<td>FRAMEWORK</td>
<td>Protect, Respect and Remedy Framework</td>
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<tr>
<td>HRC</td>
<td>Human Rights Council</td>
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<td>HRD</td>
<td>Human Rights Impact Assessment</td>
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<td>HRD</td>
<td>Human Rights Due Diligence</td>
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<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>ECHR</td>
<td>European Human Rights Convention</td>
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<td>EU</td>
<td>European Union</td>
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<td>ILO</td>
<td>International Labor Organization</td>
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<td>NAP</td>
<td>National Action Plan</td>
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<td>NCP</td>
<td>National Contact Point</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
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<tr>
<td>OECD</td>
<td>The Organization on Economic Co-Operation and Development</td>
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<td>OECD</td>
<td>OECD Guidelines for Multinational Enterprises</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>OEIWG</td>
<td>Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights</td>
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<tr>
<td>SEC</td>
<td>United States Securities and Exchange Commission</td>
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<tr>
<td>SRSG</td>
<td>Special Representative of the Secretary-General</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>The United Nations</td>
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<td>United Nations Convention against Corruption</td>
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<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<td>UN NORMS</td>
<td>Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights</td>
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I THEORETICAL AND DOCTRINAL FRAMEWORK
1 INTRODUCTION

1.1 Morally Wrong, but Legally Right

Globalisation, trade liberalisation and economic growth have changed the landscape of business operations and corporate activity. According to estimations, there exist around 65,000 multinational corporations with 850,000 affiliates, whilst others estimate that the number is actually closer to 100,000 multinational corporations with 900,000 affiliates. Today, multinational corporations make up almost a third of the world’s largest economic entities. Global trade connects the entire world, as trade barriers have ceased to exist between nation states. No one could have foreseen decades ago what international trade would look like in the 21st century. For example, the hundred largest corporations have grown faster than any nation.

The relation between corporations and human rights was not initially seen to be direct or even indirect, but in the age of globalisation, academics, consumers and company executives alike are interested in the real impacts corporate action can have on human rights and the relation between them. The problem may seem new and globalisation the direct cause of the rise in corporate human rights violations, but examples of companies disregarding human rights have existed for centuries. For example, slavery can be considered one of the most atrocious human rights violations known to humankind. The use of slavery in the 18th and 19th century was however explained as a financial decision, and its use shaped the growing economic climate of the US. Ever since then, profitable action has been found to be tangled with human rights, and private companies were even affiliated with the gravest human rights violations committed in the Nazi regime. Unfortunately, human rights violations by profit-driven entities occur in modern times as well.

Multinational corporations are not restricted by state borders, but instead operate in multiple states and hence different jurisdictions, and thus they have found themselves in a selection of jurisdictions. Judicially, multinational corporations act under the obligation to conduct their operations in accordance with the domestic laws of each jurisdiction. Complexities emerge when transnational corporations operate in host states which are unwilling or unable to enforce human rights and

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4 ibid.
fundamental rights. The most gross human rights violations typically occur in *weak governance zones*, which typically suffer from conflict, poverty and corruption.\(^5\) Weak governance zones are defined as ‘investment environments in which public sector actors are unable or unwilling to assume their roles and responsibilities in protecting rights (including property rights), providing basic public services (e.g. social programmes, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective’.\(^6\) Home countries are not able to process human rights violation claims from other jurisdictions when the domestic enforcement of laws has failed, and thus multinational corporations can allocate risks to these types of host countries, making it almost impossible for any government to hold them accountable.\(^7\) In this area, simply adhering to local laws in the host countries will not be enough in order to act ethically. Similarly, adhering to local laws does not guarantee international human rights law is automatically respected, as human rights law is not adopted into domestic law everywhere in the world.

The relation between multinational corporations and human rights exists in three respects. Firstly, MNCs can directly violate the human rights of individuals. Secondly, they can indirectly affect human rights in the regions where they operate. The indirect effects may be less distinct and involve levels of complicity or financial profit. Thirdly, companies can impact the areas they operate in merely by their presence. MNCs can positively impact rights by bringing jobs and wealth to low-income countries and for example through assisting in improving the region’s infrastructure, health care system and school system. By offering employment for women companies can indirectly impact the role of women in society and thus the lives of them and their children in a positive manner. The positive impacts can be either directly attributed to the company’s actions, such as cooperation with organisations or charity, or then can be indirectly attached to the company’s overall presence. Similarly, however, companies in *weak governance zones* can with their silence indirectly affect the area’s tumultuous culture, oppression or conflict. The effects a company can have on human rights through its conduct are divergent and can be all-encompassing much like the companies, countries and people who exist in the sphere of the company’s influences. As multinational corporations can impact human rights in various ways directly and indirectly they can have an impact on all recognised human rights in different situations.


\(^6\) OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (2006) 42.

Striving for profitable business is not against the foundations of human rights. Profitability itself is a morally neutral goal. Most multinational or national companies never violate human rights, but out of the hundreds of thousands multinational corporations and their subsidiaries some of them might and most likely some will. In such a large quantity of companies there is a clear possibility for a bad specimen. It however seems that we live in a paradox where companies seem to have been indirectly granted impunity on an international scale. Partly this is due to the loophole of the jurisdictions for companies to operate in, and accountability is not generated from international law either. As corporations are not understood as subjects in international law, they cannot be bound by international regulation such as that on human rights. International treaties do not regulate non-state actors such as private companies, nor can these be adjudged in international tribunals.

Traditionally we consider that companies should solely operate in the context of either a domicile law or international private law, and hence should not have a place in public international law. All current international mechanisms attempting to discuss business and human rights are based on the voluntary commitment of corporations. The flood of soft law has been overwhelming and there exist wide-scale complexities surrounding this due to most of them lacking enforcement mechanisms and suffering from different levels of validity and legitimacy issues. At the same time, some scholars argue that the essence of human rights actually demands that companies are brought into the sphere of human rights, as the realisation and materialisation of human rights demand the protection of non-state actors as well. Judicial direct obligations in contrast to the current soft-law regulative field would in this sense impact the problems related to enforcement, remedies and overall compliance with human rights norms.

1.2 Hypothesis

Legal and economic scholarly research has examined the protection and promotion of human rights in the context of business operations in growing numbers in the last decade. Specifically, research has focused on corporate social responsibility and its effectiveness; international soft-law mechanisms and their effectiveness; and the ethical and moral argumentation of profit-driven companies being assigned social obligations. Scholarly research has, however, not focused and tackled the question of judicial mandatory obligations regarding business and human rights.

Hence, this dissertation seeks to fill a gap and add a new element to the existing research by comprehensively surveying the evolution of mandatory human rights protection and promotion by corporations. In particular, the research will concentrate on the forms and models of regulation and its validity, enforcement and overall acceptance by corporations, other non-state actors and states. The hypothesis is to find whether mandatory regulation, which regulates the direct human rights obligations of multinational corporations, exists. More importantly, if it does not, can such binding regulation evolve? And if such regulation can evolve, then how will it evolve? Similarly we want to ask what specific obligations and what distinct responsibilities related to human rights it can impose on multinational corporations.

The study is divided into three parts. The first part discusses the various theoretical problems surrounding mandatory business and human rights regulation. This will mean firstly inspecting the theories behind state and non-state actors based on the collected material of academic scholars. The role and theory of non-state actors in international law is carefully reviewed, because international human rights law does not currently consider multinational corporations to be its subject. Specifically, this includes discussing the theory of international legal personality from a human rights law point of view. The horizontally aligned level of human rights is reviewed to bring forth the concept of human rights not existing solely as a vertical relation between state and individual and further discuss how the role of companies correlates with the state’s responsibility to ensure the realisation of human rights.

The interesting dilemma regarding companies as holders of human rights, but not as duty bearers, is discussed firstly through the acceptation of companies as holders of human rights in the context of the European Convention of Human Rights and secondly through discussing the basic concept of corporate actors’ complicity in human rights violations. By understanding the basic theoretical problems of the loopholes left by domestic and international law for multinational corporations to operate in, it is simpler to discern the current evolution of mandatory regimes. The analysis will include cross-referencing and comparing traditional and contemporary theories on the topic in the scope of international human rights law and constitutional law.

The second portion of the study will provide an extensive depiction of the current regulative sphere. This will mean finding the juridical human rights measures that have a connection to corporations and examining their function, validity and enforcement. The dissertation will provide a comprehensive presentation of the existing international human rights instruments regulating business and human rights. This regulation exists currently as soft law and thus is merely voluntary for non-state actors such as multinational corporations. Certain domestic regulative measures are discussed and reviewed in order to demonstrate the role of states in
business and human rights, and more importantly the difference between mandatory national regulation and voluntary international human rights regulation. In order to illustrate that soft law and binding law are not in theoretical conflict, and even more specifically, international soft law and mandatory international law are not in conflict with each other, it also discusses corporate social responsibility and other market-based regulation.

The second part also entails not only the international and domestic regulative sphere, but two case studies regarding business and human rights. Both have been chosen due to their importance to the subject and to illustrate the impact one country’s regulation may have extraterritorially to other countries. The first case study focuses on conflict minerals and how the decision of the US to regulate the importing of minerals from the Democratic Republic of Congo impacted entire industries and also extraterritorially other countries outside its borders. Conflict minerals show how the go-at-it-alone attitude of one powerful country can have global effects. The second case study focuses on the effects civil remedies based on the Alien Tort Statute in the US have had on the human rights situation in Nigeria. The chapter specifically relies on the dynamic between Nigeria and the oil company Shell. The Alien Tort Statute has often been cited as an effective remedy and plausible path to effective business and human rights regulation. In this context, however, the chapter will illustrate how the Alien Tort Statute can have extraterritorial effects, but it will also discuss the failure of the statute as an effective remedy and the recent opposition of the US Supreme Court to applying it to business and human rights cases.

In the third part, I will review based on the first and second part the overall hypothesis and ask whether companies actually are capable of having human rights obligations. The research concludes that the role of states continues to be at the centre of human rights protection and enforcement, not only vertically between state and individual, but also in horizontal relations. Their role has not been diminished in international law or international relations by the growing power of multinational corporations. Even if multinational companies may be subject to direct human rights obligation, this does not automatically make it a desirable outcome. However this does not mean that multinational corporations do not have a role in relation to human rights. The research will continue to argue that international human rights and domestic regulative measures include an expectation of human rights due diligence towards companies and hence such an obligation may already exist as a responsibility in certain regions. Therefore all multinational corporations should have a proper and prudent level of due diligence towards human rights impacts and thus also their human rights risks. The actual content of due diligence requirements are carefully discussed to give an extensive view of the demands set by human rights due diligence obligations in theory, but also in practice.
Further, the research addresses the implications for the future of business and human rights in relation to the evolution of binding human rights obligations regarding corporate conduct. Through the political science theory of policy convergence, the text will illustrate how similar concepts and ideas of due diligence have spread between states through models of regulative cooperation, competition and transnational communication. The race to the bottom theory, in which trade liberalisation and globalisation will ultimately lead to laxer regulation everywhere as states compete for economic advantage, is proven to not be just one plausible outcome of many, but actually an unlikely one. By using the same theory of policy convergence, the research will discuss how regulation regarding mandatory due diligence requirements may spread from one country to another and slowly grow more regional and further on global. In this situation, companies wishing to operate or trade in such areas must accept and comply with the new obligation of human rights due diligence.

1.3 Methods

In order for the research to answer the fundamental questions it attempts to answer, various methods are applied. First and foremost, the research can be described as using legal doctrine as its main and focal method. As the research aims to describe the current regulation sphere, it is important to use traditional methods and tools of legal research. The hypothesis is centralised around the plausible existence of mandatory and binding human rights regulation regarding corporate entities and thus the only manner in which such research can be conducted is through addressing and reviewing judicial instruments, legislation and legal praxis with legal doctrine. The methodology of this research is based therefore on desk-based literature and legal research. In this sense the research is descriptive, as it illustrates how the legal order exists currently.

At first premise, critical legal theory might seem like the appropriate method for conducting the research. The research cannot be described absolutely objectively or with no bias, as the premise itself already leads to a question on the necessity of mandatory international regulation. If we ask should mandatory regulation exist and what should it look like, we simultaneously presume that mandatory regulation is the correct answer to the problem of business and human rights, even if the outcome is the opposite. We then could enter into a conversation in which we criticise the foundations of international law, state sovereignty and the role of non-state actors. International law is built on the role of states, and hence non-state actors do not hold international legal personality, which would allow them to be bound by international law. The inclusion of multinational companies in international law by regulating companies to be bound by human rights law
would shatter this distinction. As we observe the need for binding international regulation regarding private corporate entities, we have already accepted that such a critique is deeply integrated within the research.

In many ways, the research for this reason could be considered to belong to critical legal theory as it criticises not just the law, but could also criticise the underlying system, values and structures, and unveil their true nature. In addition, the hypothesis itself already entails a level of critical legal thinking, as it states that international binding regulation could and possibly should exist, also regarding other actors than states. However, the research relies on the ideal that law and its systems and norms are the solution for a practical social problem. The research does not throw the theories of law or its system to the wind, but attempts to tune the existing system and theories to accommodate the rise of new actors. Critical legal theory does not attempt to answer a problem by modifying the problems of law, but because law cannot address social issues in their mind. Here lies the fundamental difference between the aims and questions of my research and the method of critical legal theory. Therefore this research cannot be considered to belong to critical legal theory.

The hypothesis itself criticises the lack of human rights regulation regarding multinational corporations, it attempts to provide answers and not solely offer critique. The solutions are moulded to fit with the currently existing legal system. Legal doctrine allows us to still operate within the existing legal system and its norms whilst also offering mechanisms for the evolution of international law. It strives for the same criterion as legal systems in general: coherence, consistency, practicality and effectiveness. The research aims to show how these same principles should exist in business and human rights regulation. As non-conservative legal doctrine, the research aims to rearrange matters in law for a new feature to fit into the existing system. Although moral concepts do have a place in the overall conversation on human rights, the research studies the judicial aspect of this concept and hence legal doctrine remains the correct choice of method.

The research does not belong in the “Law and Economics” movement, even though it discusses the conflict between law and economy. Although the research

attempts to describe how the law ought to be in regards to economics, it does not use economic analysis in doing so.\textsuperscript{14} Though the research discusses economic actors and corporate conduct, it remains judicial research with its primary focus on regulation. Even when discussing the theories of economic scholars, the focus and method remain within legal doctrine. For example, the economic theories behind corporate social responsibility are only presented to allow a full understanding of the term and its entry into the legal sphere. The same can be said of Marxism, which believes that the law and the capital market system together are oppressive powers.\textsuperscript{15} Even within the realm of international law research, the Marxist view attempts to show the unjust distribution of power. This research attempts to show the need for regulating free markets and it does not discount their significance or try to discredit them.

\subsection*{1.4 Examining Objectivity in the Research}

\subsubsection*{1.4.1 Scope of the Research}

This research is conducted within the realm and scope of international human rights law. International human rights law is in this context defined as international law regarding international human rights and consisting of treaties, customary international law and international soft law. The focal point of this research is human rights related regulation and more specifically regulation aimed at regulating multinational corporations, and hence other legislative measures which may have an effect on either human rights or business operations, might be left outside the scope of this research. The field of business and human rights is a new field of legal research, but it is however a clearly existing field of judicial research.

Therefore, even when discussing theories of international law, this is solely done in order to further elaborate on the theoretical complexities in this research and thus the research remains focused on international human rights law. It is not the focal point therefore to discuss or research in depth complexities within international law, but merely to observe them when they are in relation to the research topic. The aim of this research is not therefore to conduct a study on international law, but on business and human rights law in relation to international law. International law does therefore constantly exist in the background of the research, but it should not be understood to be the core of this research.

\begin{flushleft}
\textsuperscript{14} Robert Cryer and others, \textit{Research Methodologies in EU and International Law} (Hart Publishing 2011) 84.
\textsuperscript{15} ibid 61.
\end{flushleft}
International law differs from domestic law, because the latter is created and enforced by a judicially superior authority.\textsuperscript{16} The international community is made up of sovereign states and hence cannot be subject to any hierarchical authority.\textsuperscript{17} Legislation and regulation from the European Union is not understood to belong to this definition of international law. When European Union legislation is discussed, it is always clearly kept separate from international law. This research also discusses and addresses questions of domestic regulation and sovereignty, and thus constitutional law also serves as an important part of the research, but not as the core. The review of certain national laws as examples was picked from a variety of possibilities. The reason for the choice is typically to illustrate specific nuances of the problems of national regulation of business and human rights. The discussion on national regulation does not attempt to give a comprehensive illustration of all domestic regulation surrounding the subject, but merely to show a glimpse of the variety of possibilities. Similarly, although the research illustrates examples of certain key domicile regulations regarding the issue, it does not attempt to show a wide-ranging analysis of a demonstration of the chosen state’s legislation.

Similarly, even though the research uses a specifically chosen theory in Chapter 10 from political science and thus relies in this chapter heavily on literature from political science in relation to the chosen theory, this research is and continues to be legal research. The theory of policy convergence does focus on the evolution and transfer of legal policies and hence it can easily also be used in relation to legal research. It is important to note however that referenced sources in relation to policy convergence are from political science and thus it does play a crucial role in Chapter 10. Therefore the research does not use methods used in the field of political science, such as calculations or various types of formulas, but focuses on desk-based literature review in relation to policy convergence, as noted earlier.

The research is limited to multinational corporations which are operating purely for commercial reasons and independently from any governmental affiliation. Therefore the obligations and role of state-owned companies will be noted, but not thoroughly discussed. The research focuses on multinational corporations, which means that it does not discuss the role of merely national corporations, even though they often exist in close relation with multinational corporations. They will be therefore sometimes specifically discussed in connection to multinational corporations, but their role and stance will not specifically be discussed in the same depth as the role of multinational corporations.


\textsuperscript{17} ibid.
1.5 Sources

The research operates in the realm of both international law and constitutional law, which also requires the use of sources from international and national jurisdiction. Sources of international, EU and national law are kept clearly separate. This is visible in the formulation of different chapters to address international, national and market-based regulative measures. This allows the differentiation of the roles and objectives also to be understood as divergent.

The current research rests on the same formulation of regulation classification as that proposed by Ralph G. Steinhardt. He divides the regulation of business and human rights into four classifications.\(^{18}\) Firstly we have international declarations, recommendations, guidelines and norms for regulating socially responsible behaviour from international organisations, such as the UN and the International Labor Organization. Even though these regulative regimes are separate instruments and have evolved somewhat in isolation, they are still compatible with each other in many ways.\(^{19}\) All current international declarations, recommendations, guidelines and norms for regulating socially responsible behaviour they are completely based on voluntarism and thus are not judicially binding. However, their significance should not be under-estimated, as they can provide corporations with a set of ethical values and guidelines in conducting ethical corporate activities.

Secondly there are the regulative measures which can be identified as belonging to the market-based group.\(^{20}\) The basis for these regimes can be usually found in the profit-driven corporate strategies with which corporations try to attract consumers and shareholders. The new trend of socially accountable auditing contributes not only to the difficulties transnational corporations have trying to pinpoint their possible violations, but also helps corporations to understand the financial repercussions of violating the ethical code of conduct and to prepare for possible reductions in their profitability based on their violations. Companies evolve, regulate and enforce the obligations that bind them themselves. Therefore, market-based regimes are typically self-regulation of the companies themselves as individual companies, as a group or as an entire sector.

The third sets of regimes are those which are enacted by domestic law.\(^{21}\) Various countries have started regulating corporate activity in relation to human rights in recent decades. Not all regulation focuses on human rights, but on various aspects of sustainable behaviour of companies and transparency on issues related


\(^{19}\) Ibid.

\(^{20}\) Ibid.

\(^{21}\) Olivier De Schutter (ed), Transnational Corporations and Human Rights (Hart Publishing 2006) 22.
to human rights. As mentioned reporting on non-financial matters has been a growing trend in recent years. European Union member countries have followed EU regulation and made non-financial reporting mandatory for certain corporate entities with a specific scope.

The fourth set of regulations is based on civil liability and judicial direct liability.\textsuperscript{22} Judicial liability rises from domestic legislation, which makes it possible in certain cases to prosecute corporations for their violations of law. The application of the extraterritoriality principle has allowed states to prosecute corporate offenders for violations of human rights which occurred outside their jurisdiction. Usually these sorts of domestic cases have revolved around environmental restrictions.

1.5.1 Literature

The sources of material regarding this research are varied and do not solely depend on judicial material. The theoretical questions must be viewed from an international human rights law point of view and using its core theories. The literature review has been therefore focused on international human rights law literature. Similarly literature on the specific business and human rights research field is at the core of the collected material. Academic articles, academic books, dissertations and all other academic writings that have a connection were widely used. The work of focal legal researchers, such as Surya Deva, Michael Addo, Andrew Clapham and Larry Catá Backer, were focused on, but it was not limited to them. Essential writings by important international scholars, such as Philip Alston, Jan Klabbers, Robert McCorquodale and Anita Ramasastry have also been specifically analysed. Material has been collected from various databases.

1.5.2 Legal Praxis

Legal praxis has been researched to indicate complexities in practice. Specifically legally binding verdicts from various courts in regards to business action violating human rights were focused on. These included judgments from the US higher courts in relation to the Alien Tort Statute. The rulings are therefore used as material to provide an outlook on the progression of business and human rights or certain key characteristics of the research in our case study in Section 7.1. Specifically whilst discussing civil remedies for human rights abuses the different legal system is pointed out clearly and distinctly.

The most important legal praxis and the main focus come from international tribunals and international courts. The legal praxis of human rights tribunals is

\textsuperscript{22} ibid 26.
at the heart of the research and hence has been one of the pivotal sources of material. The European Human Rights Court and the Inter-American Court of Human rights provide important milestone cases in which human rights have been effectively linked with business operations. The European Human Rights Court has also adjudged in a number of pioneering judgments that corporate entities are the holders of human rights, which is discussed in Section 3.2. Specific case law of the ICC was also used as reference to the criminal responsibility of individuals, and the legal praxis of the Nuremberg trials was also used as a reference and has been reviewed in order to indicate the ability of companies to abuse human rights.

Non-obligatory decisions and non-judicial remedies in relation to business and human rights were also studied, such as those of the National Contact Points for the OECD Guidelines for Multinational Corporations. The National Contact Points are not courts or even judicial organs, but provide actual manifestations of corporate actions which violate human rights and hence give a practical view of the problem even though they are not strictly judicial in their nature.

1.5.3 Judiciary Text

Domestic regulation has been used to provide examples of mandatory business and human rights regulation. In domestic laws enacted in the local language that the researcher does not speak, such as French and Dutch, I have relied on the translations of various organisations. Judiciary texts and drafts were collected and reviewed from specified international organs of the United Nations, the International Labour Organization and the OECD. One of the main features of the research is a detailed review of the current international regulation sphere. Particularly for this purpose the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the Guiding Principles on Business and Human Rights and the Global Compact of the UN initiatives were reviewed. The OECD Guidelines for Multinational Corporations acted as an important source in presenting a comprehensive outlook on the existing regulation. The current conversation and the drafting of a binding treaty regarding business obligation for human rights is obviously a focal point for this type of research. As there currently exist no draft texts, we must rely on the information published at the time this research was conducted.

Similarly the recommendations and comments of certain organs of the United Nations, such as the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights, were analysed, as they produce important practical aspects of human rights. Specifically they allow us to move beyond international treaties in the research on non-state actors, state duties, the horizontal level of human rights and the obligations of multinational corporations.
1.5.4 Interviews

Experts and other people working with human rights or corporate social responsibility were interviewed for the dissertation. These interviews served only as background material and important exchanges of views rather than actual concrete source material. Interviews offered the researcher the possibility to discuss the subject of business and human rights with people who actually work with the topic in practice and thus can offer a new point of view to keep the research grounded in practice as well. Interviewees have been thanked in the Acknowledgments of this work.

However, these interviews were conducted in an ethical matter and as focused interviews in which the interviewee was not tied to certain pre-discussed questions. The interviews were also less structured, which allowed a focus on certain topics that came up during the actual discussion. The function and subject of the dissertation were clarified in every interview and confirmed with every interviewee. Interviewees did not receive any form of compensation for their interviews and neither were they given any possibility to have an impact on the research in exchange for their participation in the interview.

1.6 Ethics of Research

All research for the dissertation was conducted in an ethical manner respecting the integrity of research. To ensure that the dissertation followed all applicable ethical standards, the Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland by the Finnish Advisory Board on Research Integrity was followed. Specific attention was paid to sourcing and referencing in a manner on par with academic standards. A clear division between others’ work and this work shall be made to ensure the integrity of research. Plagiarism has not been accepted in any manner in this research.
2 STATES, NON-STATE ACTORS AND HUMAN RIGHTS

2.1 State Actors

2.1.1 Definition of State Actors

To be able to dive into the topic, the differences between state actors and non-state actors must be understood to realize why international human rights law depicts multinational corporations in the role that it currently does. Much of the hypothesis is specifically rooted in the different roles and nature of these two actors.

Only nation states are considered to be state actors. No other form of actor can be considered to be a state actor, and more importantly a state must be a juridical state entity to be considered as a state. For a state to gain juridical statehood according to the Convention on the Rights and Duties of a State of 1933, it must possess a permanent population, a defined territory, a government and the capacity to enter into treaties with other states. These narrow definitions can be met if firstly a state possesses a permanent population, which means it must have citizens. Secondly, there is no specific standard of size for a state’s territory, but the area must be defined for the nature of the demanded organised government. Thirdly, for a state to be considered an equal sovereign entity, it must have the capacity to enter into relations with other states. Some wish rather to define a state based on its function. For example a state can be defined as ‘that particular, subsidiary, functional organization of the body politic which has for its proper object the promotion of the temporal good’. A state has a number of basic functions which are expected from it. For this reason a state cannot be an entity that has its intentions based on commercial purposes.

Lassa Oppenheim notes that ‘a state is and becomes an international person through recognition only and exclusively.’ Recognition is in the other hands of other states, as there exists no international organ to decide on statehood or interpret on the state’s capacities. Statehood and recognition are hence separate

26 Broms (n 24) 44.
28 ibid 45.
ideas and recognition tends to imply a possible entrance examination held by the international community consisting of the established states testing the candidate.\textsuperscript{29} The United Nations has had a significant role in illuminating questions on statehood. The Charter of the United Nations notes that the ‘membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations’.\textsuperscript{30} It must be mentioned that the Charter requires statehood as an admission criterion, which means that admission to the United Nations does not constitute recognition of statehood.

\textbf{2.1.2 Sovereignty}

The definition of a state is tangled with sovereignty. For a state to be considered a state actor, it must also be considered a sovereign nation entity. Sovereignty is the true lifeline of statehoods, because sovereign states are possibly able to govern and operate with superior power in the manner of their choice inside their territory without interference from the outside. International relations and the international community rely on the fundamentals of sovereignty to define jurisdictions and equality between sovereign states in relation to their own territory and population as well as in relations between them.

Although the concept of sovereignty originated much earlier, it was Jean Bodin who wrote the early theories of absolute sovereignty and has been seen as the father of sovereignty.\textsuperscript{31} Bodin saw sovereignty as absolute power of the ruler, as sovereignty is given by mandate, which is continuous and unbreakable. As Bodin states, ‘if such absolute power be given him purely and simply without the name of a magistrate, governor, or lieutenant, or other form of deputation; it is certain that such a one is, and may call himself a Sovereign Monarch’\textsuperscript{32} Civil or positive law could not even limit the sovereign’s absolute power.\textsuperscript{33} In his view there were only three exceptions to that absolute power, which were the laws of God, the laws of nature and human laws common to all peoples, which cites the constitution of a given state. These three refer to principles of reason and justice and to a superior

\begin{footnotesize}
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\item \textsuperscript{30} Universal Declaration of Human Rights, UNGA Res 217 A(III) (adopted 10 December 1948) II 4 [herein after UDHR].
\end{itemize}
\end{footnotesize}
moral. Bodin’s view on sovereignty differs widely from that of another significant scholar, Thomas Hobbes. Hobbes saw that in an unregulated world there would be war amongst all people, but with a social contract and the renunciation of rights or the transfer of rights a sovereign competence could be authorised. The authorisation of the sovereign would not however derive from the social contract, but from the sovereign’s ability to protect those who had consented to its obedience and hence from the concept of sovereignty itself. Sovereignty is absolute, cannot be divided amongst quarters and is an authority for which there exists no appeal, and thus the power of the sovereign is only limited by itself. In contrast, this also means that when a state is unable to protect its citizens, it is no longer sovereign and its power could be tested. In losing sovereignty, the sovereign hence ceases to exist. The people of the state can then together as a whole change their sovereign ruler based on their role as parties to the contract stating their safety, as solely in their role as subjects they cannot.

Even more importantly, the Westphalia principles gave international law its normative core. With the use of sovereignty all elites of power could claim authority and power over their lands and countries. As the forces of communities had grown stronger during the 16th century, the idea of ultimate power of the ruler appealed to the parties of the treaty. With the treaty was established a new Europe that was based on the sovereignty of nation states, which was influenced by the ideas of both Bodin and Hobbes. Sovereignty meant that each government of each state was unequivocally sovereign within its territorial jurisdiction and that states would not interfere in each other’s affairs. In the Westphalia view, the sovereign had the right to act within its jurisdiction without any interference, which also meant the rise of the principle of non-intervention. The idea of Westphalian sovereignty remained intact during the next centuries as growing statehoods wished to ensure their absolute power and dominance. After the First and Second World War, there was a clear erosion of sovereignty with the development of the basis of human

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34 Beaulac (n 31) 14.
35 Simona Tuțuianu, Towards Global Justice: Sovereignty in an Interdependent World (Asser Press 2013), 8; Nagan and Haddad (n 33) 442.
36 ibid 442.
38 ibid 64.
39 Nagan and Haddad (n 33) 446; Douglas Howland and Luise White, ‘Sovereignty and the state of the state’ in Douglas Howland and Luise White (eds.) The state of sovereignty: territories, laws, populations (Indiana University Press 2009) 3.
41 ibid; Nagan and Haddad (n 33) 447; Tuțuianu (n 35) 9.
rights and humanitarian standards.\textsuperscript{43} It was determined that states could not let even other states commit grave and unjust crimes inside their borders without any interference. In this vacuum, the United Nations grew rapidly to be an international arena where the focus was to uphold global peace, security and human rights. The Charter of the United Nations codified sovereignty as one of its principles using a more traditional view by stating that the United Nations is based on the principle of the sovereign equality of all its members.\textsuperscript{44}

In the modern world, as well, sovereign equality of states consists of four elements: the judicial equality of states, the enjoyment of the right inherent in full sovereignty, the respect of the personality of a state, its territorial integrity and political independence, and faithful compliance with international obligations.\textsuperscript{45} The equality of states is directly and inherently linked with sovereignty, because if there exists no higher power than the nation-state, there cannot be any rival power, whether foreign or international.\textsuperscript{46} The international community consists of sovereign states which are all equal and sovereign in their jurisdictions and in their relation to each other. Sovereignty remains the primary rule for all international relations\textsuperscript{47} International organisations have received their authority and legitimacy by being formulated by nation states. International law receives its legitimacy from state consent, which is a sovereign act conducted by a sovereign entity. When the nation-state is the highest source of power due to its sovereignty, then there cannot exist any higher regulation unless it has explicitly given its consent.\textsuperscript{48} Every government has carefully chosen the situation where they consent to delimiting their own power and to transfer some of it to another entity. The jurisdiction of a state represents the scope of municipal law in which international obligations may only operate inside the territory of a state with the specified consent of the state.\textsuperscript{49}

Even with the vertical allocation of power between states nation states have been forced to reconsider sovereignty. International organisations, supranational organisations and international law have all demanded that states surrender some of their sovereign power. The monopolised and untamed power of nation states has faced widespread opposition and has had to surrender to international legislation, such as that on human rights. Human rights spear through sovereignty by regulating

\begin{thebibliography}{9}
\bibitem{UDHR} UDHR (n 30) 2
\bibitem{Broms} Broms (n 24) 60.
\bibitem{Jackson2} Jackson (n 46) 782.
\end{thebibliography}
sovereign states on matters inside their own jurisdiction. Actually it could be said that when we refer nowadays to modern sovereignty we are actually referring to a question of the allocation of power and even more the government’s decision-making power. The debate on international regulation and national power is at its core a question of the fear of losing the national government’s legislative and governmental power. The allocation of power is extremely different today than it was previously, with international organisations, governmental entities and non-state actors operating in the same sphere.

2.1.3 Extraterritoriality in the Human Rights Context

Sovereignty is closely assigned with territoriality, which allows the sovereign authority to exercise its authoritative power in its territory. Jurisdiction, as according to Oppenheim, ‘concerns essentially the extent of each state’s right to regulate conduct or the consequences of events’. Jurisdiction can be prescriptive, adjudicative or enforcing depending on whether jurisdiction means the applicability of law or the enforcement authority of the laws of a state. Jurisdiction allows states to regulate and enforce persons and occurrences within their borders in accordance with the territoriality principle. The principle applies to situations in which the act takes place, the effects of certain actions or certain acts occurring within the state. The principle of territoriality may be the general rule, however, it is not absolute, as problems with jurisdiction only arise in situations which have a transnational quality and derivation from it is acceptable in accordance with the rules of international law.

Extraterritoriality is a complex field without distinct clear guidelines or rules in place, also in relation to international human rights law. International law

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50 Jackson (n 46) 790.
56 Frederick A Mann, The Doctrine of Jurisdiction in International Law (Volume 111, Nijhoff 1964) 14; Brownlie (n 53) 165.
governs the rules which determine whether extraterritorial jurisdiction can be applied to a specific instance. Extraterritorial prescriptive jurisdiction is accepted if there is a connection between the state and the conduct it is regulating. Such a connection must typically exist for extraterritoriality to be appropriate, and a variety of situations can be considered in which the relation is considered to approve extraterritoriality. For example, the active and passive nationality principles allow states to have jurisdiction in cases where the offender or the victim is a national, whilst the protective principle gives jurisdiction to a state when its vital interests are at stake. Specifically, the active nationality principle is widely used by domicile courts as grounds for extraterritorial jurisdiction, but the scope has widened to include other principles as well.

Extraterritorial jurisdiction according to the universality principle arises solely from the nature of the crime without the demanded nexus, as other principles of jurisdiction. Often the reasons for universal jurisdiction are that other states cannot exercise jurisdiction in accordance with the traditional rules and no other states have a direct interest, but the international community has an interest, which allows the state to act as a surrogate for the international community. Certain conventions allow universal jurisdiction and, for example, the Geneva Conventions specifically allow extraterritorial prosecution for war crimes. Certain offences, such as piracy, have been tackled traditionally in nation states by applying universal jurisdiction. Serious crimes like genocide have also been tackled by universal jurisdiction and some argue that you could think that universal jurisdiction is applicable to ius cogens rights. The overall existence of ius cogens

58 DP O’Connell, International Law (Stevens & Sons Ltd 1970) 599.
63 Bassiouni (n 62) 96.
norms however is debatable. In the Arrest Warrant case judge Van den Wyngaert noted that there is no generally accepted definition for universal jurisdiction\textsuperscript{68} and hence complexities will rise when states argue for its use.

As noted, if local courts started asserting international law in these cases, the situation would become even more complex. This would make domicile courts capable of behaving like international tribunals, but without acceptance and legitimacy from other states. Even when applying international law, a domicile court is still only a local court in one jurisdiction. William J Aceves notes that a universal system for human rights litigation in which domicile courts tackle human rights violations by applying international law would set up a network of liberal democracies, apply the principle of universal jurisdiction and enforce common international standards.\textsuperscript{69} So-called transnational law litigation\textsuperscript{70} brings together and merges the distinct international and domicile litigation.\textsuperscript{71} In transnational law litigation, the domicile court applies international law and hence intertwines the national and international legal spheres together. The courts obviously even in these situations follow their domestic procedural rules, but apply international law to the factual judgment. Apart from the legitimacy issues, the possibility of international conflicts is even more possible when a local court applies international law to cases based on the universality principle.

\section*{2.2 Non-State Actors}

\subsection*{2.2.1 Definition of Non-State Actors}

The definitions of state and sovereignty matter in the scope of this research, because international law and thus international human rights law has been centralised around state actors for its entire existence. International law does not exist without nation states. States are the key players in the international field and possess the authority and power to consent and bind themselves to international obligations. They are the subjects of international law, who can therefore act as the receivers of rights and responsibilities. When recognised, statehoods operate in the sphere of international law and human rights. Therefore it is rather simple to define non-state actors as all other entities that cannot be characterised as states. As such,

\begin{itemize}
\item \textsuperscript{68} International Court of Justice, Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium, dissenting opinion Van den Wyngaert (14 February 2002) 46.
\item \textsuperscript{70} ibid; term used also by Philip C Jessup, Transnational Law (Yale University Press 1956).
\item \textsuperscript{71} Harold Hongju Koh, ‘Transnational Public Law Litigation’ (1991) 100 Yale Law Journal 2347, 2348.
\end{itemize}
they enjoy human rights compared to states that are the responsible party in their protection. States are still seen as the only true subject of international law and hence must be segregated to avoid confusion between these clearly different entities, and the term non-state actors indicates the bipartite division of international actors, because actors are defined either as states or non-states.

Typically we define non-state actors as all actors that cannot be qualified as states. Philip Alston call this the ‘not-a-cat’ syndrome, in which everything that is not defined as a state actor is defined as a non-state actor.72 By this classification, with regard to multinational corporations, international organisations consider individuals and all other private entities as non-state actors. Views on the actors characterised to belong under the term diverge between scholars. Bas Arts defines non-state actors as all actors that are not states, but operate on an international level and are potentially relevant to international relations.73 He continues to depict criteria of relevance of international relations to size, constituency, formal recognition and political impact.74 His view attempts to sort solely domestic actors from the real international operators who are at the centre of our attention, as well. The Cotonou Agreement depicts non-state actors to include the private sector, economic and social partners, including trade union organisations; and civil society in all its forms according to national characteristics.75 Others, such as Arts, have specified five general groups of non-state actors: intergovernmental organisations, international non-governmental organisations, transnational corporations, epistemic communities and a remaining general category.76 However a number of actors can be placed within the term. For example international terrorist groups or political movements could be seen to represent international non-state actors, as well.

Attempts at defining the term have been made in various situations. The European Commission notes that non-state actors are created voluntarily by citizens and are independent from the state.77 Although they can promote an issue and even have a role in defending those interests or policy-making, they are still only a profit or non-profit organisation.78 It is hence clear that international non-

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73 Bas Arts, Non-State Actors in Global Governance Three Faces of Power (Max-Planck-Gesellschaft 2003), 5.
76 Arts (n 73) 5.
78 Ibid.
state actors operate on an international level and can even be relevant or vital to international policy-making. This does not however make them in any way relatable to state actors. As early as in 1949, the International Court of Justice (ICJ) commented that ‘the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community’. 79

A few things are certain. Firstly, there exists a clear differentiation between states and non-states. This is obvious, as the wording itself of the term already entails the difference. Wording can also differ in other aspects than the name. Some only use “violation” in relation to human rights when the actor in question is a state in contrast to a situation in which a non-state actor violates human rights. In these situations the term “infringement” is typically used. However this research uses the term “violation” in relation to both state and non-state actors, due to the nature of this work.

Secondly the different terms emphasise the different roles states and other entities play and possess. The terminology attempts to demonstrate that non-state actors are not recognised statehoods, which means that they do not possess the rights and obligations granted to states by international law. Non-state actors are not wished to act and cannot act in the same manner as states in the international community. 80 The sovereignty of nation states remains the valid argument differentiating state and non-state actors, since demanding state-like behaviour from private actors would violate the existence of sovereignty. If non-state actors acted like states, they would, even if only on a theoretical level, become a rival source of power.

2.2.2 Globalisation, State and Non-State Actors

Without globalisation and the rapid growth of capitalism, sovereign nation states would not have needed to consider diminishing of sovereignty on the part of private actors. International organisations would have continued to impact the internal affairs of states, but other non-state actors would have not had an affiliation when it came to matters regarding sovereignty. The power has, however, shifted, and non-state actors have evolved into a somewhat imminent threat to sovereignty. States have always had and continue to have legislative and enforcement power inside their jurisdiction, and international law applies to non-state actors indirectly through

domestic legislation. Sovereignty allows states to bind themselves to international obligations of their choice, to translate the obligations into domestic law and to enforce those norms on subjects inside their jurisdiction with internal legislative measures. The jurisdiction of a state represents the scope of municipal law in which international obligations may only operate inside the territory of a state with the specified consent of the state.\textsuperscript{81}

Clearly in today’s modern world a variety of international players have adopted some of the power and control that states used to solely possess. Scholars such as Georg Schwarzenberger insist that the real measure of power is not economic, but military and political power, which are superior to economic power.\textsuperscript{82} Schwarzenberger does not see that economic power could surpass military and political power in any situation.\textsuperscript{83} The entry of new obligators of human rights would not diminish the meaning of states, as they would continue to be the main actor in the promotion of rights. Some could even consider the current situation to depict the end of sovereign states, but at least there exists an undisputed change appearing in the role of a state. The globalised economic markets have meant that corporate action and the lives of individuals are not directly linked to only one jurisdiction.

Some discuss that non-state actors for this reason should have some of the burden of states and not only enjoy their global power. However, non-state actors would as the holders of international responsibilities shift responsibilities away from states.\textsuperscript{84} This would not only mean that states would lose some of their international power, but it could also lead to a perception that states have less responsibility than previously regarding human rights. By sharing the pool of responsibilities, it would become easier to usher unwanted responsibilities onto someone else. States could possibly use the new role of private actors to avoid responsibility for the promotion and protection of international human rights and hide behind the role of non-state actors. In this scenario, the language of human rights could be used to justify human rights violations by shifting blame to, for example, rebel groups, hence making a non-governmental organisation the culprit instead of the state.\textsuperscript{85} The entire concept of human rights as the protection of individuals from state power could be therefore trivialised. This idea however is fully based on the presumption that states have some level of control over all the human rights violations occurring in their jurisdiction.\textsuperscript{86}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} Lukashuk (n 49 ) 305.
\item \textsuperscript{82} Georg Schwarzenberger, \textit{Power of Politics - A Study of World Society} (Stevens & Sons Limited 1964) 129.
\item \textsuperscript{83} ibid.
\item \textsuperscript{84} Discussion of a similar critique, on the the Legal Impossibility Agrument in Clapham (n 67) 41–46.
\item \textsuperscript{85} ibid 42.
\end{itemize}
\end{footnotesize}
2.2.3 Definition of Multinational Corporations

The interest here in the scope of non-state actors is obviously multinational corporations. Multinational corporations are private non-state actors by all definitions and are in theory and practice segregated from nation states. The term multinational corporation is widely used, but not always clearly defined, and the content of definitions varies. However, the problem is that the term should not be over-inclusive or under-inclusive. Various international and domestic regulative instruments have struggled with attempting to set boundaries of, for example, revenue and employees, to limit the inclusion of companies in their scope.

For the purpose of this text, the term multinational corporation was chosen over transnational corporation, but the terms multinational enterprise and transnational companies typically denote the same meaning. Multinational does not however mean the same as transnational. As Andrew Clapham describes, a transnational corporation focuses on a single legal corporation which operates outside the home country with legal status incorporated in the national law in the home country. Transnationality emphasises that even when such companies have nationality in their home state, they have clear elements of transnationality. A transnational company seeks to establish global operation with little regard for borders, in contrast to a multinational corporation, which expresses a traditional horizontally organised company which has operations in various countries. For clarity, the entire dissertation is written by using the term multinational corporation. Only in situations in which “transnational corporation” or “multinational enterprise” is used in an original text will the text differ on the term.

The OECD Guidelines define multinational corporations as ‘companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways.’ Multinational corporations have three clear characteristics. Firstly, a company is a legal entity which has a separate legal personality from its owners, employees or directors. Limited liability entails that its investors are only subject to losses equal to their investments. The ownership may be private or public. Shareholder primacy theories note that as a profit-driven entity, a company seeks profits, and that is its only aim and sole purpose.


Clapham (n 67) 199.

ibid 200.


ibid.
A corporation is a large company or group of companies authorised to act as a single entity which is recognised by law. Secondly, a corporation is a cluster of legal entities. The parent company exercises a level of control or ownership over its subsidiaries. Corporations are group of separate legal entities with each subsidiary being separate from the parent. This problem is often noted to be the “corporate veil” problem, in which the parent company can hide behind the legal separation between legal entities when their subsidiary has acted in an unethical or questionable manner.

Thirdly, the multinational element of a company could be connected to its international operations, locations or contractors, or for example to its directors’, employees’ or shareholders’ nationality. Typically, for a company to be considered a multinational corporation, ‘a corporation must have a certain minimum size, control over production or service plants outside its home state and have all this unified in corporate strategy’. To be classified as a multinational corporation, a private corporation must be large-scale, have operations outside its home state and be profit-driven. Regardless of the chosen term, it is ‘the ability of multinational corporations to operate across national borders and outside the effective supervision of domestic and international law’ that makes them the focus of attention. Certain specific features of multinational corporations are at the centre of interest in multinational corporations, for example, ‘their capacity to locate productive facilities across national borders; to exploit local factor inputs thereby, to trade across frontiers in factor inputs between affiliates’.

2.3 Horizontal Effects of Human Rights

The vertically aligned regulation of human rights descends from the sovereignty of states. The international community consists of sovereign state entities which legitimise international jurisdiction by their acceptance and participation. States are the primary subjects of international law, as they exercise the principal law-making and executive powers inside their jurisdiction. Even though there exists no jurisprudential reason for state duties to be the focus of human rights law, the link between states and human rights has formed as a product of international decision-

94 International Court of Justice, Case Concerning the Barcelona Traction, Light and Power Co Ltd, Belgium v. Spain (24 July 1970), 42.
making.\textsuperscript{98} Human rights hence provide a number of obligations onto state actors, such as the duty to avoid certain conduct, the duty of equal treatment, the duty to create institutional machinery, the duty to prevent abuses, the duty to provide a remedy for abuses, the duty to provide certain goods or services, and the duty to promote human rights.\textsuperscript{99} The language and content of human rights is defined with terms that make it only possible for states to be obliged in their execution. The idea of the non-existence of the horizontal level is due to the fundamentals of human rights, which are based on a structure designed for state actors, and all norms derive their legitimacy from the acceptance of states.\textsuperscript{100} Therefore, placing human rights in the private relationships between private actors goes in a way against the foundation of human rights.

The term “horizontal effects of human rights” has not been much used by scholars of international law. Others have used “human rights in the private sphere” as better terminology for the same phenomena.\textsuperscript{101} The term is often more closely linked to European Union law and has been used more frequently in this context.\textsuperscript{102} However, this term distinguishes the key characteristics between a human rights sphere aligned between the state and its subordinates, and an independent sphere aligned between private actors. When discussing the horizontal effect of human rights, it is important to separate it from the relation between states and the international community. The international community does not have a vertical relation to the state actors it comprises, but is aligned horizontally.\textsuperscript{103} This horizontal structure of the international community must be kept separate from the horizontal effect of human rights, which will be discussed in this chapter.

### 2.3.1 A State’s Duty to Protect in a Human Rights Context

Human rights have a tripartite character, as states must protect, respect and ensure the enjoyment of human rights.\textsuperscript{104} Firstly, they must not violate internationally accepted human rights. States are not allowed directly to infringe the rights of their citizens or aliens in their jurisdiction. Secondly, in certain instances states

\begin{itemize}
  \item \textsuperscript{98} Ratner (n 9) 469.
  \item \textsuperscript{99} ibid 466.
  \item \textsuperscript{101} Terminology used in: Andrew Clapham, \textit{Human Rights in the Private Sphere} (Clarendon Press 1996).
  \item \textsuperscript{102} It is important to note that the reason for the use of the term results from the indirect and direct effect of European Union law. Also within the scope of EU law, we refer to fundamental rights, whilst human rights are used in the context of external relations, for example between EU and non-EU member states.
  \item \textsuperscript{103} Antonio Cassese, \textit{International Law} (Oxford University Press 2001) 496, 501.
\end{itemize}
are also obliged to take positive measures regarding human rights. To ensure that rights materialise, states must also promote human rights. Positive obligations do not rely on the horizontal effects of rights, as positive duties can only have a very limited meaning among non-state actors. Human rights documents have not stalled at demanding states not to interfere in the exercise of human rights or to promote them in their territory, but have also asserted them to ensure the existence of rights in horizontally aligned relations. States therefore have the responsibility not only to refrain from violations of human rights, but also to protect individuals within their jurisdiction from violations committed by non-state actors. The duty to protect is an accepted responsibility of states in international law.

The obligation to ensure human rights stipulates a responsibility to protect against infringements made by other actors than the state and to actively enforce the legislation and enforcement of the rights. When discussing obligations regarding the ensuring of rights, we are directly referring to the horizontal sphere of human rights. In order for states to effectively uphold human rights in their country, they must also actively protect all individuals from human rights violations committed by non-state actors operating in their jurisdiction. States therefore violate their own international obligation if they fail to protect individuals from actions committed by other individuals which infringe their rights. States cannot only be held directly responsible for vertical violations of rights, but are also indirectly responsible for horizontal violations of rights. In practice, this means ensuring they conduct adequate measures to prevent violations of rights with, for example, regulation and the provision of effective remedies.

The duty to protect is directly attached to an international due diligence requirement, which is widely used to depict an obligation to provide appropriate prevention mechanisms and remedies for all victims of human rights abuses and is relevant in various human rights treaties. The Inter-American Court of Human Rights has depicted the responsibility of states in the meaning of proper due diligence, in which the state not only refrains from violation, but also provides adequate remedies to prosecute offenders and provide compensation for victims.

Due diligence first appeared in the Velásquez Rodríguez v. Honduras judgment,\textsuperscript{111} which concerned a disappeared individual assumed to have been killed by the Honduran army. The Inter-American Court of Human Rights held Honduras responsible for failing to prevent the attack or punishing the attackers, even though the state was directly responsible for the events. The judgment was therefore on Honduras’ ‘lack of due diligence to prevent the violation or to respond to it’.\textsuperscript{112}

Due diligence requires that the state not only refrains from violation, but also provides appropriate adequate remedies to prosecute offenders and provide compensation for victims. This means that states must also investigate claims and punish private actors if violations occur.\textsuperscript{113} States not only have the negative obligation of respecting human rights, but also the positive obligation of protecting them in the relations between private actors, but a state cannot however be held responsible for all violations committed by private actors. A state has to have taken all necessary means and measures that can be reasonably expected from them to protect rights between private actors. The Human Rights Council (from here referred to as the HRC) has noted in a General Comment that the obligation to ensure protection encompasses the protection of individuals against violations committed by private persons or entities, and state parties can be viewed to be in violation of the International Covenant on Civil and Political Rights (from here ICCPR) ‘when permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities’.\textsuperscript{114} The due diligence requirement specifically draws a line in the sand between violations of private actors that states can or cannot be held responsible for. The due diligence requirement therefore asks states to take all necessary action, whether legislative, administrate or enforcement.

In several core international conventions,\textsuperscript{115} states are also obligated to enforce rights on a horizontal level and to take the appropriate measures when a private actor is violating said rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms (from here ECHR) mentions the obligation of all parties to ensure to all persons subject to their jurisdictions full exercise of

\textsuperscript{111} ibid.
\textsuperscript{112} ibid 172.
\textsuperscript{113} Human Rights Committee, General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 (2004) CCPR/C/21/Rev.1/Add. 13, 8.
\textsuperscript{114} ibid.
This also entails ensuring rights to corporate entities. The obligation to ensure rights is mentioned in the American Convention on Human Rights (from here ACHR) and the ECHR. The ACHR also demands state parties ensure the exercise of all rights without discrimination and frequently uses the term “prevent”, which embodies the same idea of protecting individuals from violations committed by non-governmental parties. In addition, the African Charter on Human Rights and People’s Rights mentions the state’s responsibility to ensure rights in various specific provisions concerning, for example, discrimination against women and the right to development.

United Nations treaties often also include various obligations for the state to ensure the enjoyment of rights. The ICCPR presumes all parties to respect and ensure to all individuals within their jurisdiction the rights recognised by the Covenant. The International Convention on the Elimination of All Forms of Racial Discrimination (from here ICERD) requires state parties to prohibit racial discrimination by non-state actors and to provide equal protection regardless of whether the perpetrator is a governmental or private actor. The ICERD even has a provision specifically obliging states to regulate business activities. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families Article 16(2) notes that effective protection by the state also includes protection against acts of violence, physical injury, threats or intimidation by private individuals, groups or institutions. The Convention on the Elimination of all Forms of Discrimination Against Women (from here CEDAW), on the other hand, demands that states ‘take all appropriate measures to eliminate discrimination against women by any enterprise’ and exercise due diligence. The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography includes an obligation of states to take ‘all appropriate measures to establish the liability of legal persons’. International human rights treaties clearly address that states have a responsibility to ensure the fulfilment of rights and their protection against infringements, even by private actors. Some, such as the OECD Convention on Combatting Bribery of Foreign Public Officials, even note the state’s responsibility to establish liability for legal persons.

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119 Convention on the Elimination of All Forms of Discrimination against Women (n 115) 2(e), 4(c).
The HRC has held states responsible for their failure in ensuring the exercise of rights and has in relation used the term “horizontal effect”. Under the ICCPR, states have the responsibility to ensure other private persons do not violate rights. In *Delgado Páez v. Colombia*, which concerned a right to personal security, the committee viewed that the ICCPR entails a state’s duty to ensure everyone has the right to personal security and adjudged that Colombia was in violation of the Covenant. The same argument was used in the *Franz Nahlik v. Austria* case, which concerned the right of equality before the law and to the equal protection of the law without any discrimination. The committee noted that ‘the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector’. In both cases, the state was required to protect rights in the horizontal relation between private actors.

The Committee on the Elimination of Discrimination against Women has noted that discrimination under the Convention is not restricted to action by or on behalf of governments, but can also be committed by a person, organisation or enterprise. States are also obliged to ensure that governments take appropriate action inside their jurisdiction to prevent violations by private actors. Similarly the Committee on Economic, Social and Cultural Rights (from here CESCR) has found states to have an obligation under the International Covenant on Economic, Social and Cultural Rights to prevent violations by private actors. CESCR upholds the view in their general comment by stating that non-state actors have responsibilities in the realisation of rights even though state parties are ultimately accountable for compliance as the only parties to the Convention.

A state cannot be held accountable for all violations committed by private actors. The appropriate measures may depend on the situation, but they are measures which the state can be reasonable required to take with respect to its capabilities. A state cannot possibly be directly involved with each specific case, and hence it is responsible to ensure that there are appropriate systems in place to prevent, investigate and offer remedies. The guarantee of rights must be practical and effective, which means that rights cannot just exist on a theoretical level for

122 General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (n 113) 8.
126 Velásquez Rodríguez v. Honduras (n 110) 174-175.
individuals. For rights to exist in practice, they must be protected from infringement from all parties, whether governmental or private actors. As many human rights instruments enforce the obligation for the practical guarantee of rights, they also indirectly demand state parties to take appropriate measures regarding horizontal relations as well. The effective realisation of rights concerns the overall exhausting of rights.

2.3.2 State Responsibility for Non-State Actors when an Act is Attributed to a State

In the private sphere, states have three obligations: ‘to prevent violations of human rights in the private sphere; to regulate and control private actors; and to investigate violations, punish perpetrators and provide effective remedies to victims’.\(^{127}\) According to international law and traditional doctrine, acts of private actors are not attributable to a state. However, in certain situations the responsibility of the state may arise due to the actions of a non-state actor, but the acts, which constitute a violation of international law, must be attributed to the state. The attribution must occur on the basis of international law.\(^{128}\) The International Law Commission in the Draft Articles on State Responsibility, which have a non-binding status, discusses which situations can be attributed to a state when a violation of international law occurs. Firstly, certain non-state actors which possess a level of governmental authority may be attributed to act as the state under international law.\(^{129}\) Typically the organ is mandated with a strict authorisation to exercise governmental authority in certain specific instances.\(^{130}\) The acts are only attributed to the state in situations limited to the execution of powers and do not extend to other acts of the private actor.\(^{131}\) This includes a number of private actors mandated by law to carry out governmental functions due to states outsourcing and privatising their duties to private actors.\(^{132}\) Privatisation is common in most countries and there has been growing concern over the outsourcing of core state activities to private commercial entities. It is noted that in such a situation, the state remains responsible for these specific governmental functions.

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130 ibid 5 Commentary (3).
131 ibid 5 Commentary (5).
Secondly, conduct of organs placed at the disposal of a state may be attributed to the receiving state.\textsuperscript{133} Thirdly, acts by a private actor will be attributed to the state when it is in fact acting on the instructions of, or under the direction or control of, a state.\textsuperscript{134} The adequate level of control has been discussed in international law for and in the \textit{Military and Paramilitary Activities in and against Nicaragua}; even though the operation was planned and supported by the US, the ICJ did not consider it to have happened under the ‘effective control’ of the US or that they were ‘acting on its behalf’.\textsuperscript{135} It is evident that a certain level of direct control and support must occur between the state and the private actor and that also in each case the criteria may differ, as noted in the \textit{Prosecutor v. Tadic} case.\textsuperscript{136} For there to be considered attribution, according to the Tadic judgment, specific instructions concerning the commission of a specific act must have been issued.\textsuperscript{137} There must exist a clear nexus of control and specific instruction for Article 8 to be considered filled, with the threshold being set high.

Fourthly, conduct carried out by a private actor which includes elements of exercising governmental authority in the absence or default of the official authorities.\textsuperscript{138} The circumstances in this instance must call for such action and hence such situations in reality are extremely rare.\textsuperscript{139} Fifthly, insurrectional or other movements may be considered acts of state if they in fact establish a new state or the new government of a state.\textsuperscript{140} Sixthly, even conduct that does not fall into any of the preceding categories is attributed to the state if the state acknowledges and adopts the conduct as its own.\textsuperscript{141} The draft articles do not apply if special rules of international law apply according to Article 55.\textsuperscript{142} There exists a level of acceptance towards state responsibility amongst international bodies. For example, the European Court of Human Rights has applied the Draft Articles, but has not

\begin{itemize}
\item \textsuperscript{133} Draft articles (n 129) 6.
\item \textsuperscript{134} ibid 8.
\item \textsuperscript{135} International Court of Justice, Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America (27 June 1986) 62-64.
\item \textsuperscript{136} International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Prosecutor v. Du[ko tadi] (15 July 1999) 117.
\item \textsuperscript{137} Creutz (n 128) 84.
\item \textsuperscript{138} Draft articles (n 129) 9.
\item \textsuperscript{139} ibid 9 Commentary (1).
\item \textsuperscript{140} ibid.
\item \textsuperscript{141} ibid 11.
\item \textsuperscript{142} ibid 55.
\end{itemize}
specifically referred to them in judgments.\textsuperscript{143} The presumption that the rules set in the draft articles have some level of legitimacy and acceptance can thus be made.

There are a number of problems regarding the obligation to ensure rights within a state’s jurisdiction. In the case of \textit{Costello-Roberts v. the United Kingdom} the claimant claimed that the private school her son attended had used corporal punishment as a means of discipline. These events had in her view violated provisions on the prohibition of torture and the right to respect private and family of the Convention. The UK obviously denied they were directly responsible as the events occurred in a private school. The Court reminded that it has ‘constantly held that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction’.\textsuperscript{144} The UK could not absolve their responsibilities simply by delegating obligations to private actors.\textsuperscript{145} The Court has expressed the same point of view in other judgments.\textsuperscript{146}

\textbf{2.3.3 Horizontal Effects Without State Involvement}

The horizontal effect of human rights concerns the ability of human rights to have effect in relations between individuals.\textsuperscript{147} Even the most core human rights documents have expected that the realisation of human rights will denote their enforcement on a horizontal level. The Universal Declaration of Human Rights (from here UDHR) acts an example and the backdrop to all human rights instruments that succeeded it in years to come. The UDHR sets ‘a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction’.\textsuperscript{148} The UDHR is a non-binding instrument, but can be argued to have gained a juridical role and could even be considered to be customary international law. The basic

\begin{itemize}
  \item \textsuperscript{144} European Court of Human rights, \textit{Costello-Roberts v. United Kingdom} (25 March 1993), 26.
  \item \textsuperscript{145} ibid 27.
  \item \textsuperscript{146} European, Court of Human Rights, \textit{Waite and Kennedy v. Germany} (18 February 1999).
  \item \textsuperscript{147} Pariotti (n 105) 142.
  \item \textsuperscript{148} UDHR (n 30) 1.
\end{itemize}
theoretical obligations of non-state actors can even hence be deducted from the UDHR.

The term “organs of society” goes beyond the notion of state and thus includes non-state actors. Some scholars have asserted that ‘every individual and every organ of society’ includes companies, as it does not exclude any actors from its applicability. The term “organs of society” goes beyond the notion of state and thus includes non-state actors. Some scholars have asserted that ‘every individual and every organ of society’ includes companies, as it does not exclude any actors from its applicability. States are not able to limit human rights to only relations between state and individual, but must also accept their existence between private actors. The UDHR could be viewed to include a positive obligation of companies to not interfere with the rights it declares. When states are demanded to ensure that the human rights of all individuals are not violated, they are also compelled to ensure that a private actor does not commit such violations.

International human rights treaties and instruments are written directly for states, but they do not restrict obligations only to states. For example, the Genocide Convention clearly notes that genocide is punished even when the offenders are private individuals. The International Convention on the Elimination of All Forms of Discrimination Against Women requires states to take all appropriate measures to eliminate discrimination against women by any enterprise. Article 3 of the Geneva Conventions binds all members, including non-state actors, in an armed conflict. Both the ICCPR and the International Covenant Economic, Social and Cultural Rights impose horizontal duties for private actors to ‘strive for the promotion and observance of the rights recognized in the present Covenant’ and prohibit interpretations limiting the enjoyment of protected rights by ‘any State, group or person’. CESCR has noted that even though only states are parties to the Covenant, ‘all members of society’, which includes in their words the private business sector, ‘have responsibilities regarding the realization of the right to


150 Stephens (n 8) 77; Henkin (n 149) 25.


153 Convention on the Elimination of All Forms of Discrimination against Women (n 115) 2.

Similarly, the CESCR notes that the individual’s right to food gives rise to responsibilities for private actors. Certain horizontal norms exist in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Non-Applicability of Statutory Limitations to War Crimes. All these international treaties directly regulate horizontal relations. Obviously when obligations are directly assigned to private actors, they can also be prosecuted for infringements of those responsibilities. In addition, the OECD Bribery Convention clearly notes non-state actors are directly regulated under its provisions. Article 2 states ‘each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official’.

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155 General Comment No. 14 (n 125) 42.
157 Ratner (n 9) 482; Weissbrodt and Kruger (n 149) 333.
158 OECD Bribery Convention (n 121) 2.
3 INTERNATIONAL LEGAL PERSONALITY IN A HUMAN RIGHTS CONTEXT

3.1 International Legal Personality in Relation to International Human Rights Law

Much like the previous discussion of non-state actors, the complexities surrounding international legal personhood are connected to most issues surrounding business and human rights and are at the core of what we consider to be the difference between states and non-state actors. International legal personality is a question debated amongst scholars. There is no definite consensus on who are the subjects of international law and more importantly in the scope of international human rights law. The role of the United Nations, individuals and even multinational corporations has blurred the theory of international legal personality. As there exists no hierarchical authority in the horizontally aligned international legal system, there also exists no power to govern which entities possess legal personality or any organisations possessing the ability to legally recognise legal personality.

International legal personality should not be confused with legal personality as described in domestic law. International legal personality is legal personality constituted under international law. Typically domestic law regulates the legal personality of private actors with each sovereign state, granting legal personality to entities inside their jurisdiction and governing over private actors. Domestic law determinates the manner in which legal personality is granted and each jurisdiction has its specific requirements on the legal personality of private actors. Although each state may differ, non-state actors, such as companies, must usually possess legal personality in the states they operate in to be considered a legal entity, for example. The enjoyment of legal personality in one legal system does not mean the enjoyment of legal personality in another jurisdiction, or more importantly under international law. Therefore a clear distinction must be made between legal personhood in domestic jurisdictions and in the international legal system.

As important as it is to separate international and domicile legal personality, it is also important to recall that international legal personality and subjectivity

159 Malcom Shaw (n 106) 137; Clapham (n 67) 59.
are not seen as all to be direct counterparts and differ in their content. A subject of international law is more a question for international academic reflection in contrast to the legitimacy of legal personhood stemming from a status granted by the legal system. Subjectivity is a relative notion, according to Klabbers, as the precise content differs between entities. Merely because an entity is said to be a subject of international law, this does not correlate to it also possessing international personality. However some streamline that subjects of law must be capable of having at least some rights and duties under the legal system in question to be called subjects of international law. The two are, even if not identical to each other, at least linked and therefore we will continue with the notion that subjects of international law are entities that possess international legal personality.

3.1.1 Capabilities and Capacities of International Legal Personalities

There is no one accurate catalogue of capabilities that generate international legal personality, because it consists of various capabilities. Traditionally international legal personality gives its subject the capacity to bear rights and duties under the international legal system and secondly gives them the capacity to maintain those rights by bringing forth international claims. International legal personality may be however founded upon other criteria and, for example, Jan Klabbers denotes the criteria to be the capacity to enter into international agreements, to send and receive legations and to bring and receive international claims. Ian Brownlie on the other hand acknowledges three criteria: the ‘capacity to make claims in respect of breaches of international law, capacity to make treaties and agreements valid on the international plane and the enjoyment of privileges and immunities from national jurisdictions’. Therefore international legal personality implies the capacity to conduct certain particular acts, because legal personality only denotes an entity’s legal capability recognised by international law. International legal personality is defined by the capabilities that an entity possesses, which determine whether it can be considered an international legal person.

163 Ibid.
165 Brownlie (n 53) 58.
166 Klabbers (n 162) 44.
167 Brownlie (n 53) 57.
168 O’Connell (n 58) 81.
Next the text will consider the traditional criteria of the capacity to bear rights and duties as the foundation of international legal personality and the capability to bring forth claims to protect their rights.\(^{169}\) The condition depicts that international law may only recognise actors that international law is capable of directly regulating.\(^{170}\) The capacity to bear rights and duties under the international legal system means that the actor can be the addressee of direct legal rights and obligations stipulated by international law. Rights and duties must be strictly legal in the sense that they judicially enforce duties and grant rights. Legal rights and duties are always specified by the regulation in question and they may differ depending on the addressee. The ICJ in the *Reparation for Injuries Suffered in the Service of the United Nations* judgment accentuates that the UN could possess legal personality even though its rights or duties were not similar to a state, because the UN is not considered a state.\(^{171}\) The ICJ acknowledges that rights and duties are not identical, but are moulded to suit the addressee and their role in the international community.

The capabilities of various entities do not need to be convergent. Not all actors have the same rights and duties that, for example, sovereign states do. As O’Connell illustrates ‘entity A may have capacity to perform acts X and Y, but not act Z, entity B to perform acts Y and Z, but not act X, and entity C to perform all three. Personality is not, therefore, a synonym for capacity to perform acts X, Y and Z; it is an index, not of capacity per se, but of different capacities.’\(^{172}\) The rule of international legal personality does not descend from the ability to have all of the capacities, as, for example, a state, but relies on the possibility to have some of the required capabilities. The *Reparation for Injuries Suffered in the Service of the United Nations* judgment also notes, ‘the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.’\(^{173}\)

The problem is, however, that the conditions to gain international legal personality already stipulate levels of international legal personality. The ICJ notes that ‘the Organization was intended to exercise and enjoy, and is in fact


\(^170\) Cheng (n 161) 24.

\(^171\) Reparation for Injuries Suffered in the Service of the United Nations (n 79) 179.

\(^172\) O’Connell (n 58) 81–82.

\(^173\) Reparation for Injuries Suffered in the Service of the United Nations (n 79) 178.
exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane’.\footnote{174} As Andrew Clapham perceives, the conditions create a circular requirement. He illustrates, ‘international law recognizes the capacity to act at the international level of an entity that is already capable of acting at the international level’.\footnote{175} If we draw a parallel, an actor must have legal rights and duties to be able to receive international legal personality and thus receive legal rights and duties.

### 3.1.2 International Legal Status of Non-State Actors and Specifically Multinational Corporations in International Human Rights Law

A different discourse relates to the tradition and legitimacy of international law.\footnote{176} As discussed, international law receives its acceptance and existence from states whilst states receive their existence in accordance with international law. To attempt to place non-state actors in this field could seem impossible, because it could be thought to undermine the overall system. Typically non-state actors are not considered to have international legal personality, because individuals and multinational corporations channel their ability to operate internationally from the legal sphere of a state.\footnote{177} Traditionally international law would hence only influence non-state actors through the medium of a state.\footnote{178} Companies and multinational corporations have legal personality in the national jurisdictions in which they operate,\footnote{179} but are considered not to have legal personality in relation to international law.

Even though states are the key subject in international law, this does not mean that they are the only subjects any longer.\footnote{180} Various non-state actors have been depicted to have a level of international legal personality.\footnote{181} Non-state actors can be thought to have international legal personality, if international law grants them

\begin{itemize}
\item \footnote{174} ibid 179.
\item \footnote{175} Clapham (n 67) 64.
\item \footnote{176} For discussion of a similar critique, see the Legal Impossibility Argument in ibid 35–41.
\item \footnote{177} O’Connell (n 58) 83.
\item \footnote{178} Okeke (n 164) 9; Jonathan Charney, ‘Transnational Corporations and Developing Public International Law’ (1983) 32 Duke Law Journal 748, 753.
\item \footnote{179} For deeper conversation on legal personality of companies, see Katsuhito Iwai, ‘Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance’ (1999) 47 The American Journal of Comparative Law 583.
\item \footnote{180} Friedmann (n 65) 466.
\item \footnote{181} Shaw (n 106) 183.
\end{itemize}
rights and duties.182 As discussed in Section 2.3 in the context of the horizontal sphere of human rights, international law does impose certain obligations on non-state actors. In relation to the UN and individuals, international law has granted them certain obligations and rights and hence they must also possess at least a level of international legal personality. The international legal personality of the UN or individuals is not therefore debated.

The subject of multinational corporations, however, is a much more controversial topic. Multinational corporations are not considered to be subjects of international law.183 Whether companies possess the type of judicial rights and duties required to obtain international legal personality is at the core of this debate. There is not much discussion on whether corporate entities enjoy rights similar to individuals, as the conversation typically focuses on whether companies can have obligations imposed upon them. We, however, want to bring both sides to the discussion. The following section will discuss companies as rights-holders and duty-bearers. Firstly, the chapter will demonstrate how multinational corporations can be rights-bearing legal persons. Secondly, the chapter will discuss the capability of companies to violate human rights, which will lead us further in the conversation on whether companies can have obligations under international law. By discussing both sides in more depth, we will be better equipped to answer whether multinational corporations are subjects of international law.

3.2 Corporations as the Holders of Human Rights

3.2.1 Corporations as Rights-holders

Based on the previous section, when international law directly grants judicial rights and obligations to private actors, they should hence be subjects of international law. Without revisiting the discussed legal status of non-state actors in international law, there are a number of complexities surrounding the horizontal relation between companies and others in regards to human rights. Human rights are often thought to belong to solely humans based on their human dignity. The possession of human rights may however also be thought to be drawn from human rights law, which articulates the individual possessing rights as the subject of human rights.184 However as we discuss the obligations of companies, we must should

182 Reinisch (n 151) 70.
183 Jägers (n 169) 262.
ask a daunting question; can profit-driven private companies be the holders of human rights?

Not much scholarly research can be found on the issue, but it is evident that companies can be seen to enjoy human rights at least in specific cases. This is not to say that an individual and a corporation could have identical rights; nor does it mean that a juristic person would be widely accepted as a holder of human rights. However in certain domestic jurisdictions, such as the US, and also in an international instance like the European Court of Human Rights (here after ECtHR), rights have also been viewed to be the entitlement of business entities. When discussing companies’ having rights we are discussing the actual legal entity possessing rights in separation from the rights of the company. The employees, directors and other private individuals acting within the company and for the company possess rights based on their humanity as individuals. Individuals are the holders of human rights regardless of whether they work for a company or are even in an executive role.

ECtHR and the ECHR, as noted by Ku, provide the only international human rights mechanism that grants corporate actors rights distinctly. The Council of Europe, which was established in 1949, consists of forty-seven European states. All these states are parties to the ECHR, which was quickly adopted in 1950 and is considered a leading binding human rights treaty. Article 1 obliges that parties secure the rights and freedoms of everyone within their jurisdiction and hence gives it a universal nature. Two of the provisions, Article 1 in Protocol 1 and Article 25 distinctly refer to legal entities, but other rights been viewed to apply to legal persons, such as companies. The legal praxis of the ECtHR indicates that human rights, even though their name indicates something else, are not the sole property of humans, but legal entities as well.

Accordingly with Article 34, any victim of a violation can bring forth an application to the ECtHR. Applicants can solely make claims against contracting states and regarding state violation of the protected rights. The ECHR together with the protection of the ECtHR provides a rather comprehensive European human rights mechanism. Unlike other international tribunals, corporate entities are able to bring forth claims in the ECtHR regarding violations of their rights. The first draft of

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186 Ku (n 185) 750.

187 ECHR (n 116), 34.

188 van den Muijsenbergh and Rezai (n 185) 48.
the ECHR noted applicants as any natural or corporate person,189 and although
the Convention discusses only non-governmental organisations, companies have
also been accepted as applicants to the ECHR from the very beginning. Since
the first case regarding a corporate claimant in 1978, the ECHR has dealt with
cases regarding the human rights of corporate entities and considered a number
of various rights applicable to corporations. The number has not been vast: by
2006, out of 2207 judgments 126 originated from applications by companies or
claiming business interests.190

As will be illustrated through two examples regarding freedom of expression
and right to privacy, it is rather explicit that corporate entities are the holders
of rights protected at least in the context of the European Convention. Certain
other rights, such as right to property, were not seen to be good examples of the
complex relationship between human rights and corporate entities. The ownership
of property has already for decades been accepted to belong also to legal entities
in domestic law and also in a more international context. Therefore the following
sections will focus on two rights; freedom of expression and right to privacy. These
two rights are thought to be rights belonging solely to humans, but have now been
extended to belong also to legal entities. The obvious question however emerges;
how far should human rights be extended? Lastly the following discusses whether
right to life could be extended to corporate entities.

3.2.1.1 Freedom of Expression

Article 10 Paragraph 1 of the ECHR states that everyone has the right to freedom
of expression. This right has also been extended to corporate entities. The right has
deep roots in constitutions around the world and is directly linked to democracy and
the fundamental individual rights of citizens. Free speech is a right which does not
directly involve the sole characteristics of humans, but can relate to governmental
and non-governmental agents, such as organisations or companies. The right to
free speech has been for decades debated to involve the rights of profit-driven
juristic persons, and the ECHR has extended the right to companies on several
occasions.191

When faced with the freedom of companies, we must consider whether
commercial expression can fall within the scope of freedom of speech. Free speech
has been usually considered only to apply to non-financial topics. However in a

189 ibid.
190 Emberland (n 117) 14.
191 European Court of Human Rights, Gmpopera Radio AG v. Switzerland, 12 Eur Ct HR 321 (28 March 1990);
European Court of Human Rights, Markt Intern Verlag GMBH & Beermann v. Germany, 12 Eur HR Rep
161 (20 November 1989); European Court of Human Rights, Sunday Times v. United Kingdom, 2 Eur HR
Rep 245 (26 April 1979).
domestic context in Canada, in *Ford v. Quebec* the Supreme Court of Canada noted that advertisement was included in freedom of expression. Later on, in *Irwin Toy v. Quebec*, the Supreme Court of Canada noted that commercial expression could not be excluded from the protection of freedom of speech under the Canadian Charter of Rights and Freedoms. Not all domicile courts have, however, agreed with such an interpretation, and even the ECtHR has made a separation between the protection of commercial and non-commercial speech. Commercial expression is considered information ‘inciting the public to purchase a particular product’ and has not been considered to fall explicitly within the scope of Article 10.

Commercial speech is at the core of a profit-driven company; non-commercial speech such as that related to politics or religion may be more applicable to freedom of expression, but may be more difficult to place in relation to the role of a company. In the US, the Supreme Court in *Citizens United v. Federal Election Commission* argued that corporations and individuals have the equal right to political speech. In its judgment, the Court viewed that the protection of the First Amendment of free speech extends to corporations. The Court stated that the legal identity of a corporation should not suppress its right to freedom of political speech. The decision drew much criticism in the US for allowing companies to possess such a fundamental right.

In the cases of the ECtHR, it appears that there is a level of protection that differs according to the company’s role in society. In the case of the *Sunday Times v. the United Kingdom*, the Sunday Times claimed that a newspaper had a right to free speech. The Sunday Times published articles regarding children suffering from deformities caused by their mothers’ taking a supposedly safe drug containing the ingredient thalidomide. The articles were seen to cause prejudice against a party in the on-going settlement suit regarding the case. The tragedy was obviously a matter of great public concern, with a high level of public interest. The ECtHR accepted the idea of freedom of free speech and adjudged that a violation of Article 10 regarding freedom of speech had occurred. However as noted in the *Observer*

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195 ibid 118.
197 ibid 50.
198 *Sunday Times v. the United Kingdom* (n 191).
199 ibid 33.
200 ibid 42
and the Guardian v the United Kingdom case by the ECtHR, the principles of free speech ‘are of particular importance as far as the press is concerned’ and hence it appears media outlets appear to be in a stronger situation to claim Article 10 rights.

Similarly in the case of Autronic AG v. Switzerland the ECtHR adjudged that a Swiss company’s right to freedom of expression had been breached. Autronic AG wished to receive TV programmes from the Soviet Union satellites as a form of promoting their aerial dishes, but the Swiss government had refused. The complexity became whether a company could have freedom of expression even when the nature of the expression was purely commercial. The Swiss government argued that economic interests are not covered by the Convention and hence such forms of expression cannot fall within the scope of Article 10. The Court disagreed and noted that ‘neither Autronic AG’s legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10’. Even though by all accounts the case was at the core of commercial speech, the ECHR extended the protection of Article 10. The judgment gave a strong signal on the protection of the Article 10 rights of companies, as Autronic AG was merely a producer and hence the case did not fall under, for example, the case of the Observer and the Guardian v the United Kingdom judgment of the importance of media outlets.

3.2.1.2 Right to Privacy

The right to privacy under Article 8 of the ECHR notes that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. In the legal praxis of the ECtHR, the right has been seen to extend also to corporate entities and not only individuals. Interpreting words, such as home and private life, to only extend to individuals could lead to unjust instances, specifically in regard to governmental authorities conducting raids or other types of investigative activities. As noted by Article 8, interferences are allowed as long as they are done in accordance with law and are necessary in a democratic society. It is explicit that the right to private life includes in many situations also corporate entities. However, unlike the protection of Article 10, the case law regarding the right to privacy in relation to companies is less extensive.

201 European Court of Human Rights, Autronic AG v. Switzerland, 12 EHRR 485 (22 May 1990).
202 ibid 44.
203 Ibid 47.
204 Ibid 150.
205 ECHR (n 116) 8.
206 Ibid.
207 Ibid 172.
The right to privacy is not always precisely defined, as it entails a variety of angles such as private life, home, family and correspondence, whether it is by phone, mail or other devices. The right to privacy is still a widely accepted right, with most international treaties and domestic constitutions noting its existence. It is also a right that does not precisely demand a human being as its holder, and hence juristic persons could also be entitled to the right. The right to privacy can hence be easily placed with business actions and legal entities. For example, the right to privacy typically protects the private internal correspondence in a company. Emails, phone calls and letters have the same level of protection, whether they are between individuals or corporate agents. Typically the right to privacy is considered to apply to a person’s home. The question arises as to whether private commercial buildings are comparable to a private home residence and should they be protected in the same manner from outside interference? In domicile courts, many of the cases concern situations regarding search warrants and inspections of various facilities and offices conducted by governmental agencies. In the US, privacy jurisprudence is a patchwork that does not grant a clear answer for the protection of privacy in relation to commercial structures.\(^{208}\) In cases, such as *Hale v. Henkel*, and *Marshall v Barlow’s Inc.*, companies have been seen to be able to receive Fourth Amendment protection. On the other hand, some countries are not precise as to whether companies have the right to privacy. In Australia there exists no clear rule on whether companies can claim privacy rights.\(^{209}\)

In *Niemietz v. Germany*, the ECtHR discussed whether a lawyer’s professional office, which was situated in his home residence, would also be included in the protection under Article 8. The ECtHR stated that there exists ‘no reason of principle why this understanding of the notion of “private life” should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world’\(^{210}\) and also mentioned that ‘home’ can be extended to business premises. The ECtHR relied on the principle of effectiveness by noting that narrow distinctions could lead unequal treatment.\(^{211}\) The essential object and purpose of Article 8 permits key words to be interpreted to include elements of business activities.\(^{212}\)

Most notably the ECtHR discussed the issue in the *Société Colas Est and Others v. France* judgment, which discussed a plausible violation of Article 8 under the


\(^{211}\) Ibid 30.

\(^{212}\) Ibid 31.
Convention. The French government raided the offices of building company Société Colas Est due to an administrative investigation regarding the conduct of public works contractors.\textsuperscript{213} The investigators raided fifty-six companies under French legal provisions, which did not require legal authorisation or permits.\textsuperscript{214} Société Colas Est claimed that the French authorities had violated the company’s right to privacy by entering their commercial premises. As in the Niemietz \emph{v. Germany} judgment, the central question was whether commercial premises could be considered a home in the required sense for Article 8 to apply, but unlike the previous case, the offices of Société Colas Est was located at a business premises. The ECtHR did however adjudge that the offices of Société Colas Est were considered protected as a home under the article against governmental arbitrariness.\textsuperscript{215} It did however note that there is ‘an entitlement to interfere’ which ‘may be more far-reaching where the business premises of a juristic person are concerned’.\textsuperscript{216} This statement would lead us to understand that in the case of companies the protection of Article 8 is not as strong as it is for individuals and their right to privacy.

\subsection*{3.2.2 The Case of Right to Life}

The right to life can be considered to be one of the most fundamental human rights norms. Each individual based on their humanity has the undeniable right to life. As significant as right to life is, it is also highly controversial when we dive deeper into its applicability to specific instances. The beginning and end of life and the issues around them are often debated. In the discussion of corporate entities as right-holders, we can continue down the rabbit hole and ask whether corporate entities could possess a right to life.

A company has a span of existence, for example, from when it is officially registered in a domicile jurisdiction to when it is disbanded for various reasons. This existence is not considered life or its length a life span. The existence of a company is fully dependent on judicial matters and hence does not resemble life in the way we understand it. Without following the judicial requirements a company will not be registered and hence does not exist as a legal person at all. Therefore however much we try, we cannot draw a comparison between an individual’s life and a company’s existence. If we artificially made a comparison between existence and life, we would soon find ourselves having to answer rather contradictory questions. Dissolution has been considered in certain situations to be a just and fair sanction

\begin{footnotesize}
\begin{enumerate}
\item Ibid 10-11.
\item Ibid 42.
\item Ibid 49.
\end{enumerate}
\end{footnotesize}
for companies. If the existence of a company was considered life, how could it possibly be justified to conclude a company’s life as punishment?

The same can be thought of rights which we connect to human behaviour and skills, such as the right to an education or freedom from arbitrary detention, or for that matter rights which are vital for human life, such as the right to food. As mentioned earlier, certain rights are directly attached to human beings and we assume therefore they cannot be held by an artificial entity. On the other hand, human rights which may as easily be granted to a legal entity as to a human do not demand similar contemplation. Procedural rights can be as straightforwardly granted to legal persons who enjoy legal personality in their jurisdiction. In addition it can be more smoothly argued that legal persons and individuals should both enjoy equal the protection of the law.

It may seem obscure to even consider whether companies could have a right to life, but it is however necessary. The foundation of human rights is to protect the individual. Therefore transplanting any right to corporate entities can be seen as artificial. This is specifically the case with rights which are directly linked to human features, such as the right to physical integrity. As mentioned earlier, certain rights are directly attached to human beings and we assume therefore that they cannot be held by a legal entity. In addition, as companies are not humans enjoying human dignity, they should enjoy less protection of rights compared to individuals. It appears that courts and scholars alike must go through each specific instance case-by-case to be able to state which rights companies possess.

### 3.3 The Capability of Companies to Abuse Human Rights

#### 3.3.1 Immunity Due to Non-existing Status in International Human Rights Law

An issue that tends to rise whilst discussing business and human rights is whether profit-driven juristic persons are even capable of having obligations regarding human rights and more importantly whether they are capable of violating human rights in practice. Individuals can obviously commit violations of human rights, but can a legal entity act in such a manner? If we are to hold companies responsible for human rights obligations, companies have to be capable of obtaining rights and duties and hence then being able to violate those duties.

The problem is whether legal entities such as companies can infringe human rights. The US Military Tribunal noted ‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals
who commit such crimes can the provisions of international law be enforced? It is through this ideology that only an individual can infringe the rights of individuals. A legal person cannot commit acts that are considered international crimes. Similarly a majority of rights can only be violated by states. A private legal person cannot infringe rights which are directly linked to the relation between a state and its individuals.

Judge Leval noted in her dissenting opinion in the Kiobel judgment of the United States Court of Appeals for the Second Circuit that by adopting corporate form, Nazi extermination camps could have become immune from civil liability. What if these situations of grave and atrocious violations of human rights were masked by making themselves into a profit-driven private actor to avoid accountability? The question is exaggerated and no sovereign state would allow such a company to operate inside their borders, as the international community would most likely interfere in such a situation. The Kiobel judgment’s dissenting opinion shows that there are those who do not see the differing line between legal entities and other private actors to be correct or at least justified. As noted by Lucien Dhooge, ‘behavior deemed to be a violation of international norms by entities possessing legal personality may not be a violation if engaged in by unrecognized entities’.

To illustrate the capability of companies to violate human rights, the following section will discuss the role of corporate entities as an instrument of abuse and as being complicit in international crimes. This section will not dive into international criminal law or discuss complicity in depth. It merely wishes to show the two clear and accepted possibilities in which companies may violate human rights.

### 3.3.2 Company Acting as the Instrument of Human Rights Violations

The Nuremberg trials already indicated that corporate officials could commit war crimes and crimes against humanity. The role and accountability of business entities in crimes committed by the Nazi regime were discussed during the Nuremberg trials, but no corporate entity was prosecuted during the trials. Companies were also benefactors of the Nazi regime, as it was not solely the political and military powers, but also profit-driven companies that profited from the atrocities. Various companies supplied drugs, money or other assistance in the establishment and

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218 Ratner (n 9) 512.


220 Dhooge (n 149) 205.
sustenance of concentration camps and the other atrocities committed. For example, more than six thousand German companies used slave labour, which consisted of concentration camp inmates, detainees and prisoners of war.\textsuperscript{221}

The Charter of the International Military Tribunal at Nuremberg did not allow the prosecution of business entities or corporate officials and hence no company was prosecuted for their involvement with the atrocities committed by the Nazi regime. The admittance of legal persons was initially discussed during the drafting process of the Charter,\textsuperscript{222} but it was later decided that only individuals could be prosecuted due to fears related to the implications of declaring organisations to be criminal.\textsuperscript{223} Even without the addition, certain industrialists could have been prosecuted in accordance with the Nuremberg Charter as direct perpetrators or accomplices to a common plan to commit war crimes and crimes against humanity,\textsuperscript{224} but none were eventually tried. The US Military Tribunal did not have jurisdiction over legal persons, but prosecuted the corporate officials from companies such as I.G. Farben, Flick and Krupp. The cases, however, touch upon the role profit-driven companies played in human rights violations.

The twenty-three defendants connected to I.G. Farben, which was at that time the largest chemical company in the world, were prosecuted, for example, for the use of forced labour, plunder and spoliation, involvement in medical experiments on prisoners and supplying of cyanide-based pesticide to concentration camps, which was used in the extermination of their inmates.\textsuperscript{225} The United States Military Tribunal noted that Farben as a juristic person was capable of violating the laws of war.\textsuperscript{226} The I.G. Farben judgment notes that ‘it is the theory of the prosecution that the defendants individually and collectively used the Farben organization as an instrument and through which they committed the crimes enumerated in the indictment’ The corporate officials being tried were hence seen merely as ‘acting through the instrumentality of Farben’\textsuperscript{227} and were later held liable for their actions by virtue of their relation to that company. The USMT did note that Farben had

\begin{itemize}
\item \textsuperscript{223} Andrew Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons’ in Memo T Kaminga and Saman Zia-Zarifi (eds), Liability of Multinational Corporations under International Law (Kluwer Law International 2000).
\item \textsuperscript{224} Desislava Stoitchkova, Towards Corporate Liability in International Criminal Law (Intersentia Publishing Ltd 2010) 52.
\item \textsuperscript{225} Thirteen were convicted with convictions ranging between war crimes, crimes against humanity and forced labour. United States Military Tribunal, \textit{the United States of America v. Carl Krauch, et al.}, “I.G. Farben” (30 July 1948).
\item \textsuperscript{226} Law Reports of Trials of War Criminals, Volume X, \textit{The I.G. Farben and Krupp Trials}, Published for the United Nations War Crimes Commission by his Majesty’s Stationery Office (1949), 165.
\item \textsuperscript{227} Ibid 3.
\end{itemize}
violated Article 47 of the Hague Regulations on the Laws and Customs of War in relation to pillage, plunder and spoliation. The USMT had no jurisdiction over legal persons and could not enforce penalties on Farben.\(^{228}\)

In the Krupp case, Alfried Felix Alwyn Krupp von Bohlen und Halbach and eleven other corporate officials were tried.\(^{229}\) Krupp AG was prosecuted for crimes against peace, war crimes and crimes against humanity, mostly regarding plunder and spoliation, and also using concentration detainees and prisoners of war as labour. None were found guilty of war crimes or crimes against humanity. The same implication was made in the Krupp case by noting the guiltiness of the crimes of the actual company.\(^{230}\) The judgment discusses the actions of Krupp in detail in relation to the use of slave labour by the request of the company.\(^{231}\)

The defendants attempted to defend their actions with regard to forced labour by the necessity of the actions, as the company would have lost their property and factories if they did not comply with the forced labour regime.\(^{232}\) The USMT noted that the fear of losing factories could not constitute a necessary action, but on the other hand the loss of life for certain defendants was accepted as a defence of necessity.\(^{233}\) Necessity derived from the option of a “moral choice”\(^{234}\) in which the court reviewed whether the defendants would have had an alternative choice of action. The Krupp firm had willingly employed forced labour and had not done under coercion. In other words, the USMT denied the inclusion of financial reasons as an acceptable defence for the violations.

When reviewing the judgments by the judgments of USTM, it becomes clear that corporate officials are considered to be capable of violating international law when committing these abuses through the company and on behalf of the company. In the Flick judgment, the court noted that who ‘knowingly by his influence and money contributes to the support thereof must...[by author] be deemed to be, if not a principal, certainly an accessory to such crimes’.\(^{235}\) In another judgment, the court noted that an individual who acts as an accessory through commercial transactions to such violations could be hence held criminally responsible for war

\(^{228}\) Ibid 52.


\(^{230}\) Law Reports of Trials of War Criminals (n 226) 150.

\(^{231}\) Ibid 96-102.

\(^{232}\) Ibid 146.

\(^{233}\) Ramasastry (n 149) 112.

\(^{234}\) Law Reports of Trials of War Criminals (n 226) 54.

\(^{235}\) Ibid 104.
crimes.\textsuperscript{236} The Farben judgment made it apparent that a company can at least act as an instrument through which human rights violations occur.

### 3.3.3 Complicity in Human Rights Violations

A state can without any question violate rights. What is the liability of a company that helps a state in the violation of rights? For example, is the company responsible when soldiers protecting a pipeline on the orders of a company violate human rights in the course of their task? Complicity tackles the situation in which the state and multinational corporations have committed human rights abuses intentionally together.\textsuperscript{237} Complicity has been discussed as the manner in which companies commit human rights abuses in most soft-law instruments as well, such as the UN Global Compact and the Guiding Principles on Business and Human Rights. John Ruggie also discusses the non-legal side of complicity, which can include indirect violations of, for example, political, cultural and social rights.\textsuperscript{238} Complicity with human rights violations is the most common way in which companies in reality infringe human rights. For example, by third parties who are hired facilitate and en up committing the actual violations.

Criminal responsibility may arise for aiding and abetting an international crime. The Rome Statute Article 25(3) notes that anyone who ‘aids, abets or otherwise assists’ the commission of a crime can be held individually responsible and liable for that action by the International Criminal Court (from here ICC).\textsuperscript{239} The article goes on to determine individual responsibility in situations where an individual ‘in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.’\textsuperscript{240} It is clear that aiding and abetting means that the act constituting aiding and abetting implies a less direct involvement in the crime. Therefore aiding and abetting of international crimes is considered to be the correct avenue for corporate responsibility, as companies are rarely the principal or direct offender.\textsuperscript{241} These types of acts obviously cannot


\textsuperscript{237} Wells and Elias (n 91) 144.


\textsuperscript{240} Ibid 25(3) D.

be ruled out, but in regard to international crimes, the role of a company usually complicates the crime.

There are three ways in which companies can aid and abet international crimes: by silently accepting, indirect complicity by facilitating the crimes, or direct complicity by profiting from the situation and directly assisting the crimes. It is important to note that mere corporate presence in a country cannot be considered complicity. The International Commission of Jurist Report of the expert legal panel on corporate complicity in international crimes names three areas of inquiry which can indicate complicity: causation and contribution, knowledge and foreseeability, and proximity. Causation can be broken down into three models of conduct which have enabled, exacerbated or facilitated the crime. Enabling is the most direct form of assistance, with the role of the company being actually linked to the occurrence of the crime. Exacerbation may increase the likelihood or the effects of the crimes, whilst facilitation helps the performance of the crime. Proximity, on the other hand, can be found in the distance, frequency and duration of contact between the company and the principal offender.

Knowledge is at the centre of complicity with knowledge of the crime or the foreseeability of the risk of the crime usually acting as the lever of responsibility. For example, in 2005 a Dutch court found Frans van Anraat guilty of aiding abetting war crimes by providing the Iraqi government with chemicals which were later used as mustard gas against the Kurdish population. Van Anraat did not have the criminal intent to participate in war crimes, but he was considered to have been aware of the possibility that the sold chemicals would be used as chemical weapons. He was however acquitted on charges of genocide, as he had no knowledge of the genocidal intent of the Iraqi government. The Report mentions that the court should review what the company itself knew, but also what a responsible actor should have known of the risks.


245 Ibid 10.

246 Ibid 24.


The California District Court stated in *Doe I v. Unocal Corp* an aiding and abetting standard for corporate conduct, which was described as 'knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime'.\(^\text{249}\) The case concerned Unocal’s oil pipe construction in Myanmar and the human rights violations which were committed by the soldiers hired by Unocal to protect the pipeline. As noted by a former consultant to Unocal, at best Unocal seemed a naïve participant and at worst a willing partner in the atrocities.\(^\text{250}\) The hiring of the Myanmar military was considered assistance in the use of forced labour, which had a substantial effect on the occurrence of the crime.\(^\text{251}\) The Court of Appeals adjudged that the standard for aiding and abetting under the Alien Tort Statute involves practical assistance or encouragement that has a substantial effect on the perpetration of the crime.\(^\text{252}\) Interestingly, the District Court differed in its opinion, ruling that Unocal could not be held liable, as its actions did not reach the level of active participation. The Court of Appeals noted that it is also sufficient that the accomplice knew or had reason to know of the intent to commit an offence.\(^\text{253}\)

It hence becomes clear that aiding and abetting can also mean that the third party had reason to know that they were complying with human rights abuses. In the Unocal case, this meant there was evidence suggesting Unocal knew of the use of forced labour.\(^\text{254}\) The practical help was considered to be the overall hiring of the Myanmar Army to build the pipeline and its surroundings. The court viewed that this was sufficient evidence to hold a multinational corporation liable for the acts of a contractor. Interestingly, in the case of *Presbyterian Church of Sudan v. Talisman Energy Inc.*, Talisman Energy was specifically accused of aiding and abetting the Sudanese government in crimes against humanity, and the US Supreme Court viewed that aiding and abetting liability requires that an accused knowingly provided substantial assistance to the perpetrator. The Court of Appeals adjudged that international law must determine the standard for the accessorial liability and that not solely knowledge is demanded, but also purpose.\(^\text{255}\) In the later discussed Kiobel judgment, the dismissal was partly due to aiding and abetting, demanding the abettor to act with plausible purpose.\(^\text{256}\)


\(^{250}\) Ibid 18-19.

\(^{251}\) Ibid 952.

\(^{252}\) Ibid 4

\(^{253}\) Ibid 7.

\(^{254}\) Ibid 13.

\(^{255}\) US Court of Appeals for the Second Circuit, *Presbyterian Church of Sudan v. Talisman Energy, Inc*, 582 F.3d (2 October 2009) chapter III.

\(^{256}\) Kiobel v. Royal Dutch Petroleum Co. (n 219) 73.
When a company is directly complicit it knowingly assists and contributes to a state in violating rights whilst knowing the plausible effects of their assistance. Moving from indirect complicity, in which a company benefits from violations, to direct means that there is a clear relation between the company and state. The company is aware of the violations and continues its interaction with the state regardless.

### 3.4 Multinational Corporations, International Legal Personality and Human Rights

#### 3.4.1 Inclusion of Multinational Corporations in the Rome Statute

An interesting dimension in the conversation of companies and international legal personality is their original inclusion in the Rome Statute. Currently no international tribunal has jurisdiction over corporate entities. The inclusion of legal persons, including multinational corporations, was initially included in the International Criminal Court Statute, which established the ICC. The French delegate made the proposal on the inclusion of legal persons to the jurisdiction of the ICC, as they hoped the ICC would end up outlawing illegal organisations, as had been done at Nuremberg. The bracketed text of the draft statute stated that the court would have had ‘jurisdiction over legal persons, with the expectation of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.’ Article 23 of the draft statute proceeds to state that the criminal responsibility of legal persons does not mean the exclusion of the criminal responsibility of natural persons when they have been perpetrators or accomplices in the same crime. The ICC would have also had jurisdiction to impose sanctions in accordance with Articles 76 and 99 of the draft statute, which stated the possible penalties applicable to legal persons, such as dissolution. However, the Rome Statute was adopted on 17 July 1998, with Article 23 solely granting jurisdiction over natural persons.

The final French proposal included more detailed provisions on the international trial of legal persons. As legal person changed to juridical person, the jurisdiction...
was limited to private corporations, which were noted to include corporations which have a concrete, real or dominant objective to seek private profit or benefit.²⁶² Hence non-profit organisations, national and international public bodies and most importantly states were left outside the scope of the jurisdiction of the ICC. The proposal would have in reality governed the jurisdiction of business entities in regards to war crimes, crimes against humanity and genocide. The article drafted in the Working Paper made clear the differentiation between corporate criminal responsibility and individual criminal responsibility by noting that ‘without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute’²⁶³.

The article continues to read that ‘charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged, if...‘the natural person has been convicted of the crime charged.’ If the draft statute had seen the light of day, the ICC would have had jurisdiction over legal entities, such as companies. According to Andrew Clapham, the final draft would have meant that legal persons could have not been tried without a natural person in a position of control if the legal person in question had also been charged and convicted, which would have been done by reference to domicile legislation.²⁶⁴

Jurisdiction over legal persons was directly linked to the conviction of the required natural person. The interwoven relation between corporate criminal responsibility and primary individual criminal responsibility conveys the agency theory, in which the legal person can solely act through natural persons.²⁶⁵ The actions of a legal entity therefore merely reflect the actions of its individuals, and thus it cannot itself have intent or will. The proposal hinged on the same line of reasoning as the judgments of Nuremberg, in which men could commit crimes. However there would have been a secondary liability of the legal entity participating in those acts. The natural person who committed the crime would have had to be ‘acting on behalf of and with the explicit consent of that juridical person and in the course of its activities’.²⁶⁶ Three criteria have evolved from this provision, which include the consent and acceptance of the company; the action in question being characterised as belonging to the daily operations of the company; and a level of

²⁶³ Ibid 1.
²⁶⁴ Clapham (n 223) 153.
²⁶⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (n 262) 2.
control required of the individual in regard to the legal entity so they could act on behalf of the company. Complying with the criteria, the ICC would have had jurisdiction over corporate officials who acted within the realms of ordinary business operations and with the full knowledge of the company and explicit consent. Thus mid-level workers could have not been held criminally responsible for their limited affiliation with the company. If the draft had been accepted, corporations would have been held liable for the same international crimes which individuals would have been held responsible for. The liability would have however followed adjudged individual criminal liability, which is an idea supported by a number of scholars.267

It is interesting that the debate never centralised around the conceptual assumption that legal persons could be bound by international criminal law, but merely the practical matter regarding their indictment.268 The inclusion of multinational corporations in the jurisdiction of the ICC would have inadvertently meant the granting of international legal personality to multinational corporations. In this case, however, the reasons for the proposal’s dismissal were more practical. The core role of the ICC was to concentrate its jurisdiction on individuals, and the expansion of jurisdiction, including the mentioned problems surrounding the international trial of legal entities, could have proven to be too much to add to their existing role.269

3.4.2 Multinational Corporations and Their Ability to Possess International Legal Personality

As no international organisation can dispense legal personality, it is extremely difficult to find consensus amongst states on the status of multinational corporations. Even when giving multinational corporations international legal personality, it is not necessary to grant them the full range of rights and duties possessed by states or full international legal personality for that matter. With legal personality, multinational corporations would not magically and automatically be comparable to states and their powers.

There are various manners in which international legal personality has been attempted to be attached to multinational corporations. Firstly, some scholars have argued that there is evidence that multinational corporations already possess a level of international legal personality270 and they can clearly be recognised as

268 Clapham (n 223) 191.
270 Charney (n 178) 762; Friedmann (n 65) 375; Ku (n 185) 753.
subjects of international law. This however is clearly not widely accepted. It can be argued that when an actor possess certain duties and rights it will lead to the conclusion that the actor has international legal personality. Typically it is said that the concept of international legal personality does not recognise corporate entities to possess the required rights and duties. However this we can argue to be at least partly false. As demonstrated, companies can in the context of the ECHR possess certain internationally accepted human rights. Their capability to be right-holders is thus recognisable. We however run into trouble when we attempt to argue whether corporations have judicial duties which would indicate a level of international legal personality. There similarly exists a concept created by some scholars that when companies are granted rights they then must be given correlating obligations. A similar concept can be found in the work of Wesley Newcomb Hohfeld. Hohfeld's writing on the real conceptions of legal terms, such as rights, privileges, duties, responsibilities, power and liability is often cited in scholarly work when attempting to find a deeper understanding of the relation between duty and right. The concept of duty in Hohfeld's work correlates with a privilege or liberty in which someone's judicial right has a correlating duty as the opposite.

Andrew Clapham believes that customary international law could bind and hence obligate corporations. However, without having a deep conversation on customary international law, such broad-based assumptions on the validity and legitimacy of customary international law do not fit into a discussion attempting to build an enforceable and globally recognised level of responsibility. Some scholars on the other hand have determined that multinational corporations do not have international legal personality, because there exists no binding treaty directly regulating them, and thus note that without the validity of a treaty issuing judicial duties to multinational corporations they do not possess international legal personality. The current international treaties are not built to include non-state actors such as multinational corporations. With a legally binding treaty specifically

271 Jägers (n 169) 266.
275 Hohfeld 1913 (n 274) 30; Hohfeld 1917 (n 274) 742; 745.
276 Clapham (n 67) 244.
drafted for multinational corporations, the demanded criterion for international legal personality would be fulfilled automatically and there would be no question whether multinational corporations possess international legal personality, as such a treaty would grant such a status whilst assigning legal rights and duties.

A second option is shifting the focus away from the concept of international legal personality. As mentioned, the concept tends to be more theoretical than attached to reality and practice. For example, Rosalyn Higgins has discussed specifically the notion that subjects or objects of international law have no functional purpose.\(^{278}\) International legal personality is in practice only a theoretical concept without much weight or importance in the actual judicial rights and duties conversation. Disregarding international legal personality to ease the extension of subjects of international law to also include non-state actors is not the right option. Instead international legal personality can be connected to precise rights and duties in a manner in which legal personality only exists in relation to those rights and duties.

The third option therefore means multinational corporations could be given limited procedural and substantial rights and duties which would be relevant to their interests, as discussed by Jonathan I. Charney.\(^{279}\) Similarly, Wolfgang Friedmann notes that multinational corporations participate in the development of public international law and could acquire a limited and transient legal personality to the extent to which the actions are controlled within international law and not private international law.\(^{280}\) In this scenario, multinational corporations would not be given full legal personality, nor would their significance in international law be elevated. Their capability of possessing certain legal rights and duties would translate into limited legal personality. Surya Deva notes that multinational corporations have at least limited international legal personality based on their rights and duties:\(^{281}\) their limited capability is due to ‘their legal construction and their status under international law’ being derived from states and is an extension of domestic law.\(^{282}\)

There exists no theoretical constraint that prevents states from accepting that multinational corporations possess international legal personality.\(^{283}\) Even though a theoretical barrier to acceptance does not exist, the international legal personality of multinational corporations is widely debated and definitely not fully accepted in practice.\(^{284}\) States might be unwilling to accept the status of corporate entities based partly on their fears of their own loss of international


\(^{279}\) Charney (n 178) 775.

\(^{280}\) Friedmann (n 65) 223.

\(^{281}\) Deva (n 87) 78.

\(^{282}\) ibid 50.

\(^{283}\) Kinley and Tadaki (n 149) 945.

\(^{284}\) Brownlie (n 53) 58.
power. At its core, the complexity concerns the idea that the increase of subjects of international law would eventually lead to an expansion of the possible authors of international law, which is a false assumption. 285 Allowing corporations into the realm of human rights would also make them ‘quasi-public institutions’, which would grant them a level of constitutional status simultaneously. 286 Companies as quasi-government institutions would allow them to have a clear public feature in regard to the surrounding society 287 and hence at least confuse the relation between government and so-called quasi-government. As noted earlier, rights and duties do not have to be convergent amongst actors. It is apparent that in any situation a multinational corporation could not obviously have the same duties as a state or even an international organisation, and nor should it have. 288

285 Clapham (n 67) 59; Kamminga and Zia-Zarifi (n 96) 6; Johns (n 160) 900; Kinley and Tadaki (n 149) 946.
286 Muchlinski (n 149) 16.
288 Joseph (n 104) 90; Kinley and Tadaki (n 149) 945; Deva (n 87) 56.
II REGULATIVE FRAMEWORK
4 REGULATION OF BUSINESS AND HUMAN RIGHTS

4.1 The Regulation Sphere

The assumption that there is no business and human rights-related regulation is incorrect. Actually there exists a cluster of regulation from various actors and with various levels of enforceability. It could even be said that there is too much regulation, which causes a patchwork of regulation with plausibly conflicting obligations and no compatible concepts. The fragmentation of regulation has led to confusion on the clear and distinct obligations multinational corporations have, the rights they must respect, and the enforceability of any such responsibilities.

The following sections will firstly attempt to illustrate the current regulations sphere with all its various initiatives. The sections are intended to show the magnitude of the existing regulative measures and how they differ in their obligations, mechanisms and impacts. Secondly we will attempt to uncover whether there exist some underlying obligations which can be found in all of the regulative measures we discuss. The aim is to find common denominators in these different measures to find any or some obligations which would be accepted by all the actors involved.

As noted the current research rests on the same formulation of regulation classification as that proposed by R.G. Steinhardt:289 The following Chapter is similarly divided into four categories. Firstly the following section reviews the efforts of the UN to regulate business and human rights. This will include insight to the Global Compact, the United Nations Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights, and the Guiding Principles on Business and Human Rights. The current treaty negotiations in the UN are discussed in Section 4.3. On the side of the OECD, the OECD Guidelines for Multinational Enterprises are further discussed in Section 4.4.

Secondly there are the regulative measures which can be identified as belonging to the market-based group, which will be further discussed in Chapter 5. The third sets of regimes are those which are enacted by domestic law. Various countries have started regulating corporate activity in relation to human rights. Recent developments in the UK, US, Australia, Finland, France, the Netherlands and Switzerland will be discussed in Chapter 6. The most relevant and stringent regulative measures have been chosen as examples and therefore will not dive

289 Steinhardt (n 18) 179.
deep into all plausible examples by various states or discuss each jurisdiction’s specific features. Domestic law measures are often thought not to be enough in regulating multinational corporations specifically due to government gaps. Although initially not valued for their plausible impacts, domestic law measures are providing mandatory requirements for companies, with some measures even containing extraterritorial effects. The chapter will also discuss the impact the go-it-at-it-alone attitude of the US has played in the conflict mineral trade as a case study in Section 7.1. The fourth set of regulations is based on civil liability and judicial direct liability. For example, the Alien Tort Statute allows plaintiffs to claim violations committed by corporations in other countries than the US. The case study of Shell and Nigeria, which is discussed in Section 7.2, highlights the problems and solutions offered by the Alien Tort Statute.

4.2 International Soft-Law Measures

4.2.1 Global Compact

4.2.1.1 Background to the Global Compact

On 31 January 1999 Kofi Annan made a speech at the World Economic Forum in which he challenged the business world together with the UN to establish a compact of shared values and principles. The UN Global Compact (from here Global Compact) was introduced in 2000 as a voluntary instrument aimed towards the business world which promotes ethical behaviour and also human rights. It is described as the ‘world’s largest voluntary corporate citizenship initiative’. The instrument is based on the voluntary participation of companies, which directly take part in the Global Compact without the interference of states or other regulative bodies. Companies which wish to be involved pledge to honour the ten principles set out in the Global Compact and in return they become signatories of the Global Compact. The Global Compact does not give states any formal status or role in relation to the standards or their enforcement.

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290 Schutter (n 21) 26.
4.2.1.2 Content of the Global Compact

The Global Compact’s ten principles touch on human rights, labour, the environment and anti-corruption. The basis for all ten principles can be derived from various international treaties and declarations, such as the Declaration of Human rights, the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption. The ten principles are to be respected and enacted within companies’ spheres of influence. This means that the principles will have to be taken into account in the company’s supply chains, which forbids corporations from appealing a lack of competence in regulating subcontractors. Human rights protection, along with the rest of the Global Compact, should be implemented in all of a corporation’s strategies and operations, including the company’s strategy and policies.\textsuperscript{294} This means that human rights protection becomes not only a given external goal, but also an internal process, and should be ingrained in the company’s overall strategy.

Two of the principles directly regard human rights, in which ‘businesses should support and respect the protection of internationally proclaimed human rights’\textsuperscript{295} and ‘make sure that they are not complicit in human rights abuses’.\textsuperscript{296} The Global Compact has in its work on business and human rights focused on giving practical relevance to these two principles.\textsuperscript{297} Giving corporations the chance to regulate themselves how they implement the principles grants them the possibility and responsibility to decide themselves how to respect human rights and internally enact them in their operations. Complicity is when a ‘company is participating in or facilitating human rights abuses committed by others, whether it is a state, a rebel group, another company or an individual’.\textsuperscript{298} Complicity does not mean that a company directly causes the abuse, but that it benefits, encourages or tolerates such action is sufficient. The Global Compact divides complicity into ‘direct complicity’, ‘beneficial complicity’ and ‘silent complicity’.\textsuperscript{299} With silent complicity, the company acts as a witness to the abuses and remains silent on their occurrence, whilst with beneficial complicity the company directly benefits from the abuse.


\textsuperscript{295} The United Nations Global Compact, the Ten Principles of the UN Global Compact (2000) 1 [from here Global Compact].

\textsuperscript{296} ibid 2.


\textsuperscript{299} ibid 13.
The four principles regarding labour are obviously intertwined with human rights as they prohibit all forms of forced and compulsory labour and child labour, and ask to eliminate discrimination in respect of employment and occupation. In the *After the Signature Guide*, the ILO’s Minimum Age Convention is specifically mentioned to provide reference. It is rather peculiar that human rights as a whole are given two principles when labour issues have double the amount. Labour is seen by the Global Compact to be more of a practical aspect of business operations than the overall sphere of human rights. Obviously labour rights are one of the key elements of business and human rights, but they are kept separate from human rights in the principles of the Global Compact.

One of the most important aspects of the Global Compact was its introduction of the term ‘sphere of influence’. The sphere of influence is described as the various individuals and groups to whom the company has a certain political, contractual, economic or geographic proximity. It can be envisioned as a series of concentric circles where influence diminishes as you move further from the core and the circles become larger. The smallest and core circle is related to business activities directly linked to the company’s operations. This sphere includes, for example, the company’s employees, with the following circle covering the supply chain, thus a company’s control in this sphere is weaker than in the middle. The third circle includes a company’s community interaction, social investment and philanthropy activities. And the final circle of influence is a company’s ‘engagement in public policy dialogue and advocacy activities’.

Companies initiate their involvement in the Global Compact with a written statement, which has to be endorsed by their board of directors or equivalent body. After joining, multinational corporations must report on their progress annually. Participants are also asked to become public advocates for the Global Compact and its principles, to annually report on their progress and assist the UN in partnership projects. With a Communication on Progress (from here COP), which is a public communication to stakeholders, companies can indicate their efforts in implementing the principles to the public. The COP as it exists today has no tools for monitoring compliance, as it is only based on the corporation’s own desire to communicate to its stakeholders and the public. There are no sanctions to ensure that corporations actually publish a COP or any structures to ensure

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300 Global Compact (n 295) 3-6.
301 *Embedding Human Rights into Business Practice* (n 298) Human Rights 17.
302 ibid 13.
303 ibid.
304 Wynhoven (n 297) 85.
306 *Embedding Human Rights into Business Practice* (n 298) 19.
that the facts presented in them are accurate. The only impact of not submitting a COP to the Global Compact database is the publication of the non-cooperative corporations’ names on the database’s website. The initiative is to a large extent based on the desire of all corporations to retain a good image and positive good will.

4.2.1.3 Critique of the Global Compact

The Global Compact’s aim was to help companies to implement and act in accordance with certain fundamental values and principles. For the principles to have true significance in practice, the Global Compact needs as many participants as possible. In 2012 there were 6,000 participating companies from 135 countries,307 and in 2015 over 8,000 participants from 161 countries.308 Although this may seem to be a fairly large amount, in reality it is unfortunately the opposite, as there are over 70,000 multinational companies, which are not part of the Global Compact, operating worldwide.309 The Global Compact’s success cannot hence be measured by its amount of participants, because it is not even close to representing a fraction of the world’s business enterprises. Even more of a worrying sign is that a large number of companies have already been delisted for failing to meet the reporting criteria set by the Global Compact.310

The General Assembly has recognised the Global Compact and its advancement of the concepts of business and human rights and strengthening their role in the corporate world.311 The Global Compact has thus legitimacy. On the other hand, scholars, organisations and even agencies of the UN have criticised the Global Compact for being too soft in its commitment, ineffective and insufficient.312 The Global Compact is obviously non-binding as a voluntary initiative and it has no monitoring system for non-compliance other than delisting. The sole sanction for failing to adhere to the reporting criteria is the publication of the non-cooperative corporations’ names on the database’s website.

It is however also a strength of the Global Compact, because it allows the principles to be incorporated by companies in a manner of their choice whilst being able to show a level of commitment to ethical behaviour. The Global Compact

307 ibid 7.
308 Information available at: https://www.unglobalcompact.org [last accessed on September 2, 2015].
does not attempt to act as a monitoring or verification system. Its focus is more on companies learning the meaning of the various principles than immediate compliance.\(^3\) The true authority of the Global Compact is in its competence to give corporations the possibility to separate themselves apart from their competitors and thus being able to set a benchmark for ethical behaviour. Accountability is obtained through voluntarism, as deciding not to join the Global Compact could negatively impact a company's public image. It is also an easy way for the signatories to hide behind the legitimacy of the United Nations.\(^4\) There exist however various instruments, certificates and initiatives which can provide the same leverage, and that might have been one of the flaws of the overall system.

### 4.2.2 The United Nations Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights

#### 4.2.2.1 Background to the UN Norms

The UN Sub-Commission for the Promotion and Protection of Human Rights, which is the main affiliate of the UN Commission on Human Rights, adopted the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (from here UN Norms) in August 2003. The UN Norms and their Commentary, which is considered by the UN Norms as a useful interpretation and elaboration of the standards,\(^5\) form together an extensive guide to ethical business conduct regarding human rights. The focus of the UN Norms and their nature are unlike the other initiatives that will be discussed. The UN Norms were intended to move away from the utterly voluntary regulative measures by the UN and towards mandatory regulation. David Weissbrodt, who worked closely on the UN Norms, noted that the UN Norms were meant to evolve from soft law towards a binding nature after building consensus, and hence were not meant to automatically and immediately become binding.\(^6\)

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In 1997, El-Hadji Guissé presented a working document on business and human rights to the Sub-Commission which raised awareness on the lack of international regulation on the matter.\(^{317}\) In 1998, the Sub-Commission established a three-year period sessional Working Group with the purpose of ‘taking into account the principle of equitable geographic distribution, to examine the working methods and activities of transnational corporations’. By 2000 it was still unclear whether the draft UN Norms were intended to become non-voluntary and which business enterprises the draft UN Norms would apply to.\(^{318}\) The Global Compact had partly demonstrated the inefficiency of voluntary tools and its success had not been considered extensive. As the process advanced, it was decided that the draft UN Norms would be most effective if they were voluntary in their nature.\(^{319}\)

In 2001, the Working Group’s working period was extended by three years. The new mandate included the Working Group’s renewed tasks, but also new functions, such as compiling a list of the various relevant instruments and norms concerning human rights and international cooperation that are applicable to transnational corporations and contributing to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights.\(^{320}\) In 2002, a revised draft UN Norms attached to the Working Group’s report was circulated widely and in 2003 the draft Norms were agreed by the Working Group to be presented to the Sub-Commission. The Sub-Commission unanimously accepted the UN Norms in August 2003.\(^{321}\) The Sub-Commission requested the Working Group to receive information ‘to explore possible mechanisms for implementing the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’.\(^{322}\)

With the UNCHR Resolution in April 2004, the UN Norms were condemned to solely exist as a draft proposal.\(^{323}\) Although the UN Norms offer ‘useful elements and ideas’, they were not given any legal standing.\(^{324}\) This did not come as a surprise, as many states, multinational corporations and UN organs had resisted the UN Norms from the very beginning. The resolution, however, ended hopes of the UN

\(^{317}\) Weissbrodt and Kruger (n 316) 903.


\(^{319}\) The critique from governments regarding the mandatory nature of the draft will be discussed further on in the text.

\(^{320}\) The effects of the working methods and activities of transnational corporations on the enjoyment of human rights. 2001.

\(^{321}\) UN Draft Norms (n 315) 52.

\(^{322}\) ibid.


\(^{324}\) ibid.
Norms providing mandatory regulation and not solely being aspirational goals.\textsuperscript{325} The UN Norms were effectively abandoned in 2005, as the High Commissioner recommended that they exist among other existing initiatives for business and human rights.\textsuperscript{326}

4.2.2.2 Content of the UN Norms

David Weissbrodt notes that the UN Norms were supposed to ‘go beyond the voluntary guidelines offered in the Global Compact, the ILO Tripartite Declaration and the OECD Guidelines for Multinational Corporations,’\textsuperscript{327} because they were the ‘first non-voluntary initiative accepted at the international level’.\textsuperscript{328} Although they offered implementation provisions, which indicated they were not meant as aspirational statements,\textsuperscript{329} the truth of the matter is quite different. The UN Norms were to be placed somewhere in the middle between the voluntary Global Compact and a fully binding instrument as hoped for by Amnesty International.\textsuperscript{330} The UN Norms were hence not mandatory in the sense that they could be described to be international legislation or “hard law”, as they are considered to be more or less a soft-law instrument. The UN Norms did have hopes of becoming mandatory regulation, but the crushing objections of the international community ensured that the UN Norms did not gain such legal status.

Even though the norms might seem quite revolutionary in many ways, their approach to business and human rights is quite traditional. The preamble highlights the state’s primary responsibility in the protection of human rights, but highlights that ‘transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights’.\textsuperscript{331} The responsibilities in respect of human rights are bipartite, with the primary responsibility trusted to states, whilst other organs of society would also be responsible for human rights. States still would hence remain the primary actor in fulfilling rights.\textsuperscript{332} States were asked to establish

\begin{footnotesize}
\begin{enumerate}
\item[325] Backer (n 7) 331.
\item[327] Weissbrodt and Kruger (n 316) 913.
\item[328] ibid 903.
\item[329] Weissbrodt and Kruger (n 149) 338.
\item[331] UN Draft Norms (n 315).
\end{enumerate}
\end{footnotesize}
laws for implementing the UN Norms, although due to the wording, some have seen this to not have been obligatory for states.\textsuperscript{333}

The UN Norms set forward twenty-three articles written in treaty-like language.\textsuperscript{334} The general obligation is that ‘states have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.'\textsuperscript{335} The UN Norms are to be read and understood in the light of this general obligation,\textsuperscript{336} which addresses the underlying fear of the international community that the UN Norms would dismiss the importance of states. These fears were even addressed directly in the UN Norms: ‘Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States’.\textsuperscript{337} The idea of the UN Norms was to extend the level of human rights protection to other actors and not to limit the obligations of those who are already obliged to obey by human rights standards, with the justification for the secondary responsibility of multinational corporations tied to the Universal Declaration of Human Rights.

The application of the UN Norms also extended to ‘other business enterprises’, meaning that it also extended down the supply chain. Similarly, the extent was widened with the ‘sphere of influence’, which describes the extent of the duties of multinational corporations. The Commentary on the UN Norms unfortunately does not shine any light on the exact definition of the term in relation to the UN Norms and hence we must rely on the term’s descriptions from elsewhere in the instrument. The Commentary prohibits companies from working with entities or persons who do not ‘follow these or substantially similar Norms’.\textsuperscript{338} The Commentary also urges companies to monitor their supply chains to the greatest extent possible.\textsuperscript{339} In

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\textsuperscript{335} UN Draft Norms (n 315) A.1.


\textsuperscript{337} UN Draft Norms (n 315)

\textsuperscript{338} ‘Commentary on the UN Draft Norms (n 336) 5(c).

\textsuperscript{339} ibid 16(d).
this sense, the “sphere of influence” is meant to be interpreted broadly and also
to include supply chains and contractors, not only the legal entity, which is the
company in question. It is however troubling that the extent of legal obligations
is based on a term which is left without proper definition.

The Commentary on the other hand mentions companies’ obligation to use due
diligence in ensuring that their activities do not violate human rights or benefit from
any such violations which they were aware or ought to have been aware of.340 The
UN Norms and the Commentary together outline companies’ responsibilities to lie
within their sphere of their activity. Companies can only be linked to abuses which
they had had known of or should have known of. Companies are not only told not
to commit abuses, but they are not allowed to directly or indirectly benefit from
any abuses either or be complicit in such activity. It appears that the Commentary
suggests that failure in due diligence could lead to some level of liability.341

The UN Norms also include positive obligation to companies to ‘use their
influence to promote respect for human rights’ and ‘contribute to sustainable
development’. Its inclusion can be seen as the UN Norms’ attempt to provide a
comprehensive regulative initiative which also urges companies to go beyond their
requisite duties. However, Section 2.1.2 notes that transnational corporations are
to respect not only international law, but also national laws and regulation and
even public interests, development objectives and social, economic and cultural
policies.342 In this manner, the obligations are only within the companies’ limits
of their resources and capabilities, but the inclusion of society developing is quite
new, as this depicts the expansion of rights to include social, economic and cultural
rights.343

On the topic of human rights, the UN Norms firstly mandates an overall
obligation to respect, ensure respect for, prevent abuse and promote international
and national law.344 This provision retains international conventions, treaties and
initiatives and hence grants a number of possible obligations to multinational
corporations. The UN Norms refer to various UN instruments, declarations and
treaties in the preamble. Clearly the UN Norms attempted to gain legitimacy by
being constructed on an already accepted foundation of international regulation.345

340 ibid A.1.(b).
341 Backer (n 7) 344.
342 UN Draft Norms (n 315).
343 Surya Deva, ‘UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises:
    493, 507.
344 UN Draft Norms (n 315) A.1.
345 Such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against
    Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on
    the Elimination of All Forms of Racial Discrimination and the International Covenant on Economic, Social
    and Cultural Rights and the International Covenant on Civil and Political Rights.
The UN Norms also defined a list of rights which multinational corporations could affect and hence did not accept that companies could effectively impact all human rights in various manners. This leaves the possibility of an oversight of specific rights. Not everyone accepted the inclusion of rights related to consumer protection, corruption and the environment, which are not considered human rights norms.\footnote{Kinley (n 333) 427.}

Multinational corporations could have implemented the UN Norms as internal rules of cooperation. For example, companies could adopt the UN Norms as their code of conduct or other voluntary operating principles. On the other hand, companies could create a corporate culture of respect for human rights which consists of training their workers in accordance with the UN Norms. It is hence left to the companies themselves to decide on the appropriate scheme of implementation within their operations. If implemented, external monitoring would have been conducted with periodic reports submitted to an UN organ. Interestingly the UN Norms differ in this sense from other initiatives, as the monitoring is not left solely to states.\footnote{ibid 500.} The Commentary dictated various responsibilities to different UN organs, such as the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights. The Sub-Commission would have been responsible for monitoring compliance with the UN Norms, whilst the Commission would have monitored compliance by establishing a working group or a special rapporteur.\footnote{Commentary on the UN Draft Norms (n 336) 16(b).} Additional reporting to states would have been made mandatory, as governments were obliged to implement and monitor compliance with the UN Norms and use them as a model for legislation.\footnote{ibid 16(b) and 17(a).} Constructing various organs from the national and international level would have built a monitoring system for the UN Norms. The UN Norms did not set up any remedy organs, but urged companies to provide legitimate avenues of remedy for their workers.\footnote{ibid.} If a company failed to comply with the UN Norms, they would have been obliged to provide reparation, compensation or rehabilitation to anyone who was adversely affected.

4.2.2.3 Critique of the UN Norms

The UN Norms attempted to gain legitimacy and possibly acceptance by referencing international treaties, declarations and other initiatives\footnote{Weissbrodt and Kruger (n 316) 915.} and wished to state that the Universal Declaration of Human Rights also truly encompasses multinational corporations. However, as noted earlier most of these instruments were not meant
to also apply to non-state actors. It is extremely difficult to legitimise human rights standards to corporate actors when the treaties that are referenced are not constructed to include other actors than state entities. Even more problematic is the fact that not even all states have accepted or ratified all the referred documents. The UN Norms were seen to privatise human rights and these private companies would become agents are able to define and enforce human rights. This complexity was noted as early as in the drafting process by governments. For example, the Australian government noted that ‘the implementation of international human rights standards rests primarily with those States who are a party to the standards, not individual businesses’. The UN Norms did not just restate the already accepted treaties, as some argue, but attempted to fill the voids of existing regulation, as noted by Casey. The UN Norms attempted to refer to various documents to provide guidelines to the applicable obligations more than extending the referred treaties to also include companies. The UN Norms also started a new wave of regulating corporate conduct, which helped formulate other business and human rights instruments.

Although the UN Norms allocated the primary responsibility to states, they included the idea of sharing certain obligations with multinational companies. This eliminated the role of the state between multinational corporations and international law and hence obligated multinational corporations directly. It was too radical for governments who were unwilling to share their international obligations, and states fiercely opposed the UN Norms. Critics remark that it is clear that even if the intention of the UN Norms was not to shift responsibility from states, it would do so inevitably and hence threaten the international system.

Compared to the later discussed Guiding Principles on Business and Human Rights, the drafting process of the UN Norms lacked transparency and political

354 Hillemans (n 318) 1070.
consideration. John Ruggie, the Special Representative of the Secretary-General, had a more transparent working style whilst constructing both the Protect, Respect and Remedy Framework and the Guiding Principles. The Sub-Commission on the other hand worked without any input from the business world, mostly within their personal capacities, and even more importantly the Sub-Commission worked without any mandate from the Human Rights Council. It was also problematic that neither the Sub-Commission or the Commission had the authority to make the UN Norms legally binding even though that was their eventual goal. When the UN Norms were finally given to the Council, their reaction was unsurprising as they had very little knowledge of the UN Norms and were surprised their hopes of a binding legal status.

The UN Norms did not become what was initially intended; a mandatory regulative instrument. This was no surprise, as most states were against the mandatory nature of the UN Norms from the very beginning. John Ruggie called the UN Norms a train wreck in Geneva and criticised them for their inconsistency with international law, as they could not be simultaneously non-voluntary for non-state actors and reflecting international legal principles. He also noted that taking existing human rights instruments which were designed for states and asserted them to be binding on business entities was not within the realm of international law. He went as far as to pronounce the UN Norms dead in 2006. He clearly wished to distance himself from the UN Norms with the Protect, Respect and Remedy Framework and the Guiding Principles on Business and Human Rights.

357 Amerson (n 314) 918.
358 Anita Ramasastry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in Surya Deva and David Bilchitz (eds), Human Rights Obligations of Business - Beyond the Corporate Responsibility to Protect (Cambridge University Press 2013) 168; Gelfand (n 356) 1.
361 ibid.
362 Remarks by John Ruggie: Delivered at a Forum on Corporate Social Responsibility, Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics, Bamberg, Germany (n 359).
4.2.3 The ‘Protect, Respect and Remedy’ Framework and the Guiding Principles on Business and Human Rights

4.2.3.1 History and Background of the Guiding Principles

In April 2005, the Commission adopted a resolution on the appointment of a Special Representative on Human Rights and Business Enterprises, whose mandate included identifying and clarifying standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights and clarifying concepts such as “complicity” and “sphere of influence”.

The mandate was established in order to move beyond what had been a long-standing and deeply divisive debate over the human rights responsibilities of companies.

John Ruggie, who became the Special Representative of the Secretary-General (from here SRSG), had two major landmarks during his mandates: the Protect, Respect and Remedy Framework and its successor the Guiding Principles on Business and Human Rights.

The debate on the opposing views on voluntary and mandatory regulative measures regarding business and human rights had only grown in the decades leading up to the mandate. The Global Compact had clearly not gathered as much support as had been hoped, whilst the UN Norms had failed miserably in their task of becoming a mandatory instrument regulating business and human rights. The failure of the UN Norms can be seen in the very mandate of SRSG, which does not even include a mention of them.

It was evident that the UN needed an entirely new approach, which led to the mandate of the SRSG and their opinion regarding business and human rights vastly differing from the UN Norms.

The SRSG attempted to distance itself from the UN Norms’ failure early on with the 2006 Interim Report, and stated that international human rights had been adopted by states for states and his task was to understand which of these standards, if any, could be transported to apply to transnational corporations.

However, the Framework complements, not substitutes, the Global Compact and its approach and their mutual existence is accepted.

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366 ibid 199.
368 Wynhoven (n 297) 89.
In 2008, The Protect, Respect and Remedy Framework (from here Framework) was unanimously approved by the Human Rights Council. The Framework depicts three ‘differentiated, but complementary’ responsibilities, which are interconnected and complement each other: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The report notes that ‘each principle is an essential component of the framework: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness.’

The SRSG mandate was continued by the Human Rights Council for another three years in June 2008 to operationalise the Framework. Compared to the original mandate, this mandate focused more on the promotion of the Framework and ways to strengthen the principles set out in them.

The Guiding Principles on Business and Human Rights (from here Guiding Principles) were endorsed by the Human Rights Council on 16 June 2011. The Guiding Principles, which are built on the foundation of the Framework, contain thirty-one principles with the core principles “the State Duty to Protect Human Rights,” “the Corporate Responsibility to Respect Human Rights” and “Access to Remedy” receiving their own sections. Under each section, the principles are divided into “Foundational Principles” of a general nature and “Operational Principles”. Altogether the Guiding Principles with their Commentary attempt to provide a cohesive set of standards applicable to all businesses in all states. One of the extremely positive aspects of the Guiding Principles is that they apply to ‘all enterprises regardless of their size, sector, operational context, ownership and structure’. The Guiding Principles Reporting Framework offers specified guidance on how to incorporate the Guiding Principles and due diligence into their operations.

The approach of the Guiding Principles is to attempt to have ‘inter-systemic harmonization of a governance regime to which three autonomous but deeply

369 Protect, Respect and Remedy Framework (n 238) 9.
370 ibid.
373 The UN Guiding Principles on Business and Human Rights (2011) 14 [herein after the Guiding Principles].
related systems contribute—the law-state system, the international system and the social-norm system. The foundation for the principles is the domestic legal jurisdiction of each state and allowing non-state actors to develop a form of responsibility alongside it. They do not extend law or generate new legal responsibilities and hence steer away from possible theoretical complexities surrounding corporate obligations. The Guiding Principles do not wish to establish binding international obligations or to change the current state of international law. They are merely voluntary principles. As noted by the SRSG himself, ‘the Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.

The Guiding Principles derive from the same starting points and core principles as their predecessor. They apply to all states and all business enterprises. Both the Framework and the Guiding Principles are practical recommendations that help to define existing international policies. They both tackle corporate responsibility of human rights with a voluntary approach, which highlights the differentiation between state obligations and corporate responsibilities. According to John Ruggie, if the Framework addresses the ‘what’ then the Guiding Principles address the ‘how’. The Guiding Principles are considered to have wide consensus and approval from governments, intergovernmental organisations and the corporate world. During his mandate, Ruggie held a number of consultations, which included written submissions and meeting with various stakeholders such as governments, experts, NGOs and business representatives. Ruggie emphasised the significance of allowing all stakeholders to be heard.

To further illustrate the content, obligations and aspirations set out in the Guiding Principles the following sections will discuss their key elements. As both the Framework and the Guiding Principles possess for the most part the same obligations with some dissimilarities, the text will mostly review the Guiding Principles.

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378 ibid 128.
Principles with some commentary on the Framework. In addition the sections will concentrate on the confusion of the exact rights referred to by the obligations and the particular use of social expectations as the basis for corporate responsibilities. The last section will offer some critique which both the Framework and the Guiding Principles have received.

4.2.3.2 State Duty to Protect

The Guiding Principles rest on the traditional responsibility of states in the protection of human rights. The duties of states and the responsibilities of business enterprises are kept separate and exist independently from one another. Such a differentiation, according to Ruggie, is to indicate that an independently existing corporate responsibility is not an obligation imposed by the current international human rights law. States hence remain the key actors in enforcing human rights obligations of companies through policy, accountability and international commitments. It is interestingly the states that have a certain responsibility towards business enterprises and their conduct within this context. As noted, the SRSG wished to distance the Guiding Principles from the failed attempts at extending international law to also involve the responsibilities of multinational corporations. The Guiding Principles therefore rely on the state’s duty to enforce human rights in business enterprises as well, and to regulate inside their jurisdiction and territory that companies conduct their operations in such a way.

The duty of the state to protect, to which the first ten principles of the Guiding Principles refer, is the baseline for all further stated obligations. As noted in the Framework, ‘the duty to protect is a core principle of the business and human rights framework’.

The obligation stems from the state responsibility to ensure, in which states must inside their jurisdiction and borders protect human rights, also in horizontal relations, which has been discussed in depth in Section 2.3. The duty of states is to ensure the realisation of rights horizontally, which also means in the relations between business entities and individuals. Without reiterating Section 2.3.1., the duty has already been accepted in international law, although it cannot be viewed as a fully legal obligation. The state duties set out in the Guiding Principles hence do not actually formulate any new obligations or aspirations, but are a reprisal of the already existing international law regarding state actors. The Guiding Principles note this obligation by stating that states may breach their international human rights law obligations ‘where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse’.

379 ibid 130.
380 Protect, Respect and Remedy Framework (n 238) 9.
381 The UN Guiding Principles (n 373).
The idea of the duty to protect is that states must first fulfil their duty to protect before there can be a shift of attention outwards to other regulatory objects. States must hence regulate and enforce policies regarding business enterprises and ensure policy coherence with international human rights. They must also protect against human rights abuses in all relations with various business enterprises, whether state-owned or private entities. States are the legitimate source of binding rules and hence can impose corporate obligations, which can also entail sanctions and consequences. Business enterprises are therefore tackled within the jurisdiction in question and not on an international plane.

4.2.3.3 Corporate Responsibility to Respect

The corporate responsibility already differs in its wording from the state duty discussed above. The corporate obligation uses the term responsibility instead of the word duty intentionally to highlight how international law does not impose legal obligations onto multinational corporations. Similarly, the Guiding Principles use the term impact and risk in relation to corporate action, whilst violation is reserved for states. The explicit aim is to separate corporate obligations from the duties of the state and specifically from legal responsibilities. Responsibility can be viewed as a less harsh term than duty. Larry Catá Backer notes that ‘the state duty is couched in the language of law and policy’ whilst ‘the corporate responsibility to respect is grounded in the language of due diligence’. Therefore, corporate responsibilities are a separately existing set of obligations from the legal duties of a state, which do not diminish any of the duties of a state accepted by the international community.

Corporate responsibility encompasses two areas. Firstly, a negative responsibility to respect human rights exists as a baseline expectation for all companies, which can over-rule compliance with national laws. The Guiding Principles note that ‘business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.’ Its main obligations are to

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382 Backer 2015 (n 356) 476.
383 Backer 2011 (n 356) 74.
386 Backer (n 374) 124.
387 The UN Guiding Principles (n 373).
388 ibid 13.
389 ibid.
‘avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur’. Secondly, there is a positive responsibility in the form of due diligence and the expectation to ‘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’. The obligations apply to all companies ‘regardless of their size, sector, operational context, ownership and structure’. At its core, corporate responsibility wishes all companies to respect human rights wherever they operate.

However the Guiding Principles do go slightly further than merely demanding compliance with national legislation, as they ask companies to comply with all applicable law, respect human rights and honour internationally accepted human rights. As we know, one key problem with business conduct and human rights is countries where the state is unable or unwilling to regulate and enforce human rights. The Guiding Principles asks business enterprises to ‘seek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements’. The obligation thus severely loses its teeth when companies are only asked to seek ways to honour and not to directly honour human rights in these types of situations.

The sphere of influence was dropped from the Guiding Principles. In 2006, the SRSG criticised its use in the Norms for the role of differentiating responsibilities between various company actors. As noted, the term has no legal status and derives its meaning from geopolitics. As mandated, the SRSG reviewed the term’s meaning in a separate report, but its clarification is also given in the Framework. The interim report recognises that the origin of the term and the rapid changes in the corporate world since have clouded the term’s true characteristics. It is also noted in the Report and the Framework that although the “sphere of influence” can remain a useful metaphor, much more defined parameters are needed to define the scope of responsibilities.

The Guiding Principles therefore ask instead to seek to prevent adverse human rights impacts that are directly linked to their relationships. Relationships obviously contain all obvious relations of a business entity, such as contractors,
suppliers or employees.\textsuperscript{397} The Guiding Principles hence acknowledge that companies can violate and negatively impact human rights by their own direct action or indirectly. However even benefiting from human rights abuses cannot bring legal liability, but can give negative implications in the public perception.\textsuperscript{398} The Framework seems to view companies as having a heightened duty regarding their core business enterprises.\textsuperscript{399}

The Guiding Principles note that in order to fulfil their obligations, companies should have a policy commitment in place; a human rights due diligence process used widely and processes to enable remediation.\textsuperscript{400} The Framework and Guiding Principles both emphasise due diligence and the entire concept of corporate responsibility is linked to due diligence. Due diligence is intended to be an on-going process in all companies, and in understanding the scope of their due diligence process, companies must consider factors such as the countries they operate in, the risks their operations have and the relationships they have with third parties.\textsuperscript{401} Due diligence should be enhanced with internal and external expertise,\textsuperscript{402} which in practice refers to independent consultancy and certification companies. The context and extent of the process may hence differ between companies based on their operations, size or locations. The due diligence process ‘should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed’.\textsuperscript{403} Even after conducting an initial impact assessment of a company’s conduct and operations, due diligence should continue throughout the company. The due diligence obligation can be thought to be the primary and core obligation of companies, followed by the obligations regarding actions on human rights impacts.\textsuperscript{404}

As usual in the field of business and human rights, complicity is an extremely important part of any regulation instrument. The Guiding Principles note that ‘corporate complicity is an umbrella term for a range of ways in which companies may be liable for their participation in criminal or civil wrongs’ and that ‘the international tribunals have developed a fairly clear standard for criminal aiding

\textsuperscript{397} ‘Business relationships’ are understood to include relationships with business partners and any other entity directly linked to its business operations, products or services.

\textsuperscript{398} Protect, Respect and Remedy Framework (n 238) 78.

\textsuperscript{399} Amerson (n 314) 912.

\textsuperscript{400} The UN Guiding Principles (n 373) 15.

\textsuperscript{401} ibid 57.

\textsuperscript{402} ibid 17.

\textsuperscript{403} ibid.

and abetting liability: knowingly providing practical assistance, encouragement or moral support that has a substantial effect on the commission of a crime.\footnote{Busine ss and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts - Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other (n 367) 37.}

As discussed earlier, it is an almost impossible mission to compile a list of human rights applicable to multinational corporations. Neither the Framework nor the Guiding Principles can be viewed to offer a “tool kit” for identifying corporate human rights responsibilities.\footnote{ibid.} The Framework approaches the issue in maybe the most realistic manner, in which it defines the specific responsibilities of companies with regard to all rights instead of defining a limited list of rights linked to imprecise and expansive responsibilities. Therefore it is different from previous instruments in which specific obligations were addressed in relation to specific rights, whilst the Guiding Principles set general obligations to all human rights.\footnote{Humberto Cantú Riviera, ‘Negotiating a Treaty on Business and Human Rights: The Early Stages’ (2017) 40 University of New South Wales Law Journal 1200, 1201.} Companies can impact various human rights and it is counter-productive to attempt to map the specific rights applicable. The Guiding Principles accept that certain rights might demand heightened attention due to the industry or context of the situation,\footnote{The UN Guiding Principles (n 373) 12 Commentary.} but do not further specify individually the rights in the scope of corporate responsibilities. The Guiding Principles note that ‘business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights.’\footnote{ibid 14.}

\subsection*{4.2.3.4 Access to Remedies}

The “Access to Remedy” chapter of the Guidelines continues the traditional view of state power supremacy, but the chapter however applies to both states and companies. The remedies presented in the chapter include national juridical and judicial systems, private grievance systems by companies and international mechanisms. It is evident from that national remedies are the primary tool regarding business and human rights, even though a narrow option is left for international operators by encouraging states to consider ways to ‘facilitate access to effective non-state grievance mechanisms dealing with business-related human rights harms’\footnote{ibid.}. The provision’s commentary notes that international human rights bodies usually deal with violations of states, but some have also reviewed the State’s duty to protect against human rights abuses by business enterprises.\footnote{ibid 28 Commentary.} Even this
provision elevates state supremacy, as international bodies are solely to review the actions of the state.

The Guiding Principles set out stipulations for ensuring the effectiveness of both state-based and non-state-based entities, such as legitimacy, accessibility, predictability, equitability, transparency and rights-compatibility. Mainly, as mentioned, such standards are aimed at the states which are the focus of the appropriate remedies. Sovereign states are allowed to construct and establish juridical and non-juridical remedies of their choosing, but on the other hand the Guiding Principles expect that if the possible outcome has an implication for human rights, states should ensure that they are in line with internationally recognised human rights. The approach is hence dualist, with the expectancy of the inclusion of international human rights in the national court system and the freedom of every state to dictate within their legal system.

4.2.3.5 Social Expectations in the Framework and the Guiding Principles

In the Interim Report of 2006 it was noted that 'companies are constrained not only by legal standards but also by social norms and moral considerations', but also by 'what their internal and external stakeholders expect of them'. The same idea continued with the Interim Report in 2007 and then with the Framework and the Guiding Principles, which base corporate responsibility on the social expectations towards businesses, not from existing international legal obligations or instruments. Social expectations, as referred to by Karin Buhmann, are 'a key feature of reflexive law in terms of informing sources of normative expectations between social sub-systems to induce self-regulation within a sub-system'. Companies are hence not obliged to follow legal standards under international law, but have to do so because it is what society expects of them. As the range of voluntary instruments regarding business and human rights increases, the surrounding society also begins to expect companies to follow suit. Businesses must respect human rights, because it is a condition to continue their social licence to operate. The expectations form the responsibility to protect human rights and the Framework notes that the

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412 ibid 31.
413 ibid 31 Commentary.
416 Protect, Respect and Remedy Framework (n 238) 54.

ibid 51.
responsibility to protect human rights is a baseline expectation of all companies in all situations.\textsuperscript{417}

The building of corporate responsibility on normative expectations differs widely from almost all other business and human rights instruments. Building responsibilities on social expectations rather than legal obligations means that the bases of obligations are the companies’ use of voluntary initiatives which increase society’s expectations of responsible behaviour. Normativity only links to the expectations through the companies’ voluntary policies, as no legal doctrine has enforced the expectations of the surrounding society. Obviously such an alignment enforces the status of voluntarist rather than mandatory regulative instruments. Hence the underlying responsibility is solely based on expectations without any true interference from legislation or policies.

Although the Framework and Guiding Principles clearly attempted to distance themselves from the Norms, they still encompass the same underlying ideal of enforceable corporate responsibility. They however attempt to find such obligations through the normative expectation of application and not through enforcing application with normative measures. The Guiding Principles themselves admit to solely existing as a standard based on social expectations without any legal grounding. This is problematic, as David Bilchitz notes, as the Guiding Principles cannot at the same time refer to human rights instruments as a source of social expectations and deny their legally binding nature.\textsuperscript{418} Rights based on social expectations cannot be demanded by their holders, nor can there be remedies for rights without legal force.\textsuperscript{419}

4.2.3.6 National Implementation of the Guiding Principles

The Working Group on the issue of human rights and transnational corporations and other business enterprises were granted a wide-ranging mandate, which included the promotion, dissemination and implementation of the Guiding Principles and the identification, exchange and promotion of good practices and lessons learned on the implementation of the Guiding Principles.\textsuperscript{420} In 2012, the Working Group issued The Corporate Responsibility to Respect Human Rights: Interpretive Guide. The Forum on Business and Human Rights, which works under the guidance of the Working Group, was established simultaneously to discuss

\begin{footnotes}
\item[417] ibid 24.
\item[418] David Bilchitz, ‘No A Chasm between ish and ought’? A Critique of the Normative Foundations of the SRGS’s Framework and the Guiding Principles’ in Surya Deva and David Bilchitz (eds), \textit{Human Rights Obligations of Business - Beyond the Corporate Responsibility to Protect} (Cambridge University Press 2013) 118.
\end{footnotes}
trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation.\textsuperscript{421}

The Working Group encouraged all states to develop and enact a National Action Plan (from here NAP). NAPs are government-drafted plans that outline the state’s duties in the Guiding Principles and how the country in question will implement and support the Guiding Principles. NAPs are aimed at states to illustrate the implementation of the Guiding Principles and move the horizontal policy coherence onwards.\textsuperscript{422} The hope was that through NAPs states would be more focused and committed in the domestic implementation of the Guiding Principles. The Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks by the International Corporate Accountability Roundtable and the Danish Institute for Human Rights attempts to provide guidance for states in the establishment of NAPs.

The hope is that NAPs strengthen the commitment of states towards the Guiding Principles and establish the accountability of states in relation to the specific plans and indicators they set in the NAP.\textsuperscript{423} The UK, the Netherlands, Italy, Denmark, Spain, Finland, Lithuania and Sweden have produced NAPs, with a number of others in the process of developing theirs.\textsuperscript{424} In Finland, the Ministry of Employment and the Economy submitted its report on the national implementation of the Guiding Principles in September 2014. In other countries, the Foreign Ministry has taken on the task. Certain countries have not eagerly begun the national implementation of the Guiding Principles. The still rather low turnout of NAPs is not the only problem implementation has faced. Most NAPs which have been published are declaratory in nature and largely do not promise concrete new actions.\textsuperscript{425}

For the Guiding Principles to have a true effect they must be properly implemented domestically by states, as they do not serve obligations towards non-state actors, but attempt to work only with the mediation of the state. There is currently growing momentum for NAPs,\textsuperscript{426} with a number of states publishing NAPs since the launch of the treaty resolution introduced later in Section 4.3. This could be seen as states starting their NAP process possibly to rather strengthen the Guiding Principles in protest at the current UN treaty process.

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\textsuperscript{421} ibid 12.
\textsuperscript{422} Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (n 372).
\textsuperscript{425} O’Brien (n 423) 118.
\textsuperscript{426} ibid 125.
4.2.3.7 Praise and Critique of the Framework and Guiding Principles

Even without judicial status, the Guiding Principles are the leading international instrument regarding business and human rights. Both the Framework and Guiding Principles were praised for their innovation and new approach to business and human rights. They were the first business and human rights regulative instrument to be approved by the UN. During his mandate, the SRSG formulated a coercive mapping of the current regulative sphere and concocted a new approach to the issue. The concept of the Guiding Principles was to build on existing structures of standards and regulation rather than create completely new ones. Therefore they make sure that the roles and duties of states and multinational corporations are utterly different and do not attempt to create binding obligations onto multinational corporations. Clearly this could be considered the correct approach and gained approval, because the concept of corporate reasonability is not fully accepted and it is better to aim at shifting ‘from institutional misalignments onto a socially sustainable path’. This avenue is far less dramatic or controversial than for example the one used in the UN Norms. When accompanied by the voluntary nature of the Guiding Principles, its appeal is quite understandable.

The Guiding Principles were praised by the business world. This can be due to the fact that firstly the Guiding Principles also understood that a one-size fits all approach would not work in business and human rights. Companies and their operations differ and hence their relation to human rights can vastly differ. The approval might have been based on their language, which discusses human rights with business-orientated wording. Secondly, ideas of benchmarking, due diligence and impact assessments fit better with the corporate world than rigid international rules as proposed by the Norms. It is important to note however that for example human rights due diligence does not mean exactly the same as due diligence in general does in the corporate world. They attempt not to apply to specified business enterprises, but to business as a whole. The complex world of business operations is better perceived in the Guiding Principles than in many other regulative instruments. However the Guiding Principles do not contain definitions of any of the used terms, which may cause complexities specifically amongst actors unfamiliar with the terms of human rights or on the other hand with the corporate world.

427 Deva (n 385) 103.
428 Blitt (n 404) 44.
430 The UN Guiding Principles (n 373) 5.
431 See further discussion in chapter 9.3.
Although both instruments gained praise, they did not gain as much acceptance amongst NGOs. The International Federation for Human Rights, a group representing over 150 human rights groups, has criticised the lack of effective remedies for victims and the complexities surrounding state obligations to prevent abuses committed by companies overseas.432 Human Rights Watch on the other hand views the Guiding Principles to only endorse the status quo, which is ‘a world where companies are encouraged, but not obliged, to respect human rights’.433 The Guiding Principles have received criticism for not being detailed or specified and leaving a variety of issues untouched. A number of NGOs have criticised the Guiding Principles for not providing sufficient guidance to governments and businesses, but leaving the government gaps unidentified.434 Also the true content of references to “appropriate steps” and “appropriate action” regarding state regulation of business activity are not elaborated on.435 Legislative text must obviously attempt to stay abstract, but the problem with the Guiding Principles is that they leave the vital and core questions without reasonable answers. Although the SRSG explicitly acknowledges government gaps and legal incoherence, for example in the Draft Principles in 2011,436 the Principles offer direct regulation of an operational model aimed directly at states.

The Guiding Principles were critiqued for being weaker than their predecessor, the Framework. It is clear that certain changes occurred in the move from a framework to principles. For example, the Framework recognises a need for home states to take regulatory action, but the Guiding Principles only note that states are to encourage businesses. Although the essence of the Framework can be found in the Guiding Principles, they have shifted their main attention to the state’s duty to protect and reorganise remedies to be an extension of that duty.437 As described by Larry Catá Backer, the corporate responsibility and remedies principles form more a peripheral aspect of the Guiding Principles.438 The Framework, for example, has no mention of the existence of responsibilities of states, but merely notes obligations as a whole. The Guiding Principles however note that the state has an existing

435 ibid.
436 Protect, Respect and Remedy Framework (n 238) 6.
437 Backer (n 374) 99.
438 ibid.
obligation to respect, promote and fulfil human rights.\textsuperscript{439} Such a dispensable word affixes state responsibilities to the current accepted platform of international law. As mentioned, there exists no obligation for states to extraterritorially regulate corporate behaviour, which means that the placement of the word affirms the voluntarism of the Guiding Principles even towards states. The Guiding Principles hence do not compel states to truly adopt extraterritoriality, for example.

\textbf{4.3 Attempts at a Binding Treaty in the UN}

\textbf{4.3.1 Background for Soft Law}

The discussion surrounding a binding treaty on business and human rights exists because treaties are seen to be superior to any other international law mechanism. In their volume, range and ubiquity, treaties are the utmost important source of international law.\textsuperscript{440} For this reason, binding treaties have become the main source of law, as the role of soft law remains de-emphasised.

Distinguishing between soft and hard law can be difficult.\textsuperscript{441} Hard law is viewed as legally enforceable obligations that states have willingly and voluntarily accepted to comply with. Article 38 of the Statute of the International Court of Justice states that the court, whose function it is to ‘decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.\textsuperscript{442} Multilateral treaties which have entered into force are binding compared to the non-binding soft law. Soft-law instruments are not mentioned in the article, which provides a clear formalistic approach from the Court to international law.

Soft law in the other hand, as described by Antonio Cassese, is a body of standards, commitments, joint statements and declarations of policy or intention, resolutions adopted by the United Nations General Assembly or other multilateral

\begin{itemize}
\item \textsuperscript{439} The UN Guiding Principles (n 373) General Principles.
\item \textsuperscript{441} Jan Klabbers, ‘The Redundancy of Soft Law’ (2016) 65 Nordic Journal of International Law 167, 186.
\item \textsuperscript{442} Statute of the International Court of Justice (18 April 1946) 38.
\end{itemize}
These instruments of soft law do not impose any legally binding obligations and therefore are called soft law compared to the hard coercive law. Soft law can in extrapolated definitions be divided into three categories: binding legal norms that are vague and therefore neither justiciable nor enforceable; non-binding norms adopted by states; and norms promulgated by non-state actors. The core of all three categories is the non-enforceability of the norms and the lack of an obligatory nature.

The term soft law itself references its soft nature compared to the binding harder nature of hard law. Soft law can therefore be used for two different reasons, as Jan Klabbers illustrates. The first is the function of description. Everything that cannot be defined as hard law and cannot be viewed as irrelevant for the international order of law must therefore be described as soft law. The second function is more normative. The complexities arise when we start giving soft law more than a descriptive meaning and more of a normative one. Generally we wish to view law as always abiding by the principles of clarity and certainty. Sceptics about the soft-law thesis however view that soft law misleads its user by suggesting that law comes in varying shades: softer and harder. The entire thesis of non-binding instruments diminishes the whole concept of law as Jan Klabbers interprets the problem with the thesis of problematising the simplicity of law. The simplicity comes from the strict categories of legal or illegal; in force or not in force; and obviously binding or not binding. Law therefore loses its purpose and hence the entire exercise related to soft law defeats its purpose.

The true difference between soft and hard law is found in the politics of international law. By using soft-law instruments, states are not forced to ratify the norms with their domestic ratification processes. The complex and heavy-built ratifying processes of each state slow the enforcement of international law, while soft law offers the possibility to evade the process altogether. The process from acceptance to ratification may take years, even decades in some cases. With non-binding instruments, international lawmakers can quickly record the common consensus of sovereign states. However without domestic ratification, it can be easy to escape domestic accountability for the policies that have been agreed upon. Soft-law instruments are more flexible compared to binding treaties as

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443 Cassese (n 277) 197.
446 ibid 386.
447 ibid 385.
448 ibid 387.
they are more easily amended, supplemented and replaced. Because of the above-
mentioned flexibility and exemption from ratification processes, they can address
more than one political motive at a time and more accurately reflect the political
view of the current time. Soft law does even address the known weaknesses of the
international legal system, such as the limited effect of many legal norms on state
behaviour and the relative paucity of sanctions for violations, the democratic deficit,
the slowness and reluctance with which international legal institutions respond
to grave problems in international society and the inadequacy of many of those
responses. Soft law tries and in some ways manages to tackle some of the key
problems associated with international law.

4.3.2 Treaty Negotiations and the Intergovernmental Working
Group on Transnational Corporations and Other Business
Enterprises with Respect to Human Rights

The possibility of drafting a binding international treaty regarding business and
human rights emerged at the UN in 2014. Two resolutions were tabled to the UN
Human Rights Council in 2014, the first drafted by Ecuador and South Africa and
signed by them and Bolivia, Cuba and Venezuela. The resolution was tabled on 19
June, but updated on 24 June. The proposal requests the establishment of an
intergovernmental working group mandated to establish a legally binding treaty.
The representatives of Ecuador had already in September 2013 made a declaration
regarding transnational corporations and human rights at the UN Human Rights
Council expressing their concerns.

The other resolution was drafted by Norway and was tabled on 12 June, and
then updated on 17 and 23 June. The Norwegian proposal, compared to the
Ecuadorean and South African proposal, requested the already existing Working
Group to prepare a report considering a legally binding treaty and built on the
already launched Guiding Principles. Companies were called upon to meet their
responsibilities in accordance with the Guiding Principles. The proposal was hence

450 Jaye (n 444) 320.
451 Human Rights Council, Resolution, Elaboration of an International Legally Binding Instrument on
Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/
RES/26/9 (2014).
452 Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights and Council, Transnational
453 Human Rights Council, Human rights and transnational corporations and other business enterprises, A/
much less invasive than the one made by Ecuador and South Africa and was supported by only twenty-two countries.

On 26 June the UN Human Rights Council adopted Ecuador and South Africa’s resolution and the following day the Human Rights Council also adopted Norway’s resolution. The Norwegian resolution was however adopted by consensus, unlike the Ecuadorian and South African proposal, which had fourteen countries vote against its adaptation and thirteen abstain. The important actors, such as the US, the UK and countries of the European Union backed Norway’s resolution. Developed Western countries, such as the US voted against the proposal whilst emerging markets, such as China and India, voted in favour.454

With resolution A/HRC/RES/26/9, the Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights (from here OEIWG) was established and mandated to ‘elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.455 The resolution was passed by twenty votes to fourteen, with thirteen states abstaining from the vote. Not only did the US, UK and EU vote against the resolution, they also initially refused to take part in the OEIWG.456

The OEIWG had its first session on 6 July 2015, which continued until 10 July. The sessions focused on ‘constructive deliberations on the content, scope, nature, and form of the future international instrument’.457 During the sessions, various panel discussions were held focusing on specific thematic issues, which also encouraged the various participants to share their comments.458 The third session was according to Resolution A/HRC/RES/26/9 supposed to have substantive negotiations regarding the drafting of a binding treaty, were held in October 2017.459

4.3.3 Three Sessions Regarding a Possible Treaty

Governments act as the parties negotiating the treaty. This is the proper process if the treaty truly wishes to be a legitimate instrument of international law. For example, one of the most critiqued aspects of the UN Norms was that though it was supposed to become a legally binding document like a treaty, it was the experts of the Sub-Commission drafting the document.\(^{460}\) Governments were left outside the negation process. The Guiding Principles took a different approach by inviting governments to the process and specifically noting that the Guiding Principles did not request states to negotiate a treaty with binding standards towards international law.\(^{461}\) Similarly, the later on discussed OECD Guidelines were carefully negotiated between all interested parties.\(^{462}\)

The first session involved conflict and maybe even chaos.\(^{463}\) It was rather obvious that many favoured the enforcement of the Guiding Principles over the plausible establishment of a treaty.\(^{464}\) During the session, the representative of the EU delegation objected to the draft and made two proposals regarding the amending of the programme of work. The underlying question was whether there was truly any need for such a panel as the Guiding Principles or was the EU merely attempting to focus the delegates’ attention on a voluntary and existing international instrument? Later, a number of delegates also noted that the Guiding Principles are complementary and not in contradiction to a binding treaty.\(^{465}\) The Guiding Principles as a voluntary tool aimed at state parties and the new proposed binding treaty applying directly to multinational companies could benefit each other immensely, but definitely are not in open conflict with each other. Therefore many believe that the EU delegation was attempting to focus on renewing the Guiding Principles rather than moving forward with drafting an international treaty.

Secondly, the EU wished to include the inclusion of the word “all” in front of all uses of the wording “other business enterprises”, which most of the other delegates expressed concern and criticism about.\(^{466}\) The wording caused much controversy around which companies would actually fall within the scope of the

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460 Ramasastry (n 358) 169.
464 Cantú Riviera (n 407) 1204.
466 Lopez and Shea (n 463) 112.
treaty. The amendment would have directly meant changing the wording of Resolution A/HRC/RES/26/9 and many delegates considered such alterations not to fall within the mandate of the OEIWG. The session was then stalled for several hours due to informal consultations regarding the amendments proposed by the EU delegation, and upon return the revised version was introduced. A number of delegates noted that the addition of a new panel could be accepted in ‘the spirit of building consensus’ and the Chair later declared the addition of the new panel, however with the amendment of the wording as the majority of delegates opposed the proposal.

It is unclear whether the EU delegates wished to interrupt the proceedings or were merely highlighting certain complexities surrounding the topic. The objections led to several hours of private negotiations and the EU not joining the remainder of the sessions. By the second session, however, the EU had seemed to have come on board, with the entire session having a more cooperative feel. The second session had various panels on state obligations, which were the focus of the second session. It appeared that the delegations were finding consensus on certain topics.

### 4.3.4 Scope of the Possible Treaty

In September 2017, the Chair of the OEIGWG published the Elements for The Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights, which acted as the basis for the negotiations in October 2017. Before the publication of the Draft, state representatives were considering the lack of material to base the upcoming negotiations on. The Draft sets a clear tone and scope for the upcoming treaty, but it is important to note that it was written based on the first two sessions and has the status of being a basis for future negotiations.

The stance of the OEIWG on the plausible instrument’s content and scope has been surprisingly liberal, considering the chaos of the first session. It is believed that the instrument should cover all human rights and all human rights violation under its scope. The Draft notes the universality, indivisibility and inter-relationship of

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467 Bilchitz (n 454) 220.
468 ibid 115.
470 ibid 112.
471 Cantú Riviera (n 407) 1212.
all human rights, which are therefore to have the same relevance. All human rights and hence all abuses should be covered, according to the Draft. The preamble references various UN instruments and reaffirms the Guiding Principles. The referenced UN instruments also include the UN Norms, which as noted were deliberately left out of the Guiding Principles.

One of the most pressing issues during the first session was whether to limit the instrument to solely transnational corporations or to also include domestic entities, and the issue was debated during the first session of the OEIWG. Resolution 26/9 discusses ‘transnational corporations and other business enterprises’. The EU’s wish to add the word “all” was seen by some to extend or change the given mandate. Previously international instruments have decided not to limit their scope to multinational entities. For example, the UN Guiding Principles apply to ‘all enterprises regardless of their size, sector, operational context, ownership and structure’, whilst the UN Norms also cover all other business entities. As mentioned, transnational corporations as a term is not universally defined, and most international instruments have failed to bring clarity to its content. It is vital that the instrument clearly depicts which features are attributed to a multinational corporation, and whether size, variability in location, revenue or control over various domicile subsidiaries are stipulated for a business entity to be considered a transnational corporation. It would actually be beneficial for that objective to cover other business operations in the scope. One of the key problems of attempting to draft a binding international treaty is the possibility of companies using the treaty’s definitions to bypass applicability. If, for instance, the instrument only applies to multinational corporations, companies could adjust their corporate structure to define themselves as local companies. Therefore extending the scope to all business entities would ensure that mere strategically aligned changes in corporate structures would not impact the applicability of the instrument to all multinational corporations. The Draft opted not to use a legal definition of transnational corporations or other business enterprises, as the ‘the determinant factor is the activity undertaken by transnational corporations and other business enterprises, particularly if such activity has a transnational character’.

The state duty to protect is at forefront of the Draft, with states being responsible for private acts if they have failed to act with due diligence in preventing, investigation

474 ibid 4.
475 ibid 114.
476 The UN Guiding Principles (n 373) II A. 14.
and punishing these acts.\textsuperscript{478} The state’s duty is noted as the primary responsibility in relation to business and human rights, and ensuring preventive mechanisms, access to remedies and access to justice.\textsuperscript{479} Legal liability should be established by states within their legal systems through criminal and civil processes.\textsuperscript{480} Similarly, states should ensure that companies undertake human rights impact assessments, report on addressing human rights impacts and address impacts in their supply chains.\textsuperscript{481} The Draft notes the responsibility for states to respect sovereignty and territoriality, but simultaneously notes the reaffirmation that the obligations of state parties ‘do not stop at their territorial borders’.\textsuperscript{482} Extending the concept of jurisdiction is noted in the Draft as giving a possibility for victims to reach access to justice in the forum where the parent company is incorporated or has a presence.\textsuperscript{483} Multinational corporations are in the Draft asked to comply with applicable laws and respect human rights, prevent impacts, provide redress ad promote respect for human rights.\textsuperscript{484} Much like the Guiding Principles, the Draft discusses due diligence as a manner by which companies can meet their responsibilities in their capacities, but it is situated under preventive measures.\textsuperscript{485} The Draft actually proposes requiring states to adopt laws asking companies to adopt and implement due diligence processes and hence making it a legal standard.\textsuperscript{486}

In including international cooperation, the Draft wishes to strengthen existing international mechanisms, but possibly also establish new international organs in the judicial and non-judicial monitoring of the Draft. Surprisingly, the Draft even considers an International Court on Transnational Corporations and Human Rights or adding a special chamber to the existing international courts.\textsuperscript{487} This is very surprising, because international courts are not often widely accepted by states. For example, jurisdiction of the International Criminal Court has not been accepted by states like the US and Russia and it would be unlikely that these states would rush to hold their companies internationally liable in an international organ when they do not wish to do so with individuals.

\textsuperscript{478} ibid 5.  
\textsuperscript{479} ibid.  
\textsuperscript{480} ibid 8.  
\textsuperscript{481} ibid 6.  
\textsuperscript{482} ibid 4.  
\textsuperscript{483} ibid 11.  
\textsuperscript{484} ibid 6.  
\textsuperscript{485} ibid 7.  
\textsuperscript{486} ibid.  
\textsuperscript{487} ibid13.
4.3.5 Praise and Critique of the Possible Treaty

There are a number of complexities surrounding the treaty process that have not yet been discussed. Firstly, the issue of business and human rights encompasses a variety of rights and problems related to those rights. For example, the United Nations Convention against Corruption, which also requires state parties to regulate the actions of private nationals and hence directly obliges legal persons, tackles a clear and distinct phenomenon. The problem in this case is attempting to build similar consensus on a problem which is nearly impossible to define simply in one international treaty, which would be built on international consensus on the topic.

Secondly, as John Ruggie noted already before the current treaty negotiations, a possible treaty will have a long process ahead and hence cannot work with business and human rights, which demand quick and immediate solutions. The UN Norms took almost a decade to write and were never given international status. The current treaty is being formed from a completely different foundation, as the OIEGW was mandated to negotiate a legally binding treaty. The process however will most likely be longer than the three years and the three sessions the OIEGW has been currently given. At least in the spring of 2018 it appeared that the treaty negotiations were not close to being concluded.

The relation between the treaty and the Guiding Principles has been seen by some to be one of competition. This would make them mutually exclusive and even more importantly treaty negotiations are seen by some to cause states to stop the implementation of the Guiding Principles. The on-going negotiations may also cause negative ripple effects for the already built unprecedented consensus the Guiding Principles have globally and among various stakeholder groups. Scholars note that the Guiding Principles and the treaty should complement one another in building consensus and norms for business and human rights globally.

David Bilchitz, for example, argues that the Treaty would redefine the normative position companies have in relation to human rights in the scope of international law. In his view the incorrect assumption from Ruggie that the obligations of companies solely stream from domestic regulation has led to wide confusion on the judicial status and responsibilities of multinational corporations, which need further clarification in an international treaty with sufficient clarity and authority. More importantly, even though NGOs give much positive praise to

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488 Ruggie (n 461) 42.
490 O’Brien (n 423) 61.
491 Bilchitz (n 454) 223.
492 ibid 206.
493 ibid 207.
the treaty process, states, companies and scholars have discussed the practicality of a business and human rights treaty. Scholars have questioned the enforcement of a business treaty. As can already been seen in the Draft, no clear solution for monitoring is considered. The sole adoption of an international treaty does not yet transform or change the status quo, and hence enforcement is needed to actually bring the treaty to life.

Although the need for a legally binding instrument might have seemed to have been accepted by most parties, a number of organisations and state parties opposed the initiative and consider the drafting process a genuine setback for the human rights agenda after the unanimous consensus gained by the UN Guiding Principles. However the Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council mentioned that a legally binding instrument drafted by the United Nations would not only clarify the obligations of multinational corporations, but also the obligations in relation to states. The initial development of the instrument was criticised by Human Rights Watch for merely focusing on multinational corporations and not on national or other types of businesses.

One fear, as noted by Ruggie, is that the treaty negotiations will either end in their ultimate abandonment or will be only ratified by a small number of countries who cannot hence adequately enforce it globally. If only a handful of countries, specifically geographically from the same area, solely ratify the treaty, it would only mean the further fragmentation of business and human rights regulation. Ruggie proposes that the treaty would be limited in scope and for example solely discusses the involvement of companies in the most gross human rights violations, such as genocide and forced labour.

As discussed by Schutter, a framework convention, which defines responsibilities only generally and leaves leeway for states in implementation, could provide the appropriate format for the treaty. A framework treaty would leave states to
implement and enforce very general international standards in domestic legislation, thus allowing each state to take into account their country’s special features, with further detailed obligations and principles being accepted later with additional protocols over time.\footnote{Cassell and Ramasastry (n 456) 24.} More complex, detailed and difficult questions could be answered with protocols, which allow the negotiations to continue without holdups and more parties to participate in the actual treaty.\footnote{ibid 25.}

If the Draft remains centralised around the duties of states, it will crystallise the states’ duty to protect responsibilities in relation to business and human rights. This not a step towards the stringent regulation Ecuador was initially asking for, which the EU and US opposed. There exist a variety of possibilities between the strong treaty and treaty negotiations failing, which may end up as the final result.\footnote{ibid 18.} The Draft Treaty only represents the basis for the negotiations in 2017.

4.4 OECD Guidelines for Multinational Corporations

4.4.1 History and Content of the OECD Guidelines for Multinational Corporations

The Organization for Economic Cooperation and Development was created in 1961 with the Convention on the Organization for Economic Cooperation and Development. The OECD acts as an international economic organisation, which shares ‘a commitment to democratic government and market economy’.\footnote{OECD, ‘OECD Web Page’ <www.oecd.org>.} Notable policies of the OECD include the OECD Principles of Corporate Governance, the Guidelines on Corporate Governance of State-Owned Enterprises and obliviously the OECD Guidelines for Multinational Corporations (from here OECD Guidelines). The Guidelines were adopted on 21 June 1976 within the framework of the Declaration on International Investment and Multinational Enterprises, which was not legally binding and was aimed at improving foreign investment climates by multinational corporations positively contributing to economic, social and environmental progress.

The OECD Guidelines have been revised a number of times since 1976, but the most important revision in this context is the inclusion of a general statement regarding human rights in 2000. The new reformed guidelines of 2011 however set more articulate and rigorous standards for corporations. Forty-five states have committed to the Guidelines, including Australia, Finland, Israel, Japan, Korea,
Mexico, the UK and the US. Eleven of those states are non-member states of the OECD, for example, Argentina, Brazil, Egypt, Morocco and Romania.

Some considered the Guidelines as a pre-emptive move by the OECD member states. During the same time period, the UN was negotiating and drafting the UN Norms described earlier in this chapter, which would have been more constraining and mandating than the OECD Guidelines. The member states tried through voluntary and interpretative regional guidelines to shift the focus from the legally binding norms set up by the UN. The OECD Guidelines differ from the UN Norms in that they have taken an intergovernmental approach to regulating transnational corporations.

4.4.2 Content of the OECD Guidelines

As with most of their international counterparts, the OECD Guidelines are voluntary and non-binding on corporate entities. The primary purpose of the OECD is not to produce legal norms, and the Guidelines merely offer recommendations for corporate behaviour. The OECD can produce legally binding regulation on the OECD member states as it can ‘take decisions which, except as otherwise provided, shall be binding on all the Members’ to achieve its aims. The OECD member states are obliged to implement the OECD Guidelines by setting up grievance mechanisms in the form of National Contact Points (from here NCP). The OECD Guidelines are consistent with the Guiding Principles after the 2011 revision and encourage companies to respect the OECD Guidelines irrespective of their host country’s OECD status or regulation. With the 2011 reform, companies are also, in accordance with the Guiding Principles, asked to avoid negative impacts with due diligence and told how to formulate such a due diligence process.

The OECD Guidelines obligate corporations to respect human rights, which the host states have previously pledged to enforce. The OECD Guidelines are actually one of the few business and human rights instruments which have been


The state commits to the obligations in the provisions of the guidelines in regard to all enterprises that act in their territory or from their jurisdiction and are responsible for the implementation of the OECD Guidelines. The connection between the OECD Guidelines and the governments which enforce it is also visible in the national implementation of the OECD Guidelines. In various countries, the Guidelines have also been connected to the granting of export credits or other financial support. The OECD Guidelines are thus also incorporated into the operations of companies outside the borders of the country in question.

The OECD Guidelines request multinationals to act globally in coherence with the OECD Guidelines. If companies are in a situation where domestic law and the OECD Guidelines are in conflict, they should find ways to honour the OECD Guidelines without violating the domestic laws. The idea of the OECD Guidelines is to promote the principles to the OECD states without holding multinational corporations directly responsible for their application. The OECD Guidelines are hence addressed to both the participant government and the multinational corporations that are based within their jurisdiction, but in a very different manner.

The OECD Guidelines cover main areas of responsibility such as human rights, labour and industrial relations, environment, anti-bribery, consumer protection, competition, taxation and disclosure of information. Before the 2011 revision, the Guidelines solely encouraged companies to respect human rights, but in the current Guidelines the chapter regarding human rights is more articulate and specific. The human rights chapter regarding companies clearly states that multinational corporations ‘should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations’ respect human rights, ‘which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.’ The OECD Guidelines also ask companies ‘within the context of their own activities’ to ‘avoid causing or contributing to adverse human rights impacts and address such impacts when they occur’. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the 1998 International

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510 Černič (n 505) 71.
513 ibid IV 1.
514 ibid IV 2.
One major advantage of the OECD Guidelines is that although they do not define the term multinational corporation, they apply to ‘all entities within the multinational enterprise,’ which also includes parent companies and local entities, and that the companies are hence expected in certain situations to operate with a higher level of standards than is mandatory in the surrounding country’s legislation. The OECD Guidelines hence pierce the corporate veil by including subsidiaries within their application, but go even further by including supply chains. The Guidelines note that companies should engage in supply-chain management in which companies are encouraged to engage and support initiatives and social dialogue on responsible supply-chain management, and if a risk of causing adverse impacts is identified in the context of supply chains, the company should take the necessary steps to cease or prevent that impact.

The significance of proper and appropriate due diligence is formulated in the OECD Guidelines. Companies are expected not only to have proper policies in place regarding human rights, but to also ‘carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts’. Due diligence must go further than merely identifying risks, as it also includes the mitigation and account of how to address adverse impacts. Hence if the appropriate National Contact Point determines that there has been a violation, liability by complicity could follow suit.

### 4.4.3 Implementation and Monitoring of the OECD Guidelines

The OECD Guidelines have received much of their praise and critique in relation to their implementation process. The three key bodies in the promotion and implementation of the Guidelines are the NCPs, the OECD Investment Committee and the Working Party on Responsible Business Conduct of this Committee. The NCPs, which the Guidelines directly oblige adhering states to establish within their jurisdiction, nationally promote the OECD Guidelines, answer enquiries regarding
the OECD Guidelines, but most importantly resolve complaints regarding non-compliance of corporate actors in specific processes.

The implementation procedures of the OECD Guidelines are binding on states, and participating states must establish NCPs within their jurisdiction. Although they are functionally equivalent in various countries, there is in practice a fair amount of leeway in the manners in which the NCPs wish to operate. The structures and forms of the NCPs are left to the determination of each state. In some countries, various stakeholder groups are included in the review of specific instances and in others the NCP represents more of a governmental agency. The NCPs report annually to the Committee, which is responsible for answering requests regarding the interpretation of the Guidelines, issuing clarifications and reviewing the Guidelines.\footnote{OECD, ‘The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions’ <www.oecd.org/corporate/mne/theoecdguidelinesformultinationalenterprisesfrequentlyaskedquestions.htm>. (last visited on January 16, 2018)} It is important to note that the Committee cannot review complaints, as that is solely under the competence of the NCP.

Any individual or legal person is entitled to submit a complaint to the NCP in accordance with the Specific Instance Procedure of the OECD Guidelines. Initially the complaint mechanism was solely open for trade organisations, but it was extended to individuals in the 2000 revision. A multinational corporation which operates in or is from an OECD country may be directly addressed with complaints and the complaint may regard any of the matters covered by the Guidelines. The NCP makes an initial assessment of the specific instance, in which they decide whether the case in question should be further investigated. When making the initial assessment, the NCP takes into account the parties’ identities and interests; whether the issue is material or substantiated; the existence of a link between the corporate activity and the possible issue; similar issues reviewed in other domestic or international proceedings; and the contribution the specific instance would make to the purposes and effectiveness of the Guidelines.\footnote{OECD Guidelines (n 512) I 25.}

The NCPs operate by adhering to the criteria of visibility, accessibility, transparency and accountability. However these criteria are not completely met with the specific instances process. Firstly, the entire process is confidential and the protection of sensitive business or other stakeholder information is taken into consideration at the conclusion of the procedure.\footnote{ibid C 3.} There is conflict between the confidentiality of business operations, and the requirements of transparency and evidentiary.\footnote{Gefion Schuler, ‘Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises’ (2008) 9 German Law Journal 1753, 1775; Maheandiran (n 462) 237.} Even the identity of the parties can be left undisclosed, but the Commentary on the Implementation Procedures of the OECD Guidelines for
Multinational Enterprises notes that the parties should be identified.\textsuperscript{526} Secondly, if the parties do not reach an agreement, the NCP can issue a statement and make recommendations.\textsuperscript{527} The release of public statements can however be only undertaken after consulting both parties. In a number of countries the NCPs do not actually determine publicly whether there was a breach of the Guidelines in the final statement.

Thirdly, the NCP’s role can be described as merely mediatory. The OECD Guidelines ask NCPs to offer ‘good offices’ to help resolve the various issues.\textsuperscript{528} One of the key complexities is that NCPs are not juridical bodies and hence do not possess their capabilities. They do not have the authority to order compensation or adjudge sanctions. They can conduct fact-finding and request data from the parties, but they are in no way entitled to demand such information to be given to them, and the parties of the process cannot be obliged to hand over information. NCPs clearly carry out certain judicial assignments, but none of their decisions are legally binding. Also there exists no authority which could over-rule the decisions of a NCP. For example, the Investment Committee can only clarify the Guidelines and cannot act as an appeal court or a remedy for victims. Fourthly, NCPs have a great deal of flexibility regarding the initial assessments of cases, their examination and the final statements. In various countries, this has led the companies not being held accountable for breaches of the Guidelines. For example, between 2012 and 2014 there was a growing trend amongst NCPs to reject specific instances if ‘successful mediation is unlikely’ and ‘to rather accept easy cases’.\textsuperscript{529}

Each member state has plenty of leeway in how they establish their NCP. Some are independent actors from the government whilst others exist within governmental agencies. As mentioned by John Ruggie, the housing of a number of NCPs within governmental departments which, for example, also promote business and trade, raises a red flag regarding conflicts of interest.\textsuperscript{530} The process and actions of the NCPs have vast differences. One of the major problems of NCPs is that without specific instructions, they could make different initial assessments or recommendations of the same exact case. Some have said that the ‘ambiguous and vague content, legal construction and legal commitment have led to uneven expectations and multiple approaches to this unique dispute resolution mechanism’.\textsuperscript{531} Specifically, the corporate social responsibility content of the Guidelines, which we know to

\textsuperscript{526} OECD Guidelines (n 512) Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises 35.
\textsuperscript{527} ibid C 3.
\textsuperscript{528} ibid C 2.
\textsuperscript{530} Protect, Respect and Remedy Framework (n 238) 98.
be abstract with a soft-law nature, have led to distinct means of compliance and implementation.\textsuperscript{532} The number of instances can appear significantly and surprisingly low when compared to the number of multinational corporations to which the OECD Guidelines are applicable. Between 2000 and 2007, 156 requests to consider specific instances were filed with various NCPs\textsuperscript{533} and between 2000 and 2014 an estimated 399 complaints were filed.\textsuperscript{534} By 2011 thirty-one of the forty-two NCPs had handled specific instances, with the workload of certain NCPs being significantly bigger than others.\textsuperscript{535} By 2010 49\% of instances alleged human rights violations,\textsuperscript{536} with complaints ranging from use of forced or child labour to violations of general policies, such as human rights. Most complaints in relation to human rights relate to the due diligence requirement.\textsuperscript{537}

Leyla Davarnejad, who researched the varying practices of NCPs, found severe inconsistency in their practice. For example, NCPs have widely different practices regarding the necessity of publishing statements and content.\textsuperscript{538} Oschoa Sanzhec notes that in Australia, Mexico and the US, the NCPs’ main function is to offer good offices, but they do so without thorough examination or conclusions on the observance of the Guidelines.\textsuperscript{539} This widely differs from the UK and Norway where NCPs have the authority to examine all facts and make conclusions on possible breaches of the Guidelines.\textsuperscript{540} He specifically found dissimilarities in the competence NCPs had to appropriately inspect the matter,\textsuperscript{541} the issuing of final statements and their content\textsuperscript{542} and how NCPs were willing to proceed with cases when the company was unwilling to participate in the mediation. As an example, Finland is committed to the OECD Guidelines and Finland’s NCP was mandated to be the Committee on Corporate Social Responsibility. The first case was brought to its attention in 2011 against Pöyry Plc regarding its dam project in Laos and

\begin{thebibliography}{99}
\bibitem{532} ibid.
\bibitem{534} Ruggie and Nelson (n 509) 107.
\bibitem{535} Davarnejad (n 531) 366.
\bibitem{536} Joris Oldenziel and Joseph Wilde-Ramsing, \textit{10 Years on: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct} (2010).
\bibitem{537} Ruggie and Nelson (n 509) 116.
\bibitem{538} Davarnejad (n 531) 372.
\bibitem{540} ibid.
\bibitem{541} ibid 113.
\bibitem{542} ibid 101.
\end{thebibliography}
its possible violations of the OECD Guidelines.\textsuperscript{543} The claim specifies that Pöyry would have committed violations against the due diligence obligations which are specified in the provisions of human right protection. On June 10, 2013 the NCP stated in the Final Statement that Pöyry had not breached the Guidelines.\textsuperscript{544} In this instance Pöyry’s answers to the instance were deemed confidential.\textsuperscript{545}

It is extremely difficult to review the cases of NCPs, as most of them solely note the specific instance as either “concluded” or “in progress”.\textsuperscript{546} The best example of this troubling trend is the NCP in the US. In the US twenty-seven requests in specific instances were filed with the NCP, which is the highest number of complaints in all OECD countries.\textsuperscript{547} It is common for the NCP to withhold the names of companies or any specific details of the possible violations. Of the sixteen mentioned, only six were even published, but most of them do not contain the resolution or its grounds, but merely state that the ‘parties reached an agreement’. It appears that in the US the NCP are focused on protecting the confidentiality of the parties more than on having a transparent mediation process.\textsuperscript{548} There is suspicion on the NCPs’ part towards the Guidelines and a clear attempt to ‘protect national corporations from potential unsubstantiated criticisms’.\textsuperscript{549}

### 4.4.4 Critiques of the OECD Guidelines

The OECD Guidelines have been viewed as one of the leading initiatives in the world, largely due to their intergovernmental approach, extraterritorial specific instances process and number of participating countries. They represent the common values regarding business conducted in the OECD countries and set a minimum level of socially responsible business conduct globally. Specifically regarding extraterritoriality, the Guidelines offer more than merely a regional human rights instrument, as they apply in the regions where a company based in

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544 ibid.


547 OECD Guidelines For Multinational Enterprises: 2005 Annual Meeting Of The National Contact Points: Report By The Chair (n 533) IV (a).


an OECD participant state is operating. The scope of the Guidelines hence widens to a more global scale. Some have seen the specific instances system as a victory for CSR and, for example, Larry Catá Backer notes that the ‘system may be slowly influencing the emerging discourse of corporate behavior in ways that will have substantial effect’.\textsuperscript{550}

However, from a legal mind-set, the Guidelines are non-enforceable and voluntary towards companies, which means that they only offer recommendations. They are not global and the existence of NCPs in countries relies on the state’s membership in the OECD or their voluntary application of the Guidelines. Therefore, as with most soft-law mechanisms, they draw criticism based on non-enforceability and weak obligations. One of the most common sources of critiques is the incoherence of practice amongst NCPs. Each NCP is given a fair amount of flexibility in their structuring and processes, which obviously attempts to give all countries the possibility to construct appropriate systems for their own culture and society. The flexibility may offer NCPs the possibility to offer innovative interpretations.\textsuperscript{551} However this has caused wide-scale confusion and variety amongst NCPs. John Ruggie criticises the incoherence of NCPs by noting that the approach of various NCPs is highly uneven regarding specific instances.\textsuperscript{552}

There are a number of troubling issues regarding the apparent conduct of the NCPs. As mentioned, these NCPs do not always publish final statements and they often fiercely protect the identities of the alleged culprits and the confidentiality of the process. There are a number of disadvantages in not publishing or publicly identifying the parties. Firstly, the public pressure of being exposed tends to lead to compliance. Secondly, the specific instances process itself will benefit from the companies’ fear regarding the publication of misconduct. Currently the primary confidentiality rules lead to the assumption that the NCPs easily seem to side with the companies instead of the victims of abuse. For example in the UK, the NCP has been criticised for the unequal treatment, lack of transparency and overall unwillingness to declare breaches of the Guidelines.\textsuperscript{553} It is also counter-productive that a number of NCPs refrain from determining in the final statement whether


\textsuperscript{551} Maheendiran (n 462) 479.


there was a breach of the Guidelines. It is however important to remember that the conduct of NCPs cannot be reviewed in any international or national instance, as their role is merely mediatory. They should not be expected to act as a judicial remedy for victims of abuse.

5 MARKET-BASED REGULATION

5.1 Corporate Social Responsibility and Human Rights

The story of Corporate Social Responsibility (from here CSR) began in the 1950s, but was at the time over-run by the strong market pressures and the business structures relying on profitability. CSR really started taking centre stage only in recent decades. Typically it has been discussed alongside sustainability and the environmentally friendly behaviour of corporations. It is important to understand that CSR, as understood by the general public, can encompass sustainability, employee well-being, charity work, human rights and countless other topics. CSR hence offers an umbrella for countless non-financial values and principles which concern something more than the company’s actual business operations. This chapter will only discuss CSR briefly in relation to our topic of human rights in order to illustrate the voluntary regulative mechanisms of companies themselves.

CSR has no specific definition. Typically CSR is an interaction from the company towards the society outside its own entity. It is derived from the company’s own desire to voluntarily commit to bettering that surrounding society, and not from legal obligations. CSR could be therefore defined as ‘management-driven and corporate-determined policies that are designed to assist the corporation’s business, including in terms of its reputation, even if it is genuinely aimed for a positive social end’. CSR conceptualises four social responsibilities: the economic responsibilities related to profitability; the legal responsibility to comply with relevant laws; the ethical responsibility to meet other social expectations than law; and the discretionary responsibility to meet other additional desirable expectations. Social expectations are therefore economic, social, ethical and philanthropic. There three expectations make a pyramid, which illustrates that economic performance upholds all other responsibilities. Lastly, businesses should act as ‘good corporate citizens’. Obviously in reality all these obligations intervene and coalesce and it is impossible often to separate them from one another. CSR depicts the voluntary assumption of responsibilities that clearly go beyond the

558 ibid 42.
559 ibid.
economic and legal responsibilities of businesses.\textsuperscript{560} It is important to note that the entire concept of CSR is based on voluntarism and is hence also non-enforceable.

Typically CSR is described by differentiating shareholder and stakeholder theories. The shareholder theory focuses on the value maximisation of a company through the interests of its shareholders. Milton Friedman eloquently addresses this by stating that ‘the business of business is business’. Social aspects are hence not the responsibility of companies, because companies are only required to follow the laws in the jurisdictions they operate in. Therefore they have no further positive duties towards the societies surrounding them. Hence a company can only have a responsibility towards the shareholders, not the general public or its surrounding society. The mandate of a corporation does not extend beyond its operations and corporate resources should not be spent on trying to accompany the needs outside of the true sphere of responsibilities. The shareholder’s primacy principles is thought to be the core value of a market-driven economy. Other obligations to serve the surrounding society can obviously be taken into account, but only if it does not interfere with the primary obligations regarded with shareholders’ interests.\textsuperscript{562}

Stakeholder theories on the other hand view that shareholders solely represent one interest group of the company, as there exist a variety of interest groups in the sphere of the company’s influence who are impacted by corporate conduct. Hence, the company’s influence and interest go further than those who have financially contributed to the company and therefore it should be also obligated to pursue other goals than just returnable profits. A company does not exist in a vacuum of its shareholders and operations, but is constantly interacting with actors outside of that scope. Ideally we could thus demand the company to respect the actors they may impact and to respect other values than only profitability. CSR therefore requests companies to consider their relevant stakeholders in their actions and not merely their shareholders.\textsuperscript{563}

In today’s world, companies typically voluntarily commit to sustainable development, which includes environmental and social aspects and decide to obey certain criteria of ethical conduct. Corporate entities voluntarily sacrifice their profits in order to have superior consequences to solely profit maximisation.\textsuperscript{564}

\textsuperscript{562} Backer 2011 (n 356) 4.
\textsuperscript{564} John E Parkinson, \textit{Corporate Power and Responsibility} (Oxford University Press 1993) 261.
For example, by codes of conduct companies are taking voluntary steps forward with social goals.

5.2 Corporate Codes of Conduct and Human Rights

The beginning of corporate self-regulation can be found in the 1997 Global Sullivan Principles for Corporate Social Responsibility. These guidelines offered a voluntary regime for companies conducting business within South Africa and were aimed at US-based companies who were encouraged to treat their South African employees in the same manner they would their American workers. During Apartheid, even corporations accepted their role in the social development of South Africa. However taking part in the development of the country also meant that the companies did not have to withdraw from the country altogether, as South Africa was an untracked market area and the desire to build business operations there was widespread. Even though the support from corporations was based on the struggles to maintain a good corporate image whilst operating in South Africa, its value should not be under-estimated. Similarly the MacBride Principles attempted to affect the behaviour of US companies in Northern Ireland and were influenced by the Sullivan Principles. These types of principles gave rise to the views of autonomous and profit-driven corporate self-regulation.

It is common now for companies to independently sustain CSR internally and externally in corporate operations. Usually multinational corporations have individual codes of conduct in place, which the companies have themselves drafted and later on pledged to comply with. Individual corporate codes of conduct can be defined as ‘a formal statement if the values and business practices of a corporation’. Codes of Conduct can be described ‘commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace’. Codes of conduct can be unilateral, bilateral or multilateral. Unilateral codes are established by specific companies whilst bilateral and multilateral ones have

569 ibid 40.
a number of participants, for example from the same industry. Some codes are compiled within the consensus and cooperation of a whole industry.

This self-regulation focuses on international responsibility rather than external liability. Codes of conduct contain non-binding commitments and can usually specify a number of human rights to be respected. They are drafted without the participation of the state or other third parties, but can be formulated based on existing guidelines or standards set in international or domestic law. The true strength of individual codes of conduct is their power to be based solely on the information of a single company and therefore form the code relying on and intervening with the distinctive problems foreseen in the company’s collective data. These codes can also be quickly reorganised when changes occur in the corporation’s business model or new questions arise. Therefore the codes are not rigid regulations and can be moulded with the rapidly changing business world. This could lead to better internalisation and also effectiveness. There is no consensus needed among corporations because every entity determines the standards themselves and only focuses on the issues affecting the company in question.

Truly, the effectiveness of regimes that are drafted, implicated and then even monitored by the same party can be questioned. But their meaning in the overall field of human rights should not be undermined only based on their explicit profit-driven goals. Even on a minimum level, they are still commitments for obeying human rights and possibly promoting them to the surrounding societies. Even without an external monitoring system, non-compliance with the publicly defined standards will lead to possible damage to the companies’ corporate image, hence codes of conduct rely on the goodwill of each company. Therefore even an autonomous commitment will be monitored by society at large. There is no external body that monitors compliance with the codes of conduct, which means that only internal monitoring is placed to measure compliance with the code.

Many companies offer training materials and seminars to better their employees’ and their branch offices’ understanding of the content of the code. The overall understanding for example of human rights can considerably grow with the formulation of a company code of conduct. Without judicial enforceability, codes of conduct do however encompass norm-making capabilities as they can ‘affect corporate behavior and form a basis for future legal regulation.’ They induce some level of moral expectations as the publicly announced public goals of a company.

572 Kinley and Tadaki (n 149) 958.
573 Muchlinski (n 149) 9.
Similarly, when companies announce they will respect rights they will focus on making sure that those rights are met in relation to their operations.

Codes of conduct can also have a binding nature in business operations. Often codes of conduct are used as attachments of supplier or other contracts with contractors or suppliers and thus have a somewhat binding nature as a contractual obligation between parties. It is also common to draft a specific supplier code of conduct, which is enforced with suppliers through contracts and as such has a binding nature between parties. In these situations the principles and declaritions of the Code of conduct have real teeth as breaches with the standards by suppliers can be considered a breach of contract.

Today almost all major multinational corporations explicitly mention human rights in their code of conduct or have a separate human rights statement in place. In the 1980s and 1990s when companies began referring to human rights in their codes of conduct. This partly resulted from the exposure of corporate violations of human rights and the growing media scrutiny of sustainable corporate conduct. The pressure from NGOs, consumers and governments was increasing around the corporate world. In the US, the administration encouraged US corporations and organisations to develop their own voluntary codes of conduct in 1995. In 2000 less than half of the codes of conduct of Fortune 500 companies mentioned human rights. In a study conducted by the OECD, it was noted that a number of codes of conduct explicitly referred to human rights in the workplace.

### 5.3 Non-financial Information Reporting

Almost all of the earlier discussed voluntary international regimes regulated by international organisations set reporting obligations to the corporations who obey them. For example, the Global Compact generates a monitoring system that is founded upon annual reporting. However when we discuss non-financial information or sustainability reporting, we are discussing a different form of reporting. Many multinational corporations publish sustainability reports regarding sustainability, human rights and other non-financial information. These reports are usually called “responsibility reports” or “sustainability reports”.

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Reporting has currently increased the amount of reports to an all-time high. There is a large spectrum of reports and hence their importance is often overvalued. In many ways, reporting has become the aim of responsible behaviour and not a way in which to enforce sustainable action. Sustainable action only materialises if the information or lack of it can cause public image problems for companies in the court of public opinion.\textsuperscript{578} Previously, reporting was voluntary, but in recent years certain multinational corporations are under legal obligation to do so as will be discussed in the following chapter. There exist various different reporting mechanisms. The Global Reporting Initiative (from here GRI) is a global initiative that offers guidelines for corporations on sustainability reporting. The main function of the standard is to clarify the complex requirements to observe and to set clear obligations for which to follow. The G4 Sustainability Reporting Guidelines also include human rights, with a detailed sub-category on human rights regarding non-discrimination, gender equality, freedom of association, collective bargaining, child labour, forced or compulsory labour and indigenous rights.

Sustainability reporting can include a process of assurance. Assurance is performed either by internal parties in the company or by an external assurance provider, for example and audit firm. When assurance is performed by an authorized public accountant firm sustainability report assurance can be integrated with financial auditing. In this case assurance is the most developed form of external monitoring of corporate responsibility activity because it uses the same working methods as financial auditing.\textsuperscript{579} Auditing is an inspection of an organisation’s accounting records to determine their reliability and accuracy.\textsuperscript{580} Auditing techniques can evaluate the performance of CSR programmes and the benefits socially accountable behaviour has generated.\textsuperscript{581}

**5.4 Reporting on Non-financial Information in the European Union**

On 15 April 2014, the European Parliament adopted to amend the Accounting Directives with the directive on disclosure of non-financial and diversity information by certain large companies and groups and it entered into force after being accepted by the Council. The EU has been focused on improving accountability,
transparency and responsibility in business behaviour already with Europe’s Enterprise 2020 Initiative, which attempts to strengthen the link between corporate social responsibility and competitiveness.\textsuperscript{582} CSR is widely accepted in the EU and has been at the centre of legislative measures in recent years. There has been a wide range of initiatives referencing CSR, such as the Single Market Act and the Integrated Industrial Policy for the Globalization Era. The European Commission has a renewed strategy for CSR with the targets also including improving company disclosure of social and environmental information.\textsuperscript{583}

The directive states that large public interest companies in the EU which have two of the three requirements of having over 500 employees, a revenue of over 40 million euros or a balance of over 20 million euros, will have to provide non-financial information.\textsuperscript{584} Subsidiaries do not have to provide information that can be seen to be included in their parent company’s report. For example, in Finland, this applies to only roughly 100 companies. The report must include a short description of the company’s business model, the applied lines and the results from the lines, which also includes the due diligence processes used. In the report the main risks affiliated with the company’s business, business relations, products and services should also be explained as well as how the risks are being managed.\textsuperscript{585} The companies must also have performance indicators regarding their significant non-financial information.

All this information can then be included in the applicable company’s annual report, which includes relevant and useful information regarding the company’s development, status, operations and the impacts of their operations, which must at least include issues regarding the environment, social matters and employees, human rights, and anti-corruption and bribery.\textsuperscript{586} Annual reports are obviously subjected to auditing due to domestic corporate law and auditing guidelines, and for this reason certain countries such as Finland demanded that non-financial information should be reported in a separate report. The separate report must however have a distinctly defined framework if it is not using the member state’s defined legislative regulations. If a company reports with a separate report it must firstly be reporting under the jurisdiction of a certain member state that has used

\textsuperscript{585} ibid 1 (d).
\textsuperscript{586} ibid 19.
the option of allowing companies to report with a separate report; it must also report on with the same accounting period and include all the information required by the directive. These reports must be published together with the annual report or latest six months after the date of the financial statements.

Although the directive makes it mandatory for all companies meeting the requirements to report on non-financial information, it uses the “obey or explain” principle as its only sanction method. If a company does not report, though, it must according to the new directive give a clear and justifiable explanation. There are no sanctions if a company does not report on its non-financial information. We must however remember that the directive affects for the most part large multinational corporations that cannot take the risk of losing market value with their consumers. In certain member states that have decided to use the option, companies may with the decision of their board or other organ that is mandated by domestic law, decide to leave precise information out of the report if it the information could damage the company’s commercial status. The information that is left out cannot however prevent the overall understanding of the company’s actions.

The directive is one of the first hard law tools used to regulate CSR measures even though disclosure of non-financial information has been the trend in CSR for the past decade. The new European directive is not in this light anything new in the world of reporting on non-financial information. It is, however, a clear indication of the growing need for and even interest in mandatory regimes regarding the issue. Through reporting instruments, states and the EU can take action, but use only limited governmental recourses. For example, in Finland, companies have been obligated to provide non-financial information from the beginning of 2018 in regard to the 2017 accounting period.

### 5.5 Blue Washing

Much praise can be given to the previously discussed market-based regulation conducted by the business world. However with this new trend there exists also the complexity of a phenomenon called “blue washing”. In the last decades, “green washing” became a trend amongst multinational corporations, in which they promoted environmentally friendly ideology without actually revising their conduct regarding environmental matters. A number of environmental certificates and instruments were criticised for allowing companies to distinguish themselves as environmentally friendly when the reality was far from the case.

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587 Ibid.
588 Lindsay, Kirkpatrick and Low (n 578) 44.
With blue washing, companies promote human rights-related instruments and promote an image of socially responsible behaviour, but the company might have not actually tackled any of the true problems regarding their operations. The blue refers to the colour of the United Nation’s flag to represent companies wrapping themselves with the standards and values promoted by the UN. Specifically, for example, the Global Compact has been criticised by NGOs for allowing companies to wash themselves with the image of the UN without actually changing their corporate practices. Companies can hence continue to violate human rights or resume practices known for their human rights risks whilst still publicly announcing their commitment to the Global Compact. Companies legitimise their human rights policies by attaching them to an utterly voluntary and non-enforceable initiative. The same can be done with all self-regulative measures and international voluntary initiatives. The promotion of a “good citizen” image over-rules the real action needed to sustain ethical behaviour.

Typically multinational corporations attempt to blue wash their image specifically after a public relations disaster regarding human rights. Even if the preliminary idea is to solely enhance the company image and blue wash public violations by joining human rights initiatives, the outcome may still be positively influenced by such voluntary standards. Cooperation may bring forth actual change within the company. The problem however surfaces when there are no accurate measures taken and the commitment to standards exists solely on paper.

6 DOMICILE REGULATION

Traditionally corporate conduct is regulated by the national legislations of states. Each state regulates the companies in its jurisdiction with its own domestic corporate law. This chapter will not discuss the differences in domestic corporate law or differences in other domestic regulation systems, but will provide some key examples of specific business and human rights regulative measures taken by individual countries. The chosen examples have the clear and distinct legislative agenda related to protecting human rights from negative impacts from corporate action.

Without going into depth on the various legislative actions, they provide a view of the complex interaction between domicile regulation and the behaviour of national corporations outside the country’s borders. They also show that there are a variety of ways states can enforce the business and human rights agenda in their domicile legislation. Some countries have chosen to focus on reporting whilst others focus on various vigilance and due diligence requirements. Similarly the chosen examples show the growing interest of nation states to attempt to regulate multinational corporations and how most of these regulative measures have been enacted in the recent years.

6.1 The United States

The US has often had a go-at-it-alone attitude towards all areas of regulation. For example, in international anti-corruption regulation the efforts of the US were the driving force as will be illustrated in Section 10.4.2. In the area of business and human rights, the US has taken similar approaches to specific issues relating to the matter. Conflict mineral regulation in the US is a prime example of how the regulative action of one country can impact entire industries globally. To avoid repetition, the US regulated the importation of conflict minerals from Congo and this case study is discussed further in Section 7.1.

The US has however also had failed attempts in regulating business and human rights domestically. The Corporate Code of Conduct Act was introduced to Congress in 2006, but was not enacted.\textsuperscript{592} The Act would have demanded nationals that employed more than twenty persons in a foreign country directly or through

\textsuperscript{592} The Corporate Code of Conduct Act was introduced initially in 2000 and later again in 2001 and 2006; Corporate Code of Conduct Act, H.R.4596 (2000).
subsidiaries, sub-contractors, affiliates, joint ventures, partners, or licensees, to implement a Corporate Code of Conduct. Such companies would have been required to compel their partners and suppliers, to adopt and comply with the same standards under contract. The Code of Conduct would have included compliance with internationally recognised worker rights, core labour standards and minimum human rights standards. The Act referred to for example the UDHR; the ICCPR; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention, and the International Convention on the Elimination of All Forms of Racial Discrimination. The selection of rights would have hence been rather extensive and would have rested on the legitimacy of international treaties.

Specific US states have decided to regulate more stringently than at the federal level. California has regulated certain areas more tightly than other states. For example, in environmental matters it decided to act as the leader of stringent regulation, as will be discussed in Section 10.2.1.1. The California Transparency in Supply Chains Act 2010 was enacted in California. The Act only applies to retail sellers and manufacturers who operate in California and have a global turnover of more than 100,000 US dollars. Companies must in accordance with the Act report whether and to what extent they have addressed slavery and human trafficking in their supply chains.

6.2 United Kingdom

The Modern Slavery Act 2015 is a good example of successful national legislation aimed at tackling a specific problem related to business and human rights. It focuses on reporting rather than actions and concentrates on one specific problem instead of a variety of rights, which in this case is forced labour. The Modern Slavery Act attempts to bring transparency regarding forced labour in supply chains. The Modern Slavery Act had its Royal assent on 25 March 2015 and the transparency provisions came into effect on 29 October 2015.

The Modern Slavery Act requires companies to annually report on the measures taken to ensure that slavery and forced labour are not used within their supply chains or elsewhere within their business operations. Any company which is

593 ibid 3 (A).
594 ibid 3 (B); 7(A).
595 ibid (B) 4(B).
596 ibid 3(B) 6.
597 ibid 3(C) 3.
incorporated in the UK or has business operations or parts of them located in the UK, has a global turnover of £36 million and supplies services or goods is responsible for reporting in the manner specified in the Modern Slavery Act. The statement must be approved by the board of directors and signed by a director and published on the company website. The reporting requirements are enforced for financial years ending on or after 31 March 2016.

The report can include a variety of information, for example general information on the business structure and supply chains; the company; the due diligence process regarding slavery and human trafficking; internal training of staff; and effectiveness of taken steps measured against performance indicators, as appropriate. A worrying aspect of the Modern Slavery Act is that deciding which information must be reported is not mandatory. Each company can themselves determine the suitable information. It is even more important to note that even though reporting is legally required, the actual measures are not. Therefore a company can report that it has taken no steps on combatting the use of forced labour in the financial year and still be compatible with the set requirements. This is distinctly mentioned in the text of the Modern Slavery Act. As with most reporting instruments and as discussed earlier in this chapter, solely demanding reporting will not automatically provide responsible behaviour. Companies could be more willing to act in responsible ways to ensure better reporting results, but the outcome could be for brand value or other communication benefits.

It is mandatory however to provide a Modern Slavery Statement. To be able to do so, companies have to assess their supply chains and their potential risks and affects. Such an assessment may direct the adaptation of various policies regarding forced labour and internal review of practices. Forced labour is not easily discovered and might demand a level of understanding from employees to be able to spot specific instances of forced labour. Modern forced labour often appears to be just common work to a simple eye. In the UK, findings of forced labour must always be reported directly to the police and abroad the responses should be tailored to the domicile circumstances. Eventually the assessment should lead to an internal policy regarding the appropriate courses of action if specific instances of forced labour are found.

600 Lindsay, Kirkpatrick and Low (n 578) 32.
601 This applies to body corporates other than a limited liability partnership.
603 Lindsay, Kirkpatrick and Low, (n 578) 31.
604 Modern Slavery Act (n 602) 54(4)(b).
labour occur. The problem, however, appears to be that not all companies that are required to publish a report have done so. By September 2017 the 12,000 to 17,000 companies under the scope of the Modern Slavery Act should have published a statement, but a recent report found that only 3,000 statements could be found on the Modern Slavery Registry website.\footnote{606}

### 6.3 Australia

On 16 August 2017, the Australian government announced its plan to introduce similar legislation to the UK Modern Slavery Act in Australia. Together public consultation, to which submission closed in October 2017, and the Parliamentary enquiry process will determine the content of the regulation. At this point we do not know the content of the proposed act, but we can expect it to be similar with the earlier discussed UK Modern Slavery Act.

Before this however the Corporate Code of Conduct Bill 2000 would have also set human rights standards for Australian corporations which employ more than 100 employees in another country when operating abroad. An Australian corporation was determined as a company incorporated in Australia or its subsidiary regardless of whether the subsidiary was incorporated in Australia.\footnote{607} The Bill would also have required by submitting a Code of Conduct Compliance Report annually to the Australian Securities and Investments Commission.\footnote{608} Instances of non-compliance without reasonable excuse could have faced a financial penalty\footnote{609} and executive officers could have been held liable for an offence and a fine\footnote{610} The Bill was much narrower in its human rights standards than the earlier discussed US Bill.\footnote{611}

The Bill would have also allowed civil suits against Australian companies by non-Australian plaintiffs, who have suffered losses or damages.\footnote{612} This could have developed into a similar mechanism to the Alien Tort Statute in the US, which offers nonnationals the possibility to make claims of human rights abuses which occurred outside the borders of the US. The Bill however never came to effect and the reasons are rather self-explanatory. Firstly, the Act not only covered Australian corporations, but also their holding companies and subsidiaries of

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\footnote{608} ibid 14.

\footnote{609} ibid 14(4).

\footnote{610} ibid 14(5); 14(6).


\footnote{612} Corporate Code of Conduct Bill (n 607) 17(1); 17(2); 17(5).
such corporations. It did however leave the obvious loophole of incorporating corporations outside Australia.\textsuperscript{613} The net thrown was considered far too big, but at the same time set a strict size restriction of 100 employees for its applicability. Secondly, the instinct characteristic of extraterritoriality was highly criticised as problematic by the Parliamentary Joint Statutory Committee on Corporations and Securities.\textsuperscript{614} The focus of the Corporate Code of Conduct Bill was to impose human rights standards for the overseas operations of Australian corporations. The complexities of extraterritoriality were discussed earlier, but the same fears regarding ideas of supremacy arose with the Bill. Mr. Wells of the Minerals Council of Australia noted that the Bill could imply ‘that local standards are either inferior, inadequate or somehow inappropriate’ \textsuperscript{615}. For example, corporations were advised to avoid discrimination in their employment practices,\textsuperscript{616} which could in certain countries plausibly require companies to also employ individuals whose religious or other beliefs were considered illegal, to avoid infringing the Bill in Australia.\textsuperscript{617}

\section*{6.4 Switzerland}

According to Swiss law, Swiss citizens are allowed to request an amendment to the Federal Constitution. With the support of 100,000 signatures, the petition is given to the Federal Council and the Parliament and if the petition is not rejected it can be put to a popular vote. Corporate justice groups have used this possibility to bring forth business and human rights initiatives. The Corporate Justice Campaign, which led the call for mandatory regulation, is an example of the impacts NGOs and citizen groups can have in business and human rights matters. The Swiss Coalition for Corporate Justice, which led the campaign, demanded that the parliament and national courts start to hold companies which are based in Switzerland legally responsible for human rights violations.

The petition in 2011 was signed by 135,000 people. In 2012 the petition was rejected, but it led to parliament demanding the government offer a national action plan and order a study on the differences between domicile legislations and remedies. The Foreign Affairs Committee of Switzerland’s Lower Chamber passed an initiative demanding due diligence of Swiss companies operating outside

\begin{itemize}
\item \textsuperscript{614} ibid 3.40.
\item \textsuperscript{615} ibid 3.56.
\item \textsuperscript{616} Corporate Code of Conduct Bill (n 607) 10(1).
\item \textsuperscript{617} ibid 4.27.
\end{itemize}
Switzerland. The motion was however defeated in March 2015. The efforts by the SCCJ in Switzerland have not however stalled. The Responsible Business Initiative demands a referendum regarding the due diligence of companies in human rights and environmental matters and gathered 140,000 signatures. In practice, this requires adding a Responsibility of Business article into the Constitution. The signature list was officially submitted to the parliament in October 2016. The Initiative would make it plausible for victims to seek remedy in Swiss courts for human rights abuses and environmental damages. Companies which can show that they had proper due diligence are not held liable. By its nature, the regulation is extraterritorial and makes due diligence mandatory in domicile law.

6.5 France

France has taken strides in business and human rights regulation in the recent years. In February 2017 the French Parliament adopted a Duty of Vigilance bill, which is the first to require national companies to act with care in their operations. The explanatory memorandum for the law references the Guiding Principles, which clearly establishes the law as a business and human rights regulative measure. French legislation in question requires a vigilance plan and liability arises if adequate due diligence has not been performed by the parent. Companies are expected to establish a vigilance plan, which is publicly disclosed and includes a mapping of risks; processes to assess risks; action to mitigate risks; alert mechanisms to risk; and a monitoring system. The vigilance plan must include also the activities of supplier or subcontractors with which the company as an established business relation with. The law goes further by establishing liability if a company does not fulfil its obligation of publishing an adequate vigilance plan, with periododic fines and civil liability for failing to publish a vigilance report.

618 Parent Company Accountability - Ensuring Justice for Human Rights Violations’ (n 2) 12.
The law applies to parent companies, their direct and indirect subsidiaries and their supply chain who they have a business relationship with. Under the scope of the law fall companies employing for two consecutive financial year at least 5,000 employees within the parent company and its direct and indirect subsidiaries which are all registered in French territory; or companies that have at least 10,000 employees in its service directly or in indirect subsidiaries and who has a head office located in French territory or abroad. Subsidiaries are not required to set their own vigilance plan if their parent, which also is within the scope of the law, complies with the requirement. Some views note that even if the so-called parent is a subsidiary of a foreign company it still is within the scope as long as it is registered in France. This will include around 100-150 companies who meet the required criteria.

6.6 The Netherlands

On 7 February 2017, the Dutch Parliament approved the Due Diligence Child Labour Law (‘Wet Zorgplicht Kinderarbeid’), which is still waiting to be approved by the Senate. The law applies to all companies registered in the Netherlands and also companies selling products to Dutch consumers, with certain sectors excluded which have a low risk of coming across the use of child labour in their supply chains. Due diligence is thought to consider an assessment whether there is a reasonable suspicion that the production of a product or service could involve the use of child labour. Companies are expected to reasonably assess whether child labour was used in their production and in case such a suspicion arises to establish a vigilance plan.

The due diligence requirement specifically requires companies to report with a declaration to a special Supervisory Body and publicly on their website on their due diligence actions regarding child labour. Failure to meet reporting standards

623 ibid.
624 Justice (n 145).
626 ibid 2.
629 ibid.
can cause a financial fine and plausible imprisonment after five years of failure to comply. More detailed rules for the vigilance plans and due diligence requirements will be later set by secondary legislation. However the requirements will come into force in 1 January 2020.

6.7 Finland

In Finland, at least in the business and human rights sphere regulative measures have been limited. Human rights have had some affiliation in matters regarding business, but only at a limited capacity and all regulation has been connected to government-owned business activity. For example, in regard to public procurement, the government has attempted to include human rights. The Governments Proposal from 2016 on the Act on Public Contracts allows the inclusion of social factors in procurement practices.\textsuperscript{630} The social factors mentioned can vary, such as work safety or disability access. \textit{Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement} mentions ethical trade and respect for human rights as plausible social factors which can be taken into account.\textsuperscript{631} The older version of the Act on Public Contracts also allowed the inclusion of social factors, but there was confusion on how widely or concretely these factors could influence the decision-making. The new Act attempts to make clear how social factors can be included and taken into consideration.

It is important to note that Act does not demand that social factors should be included. Human rights therefore do not have to be a deciding factor in public procurement and hence the Act does not truly promote human rights as some might have wished. Already under the old Act Finnwatches investigated seventy-six public calls for bids concerning risky products and out of the seventy-six only four of them noted social factors.\textsuperscript{632} It is unlikely that, although the possibility to include social factors is clarified with the new Act, all or more public bids will suddenly begin stating social factors. Although the Act only applies to public procurement it would have demanded that companies taking part in procurement would have had to at least assess their own human rights impacts and risks in their supply chains. This would have led to an increase in general knowledge regarding human rights within Finland. However the government chose not to include a specific mention of human rights or make the inclusion of certain social factors mandatory.

\textsuperscript{630} Hallituksen esitys eduskunnalle hankintamenettelyä koskevaksi lainsäädännöksi, HE 108/2016 (2016) 18.
7 CASE STUDIES OF BUSINESS AND HUMAN RIGHTS

7.1 Conflict Minerals and Supply-Chain Knowledge

Whilst discussing business and human rights, one thing becomes evident; one of the major problems companies face is knowing and tracing their supply chains. There are a number of companies that admit to not knowing their entire supply chains. Improper due diligence on the matter seems to be at the centre of most emerging problems companies face. Simultaneously, consumers are demanding more information on the origin of products and their intricate supply chains. Consumer interest has been steadily building as consumers are more focused on ethical trade, and the need to know where products originate from is growing for companies.

Demanding multinational corporations to possess supply-chain knowledge means that companies cannot hide behind wilful blindness. Human rights violations are often found within complex supply chains and hence scrutiny of the origin will indirectly have a spillover effect into human rights as companies become aware of their complex supply chains and the risks included in them. Often finding image-friendly suppliers means finding human rights-friendly suppliers. When companies cannot risk being associated with human rights violations and they become aware of such risks, they will also attempt to solve the risks earlier. Detailed and exact origin information directly means that companies are fully aware of their suppliers and manufacturers.

The EU drafted a proposal on the indication of the country of origin of certain products imported from non-EU countries in 2010,633 which would have demanded corporations acting inside the EU to trace their supply chain. The draft included all consumer products and the particularly mentioned apparel and other textile products. Products should have the place of origin marked so clearly that consumers would be able to understand and receive full and clear information on the origin of all products.634 The origin requirements were rather specific and would have demanded the origin of each component to be clearly marked and notified.

Stakeholder consultation was one of the dominant reasons for the regulation.\textsuperscript{635} The proposal was never accepted due to wide resistance from the corporate world.

Disclosure regulation does not demand corporations to act in a responsible manner, but instead works through pressure from consumers, shareholders and the media. With transparency of supply chains, stakeholders can shape the actions of a company, because companies are also forced to investigate their supply chains and ensure they can stand public scrutiny. Consumer protection includes the consumer’s right to information on the working conditions in which the product was made. Already in \textit{Kasky v. Nike}, Nike was found guilty of misconduct in the misrepresentation of working conditions and labour practices in its factories.\textsuperscript{636} Leading up to the court case, Nike had marketed products as being produced in fair working conditions, but in 1996 and 1997 reports surfaced of misconduct in their factories when workers under the age of sixteen were discovered and other workers with respiratory problems related to their work were also found. The obligation to provide supply-chain information and thus have knowledge of supply chains can arise also from consumer protection.

\subsection{7.1.1 Mineral Conflict Regulation}

Supply-chain and origin knowledge have been at the core of the discussion regarding conflict minerals and their regulation. In certain conflict areas, profits from minerals have been used to fund rebel groups and hence uphold conflict. Regulation on the importation of minerals of conflict areas has attempt to stabilise certain conflict areas. Section 1502 of the Dodd-Frank Act attempted to tackle the conflict in Congo and the trickle-down effect of the regulation has had wide-scale impacts on the metal and technology industries. The pressure from NGOs to regulate the import of conflict minerals in the European Union has also forced the EU to regulate conflict minerals.

Typically, conflict minerals refer to tin, tantalum, tungsten and gold (referred to typically as 3TG) from conflict areas. The most common conflict area in question is thought to be the Democratic Republic of Congo (from here DRC). The term conflict minerals is used much like the term “blood diamond”.\textsuperscript{637} “Blood diamond”

\begin{itemize}
\item \textsuperscript{635} ibid Amendment 4.
\item \textsuperscript{636} Supreme Court of the United States, \textit{Nike, INC., Et al., Petitioners v. Marc Kasky}, Brief for the United States as Amicus Curiae Supporting Petitioners, No. 02-575 (26 June 2003).
\end{itemize}
was used to associate diamonds originating from Liberia with the conflicts and human rights abuses within the country, and the Kimberley Process, which is an international certification scheme, soon followed to certify the origin of diamonds. In a similar fashion, the term conflict mineral is used to draw a parallel between the conflict of the DRC or other areas and the minerals exported from the country. Conflict minerals, so to say, is a term used to refer to 3TGs exported from the DRC. Unlike diamonds, however, 3TGs are used in all our everyday electronic products, which makes it nearly impossible to simply refrain from coming into contact with them. Daily activities like using your laptop and calling with your mobile phone bring all of us into contact with 3TGs every day.

Natural resources have been a double-edged sword for the DRC, with the country’s economy depending on mining. Vast sources of tin, tantalum, tungsten and gold can be found in the Congo with specifically tantalum from the DRC accounting for 15-20% of the world’s supply at one point.\textsuperscript{638} Much like in Nigeria,\textsuperscript{639} which will be discussed in the next section, the problems in Congo do not only stem from corporate behaviour, but are due to a number of reasons stemming from poverty to the country’s history. The DRC was a British colony which gained its independence in 1960. After independence, the country has seen two devastating wars, which have caused extreme violence, but also the spread of diseases and famine. The unrest has claimed by some estimations the most casualties since the Second World War.\textsuperscript{640}

Even when peace has been found within the country the eastern parts have still been controlled by various armed groups. The DRC has also become infamous for being titled “the rape capital of the world” as noted by the UN Special Representative on Sexual Violence in Conflict:\textsuperscript{641} “an estimated 200,000 women and girls have been assaulted over the past 12 years, with more than 18,000 cases reported between January and February 2008 alone”\textsuperscript{642} Various reports, including the one by Human Rights Watch, list acts of brutality and horrific sexual violence towards women and small children.\textsuperscript{643} Sexual violence is extremely widespread and has become an integral part of the conflict.


\textsuperscript{639} See the following chapter.


The conflict has been fuelled by the mineral trade, with rebels controlling mines, imposing taxation on exports and illegally smuggling minerals.644 In certain provinces, like Kivu, armed groups control most mining areas.645 Not only do the armed groups cause grave and uncontrollable violence in the areas, they also finance their activities partly with the mineral trade. A UN Security Council Resolution ushered states to find ways to require companies to exercise proper due diligence when coming across minerals from the DRC as early as in 2008.646

7.1.2 The Dodd-Frank Act in the United States

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted by Congress in 2010 and the United States Securities and Exchange Commission (from here SEC) finalised Rule 13p-1 on 22 August 2012. It was the outcome of tireless work by NGOs, which led to public pressure to require due diligence for US companies which import 3TG minerals from Congo or its surrounding areas. Specifically the Enough Project focused their advocacy on associating sexual violence in Congo and consumer electronic devices with the “Can You Hear Congo Now? Cell Phones, Conflict Minerals, and the Worst Sexual Violence in the World”647 strategy paper. John Prendergast notes that the link between consumers’ appetites for electronic products and sexual violence in the area fuelled the conflict.648 Companies voluntarily began to join the advocacy work regarding the conflict mineral trade. Hewlett Packard acted as a benchmark with due diligence and certification systems, but other technology companies such as Intel, Nokia, Apple, Microsoft and Dell soon followed.649

The Dodd-Frank Wall Street Reform and Consumer Protection Act (from here Dodd-Frank) grew from the ashes of the financial crisis in the US in 2008 and attempted to tighten financial regulation. In the midst of the nationally driven regulation are Sections 1502 and 1504, which address conflict minerals and resource


648 ibid.

The two sections were not aimed like the rest of the Dodd-Frank to avoid future economic disasters, but rather to ask for transparency for business operations abroad. There had been efforts to pass US legislation regarding the conflict in Congo already, which had failed. The DRC Relief, Security and Democracy Promotion Act, which was signed into law in 2006, established policy objectives for the US in regard to Congo. The Act did not *per se* tackle conflict minerals, although it addressed them. Later in 2009, House Resolution 4128, the Conflict Minerals Trade Act, specified at ending the conflict in Congo by regulating and penalising the mineral trade. The Congo Conflict Minerals Act on the other hand connected sexual violence in the area and the mineral trade and wished to amend the Exchange Act to require disclosure by companies on the origin of minerals. Both acts however never came into effect, but both served ideas for Section 1502.

The UN Security Council has encouraged states to ensure that companies exercise levels of due diligence on the origin of the minerals they purchase, manufacture or import. The reason behind Section 1502 is directly connected to the human rights violations which occur in the DRC due to armed groups operating in the area, which partly finance their activities with the mineral trade. The Section notes that ‘the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein’. The inclusion of such a specified complexity as the conflict in Congo in national regulative measures was a demonstration of the impact of NGOs in highlighting a specific human rights problem far away from the national interests of the US. The Enough Project in 2009 published a paper attaching conflict minerals imported to the Western countries to the conflict in Congo. National consumer interest rocketed, which led to public pressure to find an answer to conflict mineral imports. Certain companies reacted with internal matters, but the problem in Congo was well-known to companies before Dodd-Frank and certain companies had already rejected minerals from Congo in their products. The link between minerals and

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650 Section 1504 demands companies to inform their payments to foreign governments for access to oil, gas and minerals. This text will not focus on the said section.


653 Conflict Minerals Trade Act, HR 4128 (2009).


the conflict was made explicit and did not attempt to see the web of problems leading to the conflict. The extremely simplified causal reaction however worked. Media coverage, lobbying and campaigns forced the public to consider the effects of their technology purchases from a humanitarian standpoint. What is extremely interesting is that the internal conflict of an African country gained so much notoriety in the US, which has been typically slow to react and uninterested in conflicts in the region.

7.1.3 Content of Section 1502

The section itself and the changes in the Exchange Act demand mandatory disclosure and actually hence highlight supply-chain knowledge. It stipulates disclosure from US-listed companies that plausibly could use minerals from the countries in question. Companies must conduct proper due diligence in order to stipulate whether used minerals originate from the DRC or other neighbouring countries. However, the regulation does not require companies to abstain from using or purchasing conflict minerals, but solely requires companies to conduct due diligence and disclose on the matter.

Section 1502 is applicable to companies which file under Section 13(a) or Section 15(d) of the Exchange Act. Companies which are subject to the Exchange Act filing requirement first must consider whether minerals are ‘necessary to the functionality or production of a product manufactured, or contracted to be manufactured’ and then require the origin of their products in order to be able to determine whether the used minerals originated from the D.R. Congo. Necessity is not clearly defined, but companies should consider “(a) whether a conflict mineral is contained in and intentionally added to the product or any component of the product and is not a naturally-occurring by-product; (b) whether a conflict mineral is necessary to the product’s generally expected function, use, or purpose; or (c) if a conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.” When conflict minerals are not necessary for production, the company does not have to follow the rules set by the regulation. Companies which merely import products containing minerals are also exempt from the provision, as manufacturers and issuers who contract to manufacture with a degree of influence are in the scope of the Section. Therefore when manufacturers or issuers of manufacturing

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657 For example, Angola, Central African Republic, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.
659 ibid 13p–1.
whose products are deemed necessary to include minerals and file reports under
the Exchange Act are actors who must conduct a reasonably designed enquiry into
the origin of the country in good faith.

If a company discovers through the enquiry that their minerals originate from
the areas in question and are not recycled minerals, or on the other hand they
are unable to determine their origin, they prepare a Conflict Minerals Report in
accordance with the regulation, which is certified by an independent private sector
audit, and provide a statement to that effect.\footnote{ibid 14.} Due diligence must be based on
a nationally or internationally recognised due diligence framework, such as the
OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from
Conflict-Affected and High-Risk Areas.\footnote{ibid 28.} The Minerals Report must contain
‘a description of the measures taken by the issuer to exercise due diligence on
the source and chain of custody of its conflict minerals, which measurers shall
include an independent private sector audit of such report,’ and ‘a description of
the products manufactured or contracted to be manufactured that are not DRC
conflict-free’.\footnote{ibid.} Even if minerals originate from DRC, they could be considered
conflict-free if their use does not ‘directly or indirectly finance or benefit armed
groups,’ but without such a finding the minerals are considered conflict minerals.\footnote{ibid
83.} The rules offer a “name and shame” penalty, as companies are required to report
on the origin of minerals.

The rules in question of the SEC have been challenged in the courts. In
2015, the US Court of Appeals for the DC Circuit in National Association of
Manufacturers v. SEC stated that the disclosure requirements of Section 1502
were unconstitutional.\footnote{United States Court of Appeals for the District of Columbia Circuit, National Association of Manufacturers, et Al. v. Securities and Exchange Commission, et Al, No. 13-5252, (18 August 2015) 25.} It did uphold the rules and state the authority of the SEC
in the matter. However the court ruled that, based on their First Amendment rights
of free speech, companies cannot be required to state that their products are not
DRC conflict-free.\footnote{ibid 83.} Companies may still call their products “DRC conflict-free”
or “DRC conflict undeterminable,” but cannot be required to do so. This ruling
calls into question the name and shame factor, as companies are not required to
state products as “not DRC conflict-free”.

\footnote{ibid 14.}
\footnote{ibid 28.}
\footnote{ibid.}
\footnote{ibid 83.}
\footnote{ibid.}
7.1.4 Critique of Section 1502

The inclusion of Section 1502 into the Dodd-Frank Act is questionable. Human rights surveillance was hence ordered under the SEC, which has the purpose of protecting investor interests and efficient markets and hence not human rights-inspired objectives. The role of the SEC is tied to the traditionally aligned goal of shareholder primacy. Similarly, securities law regulates corporate disclosure on the financial information of public-listed companies and not non-financial information disclosure. Even though the Section demands transparency and therefore can give the consumers the possibility through the disclosure of companies to make decisions, it however does not sit otherwise with the agenda of the Dodd-Frank Act or the mission of the SEC. The benefits of including a human rights-driven agenda within the Dodd-Frank is to promote compliance and evaluate human rights by creating a distinct link between financial performance and human rights.

The US acted alone in its regulation and within the DRC it was even called “Obama’s law”. Compared for example to other certification schemes or initiatives attempting to tackle a specific sector or country, the US did not attempt to find companionship, but decided to tackle the issue on its own. This meant that only US companies would be affected by the regulation, while companies from the EU, Asia-Pacific or anywhere else in the world could still use conflict minerals in the same manner as before. Such regulation could and did have a spillover effect to other countries, but the first wave of costs was carried solely by US companies. Due diligence, auditing and reporting costs however did not only affect the US-based companies, but also their suppliers and subsidiaries around the world.

As with other initiatives, the Dodd-Frank actually merely requires companies to provide information. However that information can now be used by consumers.

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670 Ibid 110.


672 Barack Obama already introduced the the DRC Relief, Security and Democracy Promotion Act as a Senator in 2006. The nickname however drew from the eagerness of the US to apply Conflict Mineral Regulation while Barack Obama was president of the U.S.

673 Seay (n 649) 9.
shareholders and the media and hence push companies to investigate their supply chains and make more responsible decisions. For companies to determine whether Section 1502 applies to them, they must first know where their minerals originated from. The number of reports has been surprisingly low. Only 1,315 companies filed from the expected 6,000 companies in the first year, with a staggering 98% being unable to determine the country of origin.\textsuperscript{674} The quality of the reports has also been criticised, with many companies supplying information either on a template or in a very minimal fashion.\textsuperscript{675} It can therefore be questioned how much information is truly being given to consumers.

7.1.5 Conflict Mineral Regulation in the European Union

Europe is one of the largest trading areas of 3TGs. After Section 1502 was regulated in the US there was growing pressure to also regulate conflict minerals within the EU and regarding European actors. In May 2017, the EU passed its version of conflict mineral regulation. The regulation will not come into effect before January 2021,\textsuperscript{676} but the Commission has urged companies to start their fulfilling their due diligence requirements before then.

The road for the regulation on conflict minerals in the EU was a long one and finally on 16 June 2016, the Commission, the Parliament and the Council reached a political agreement.\textsuperscript{677} After a public consultation in 2013, the Commission had proposed in March 2014 a voluntary certification initiative for 3TG importers.\textsuperscript{678} The Committee on International Trade advocated for a mandatory certification scheme for smelters and refiners, but kept with the Commission’s view of voluntarism for importers and manufacturers. However the Parliament voted in 2015 for mandatory regulation regarding smelters, refiners and importers.\textsuperscript{679}


\textsuperscript{676} Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (2017) 20 (3).


\textsuperscript{678} Proposal for a Regulation of the European Parliament and of the Council Setting up a Union System for Supply Chain Due Diligence Self-Certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict affected areas, COM/2014/0111 final - 2014/0059 COD (2014).

Although many similarities exist between the new EU regulation and Section 1502, there are also a number of dissimilarities. Both the Dodd-Frank and the EU regulation have the aim of using mineral due diligence regulation to impact conflict-driven areas where the mineral trade finances rebel groups. Unlike Section 1502, the EU regulation does not try to solely influence DRC and its surrounding areas, but characterises conflict areas in a much wider way. The EU regulation defines conflict-affected and high-risk areas as ‘areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses’.

Both regulations exclude recycled metals from their influence. The EU regulation separates obligations between “upstream” and “downstream” companies. Upstream companies extract the mineral and also include smelters and refiners. Downstream includes companies in the ‘supply chain from the stage following the smelters and refiners to the final product’. Upstream companies are obliged to follow the mandatory due diligence requirements of the regulation, whilst downstream companies which import metal-stage products are also required by the same obligations, but importers of products past the metal stage are not. Section 1502 similarly does set requirements for companies which only import finished products.

The new EU law also exists as its own law and unlike Section 1502 is not attached to financial securities laws. The EU did not shy away from clearly regulating conflict minerals with a humanitarian purpose. This also allows the regulation to focus more on due diligence than disclosure. Due diligence in the EU regulation is defined as ‘identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities’ regarding ‘management systems, risk management, independent third-party audits and disclosure of information.’ Third-party audits are also demanded from importers. The requirements of due diligence are hence acting and investigating with reasonable care the origin of minerals and their supply chains. European importers shall make audits and information available, but the reporting of due diligence is more secondary in the EU regulation than in Section 1502. This can be explained by the different approaches in regulative style, with one being incorporated in securities law and the other existing as its own regulative measure.

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681 ibid 2 (k).
682 ibid.
683 ibid 6 (1).
684 ibid 7(1)-7 (3).
7.1.6 Effects of Conflict Mineral Regulation on the Selected Industries and the Conflicts

Section 1502 has ultimately led to a de facto ban on Congolese minerals, as companies wish to avoid the publicity surrounding purchasing from the DRC. Firstly in 2010, as a response to growing pressure, the president of DRC instigated a ban on mining in certain eastern provinces to allow governmental authorities to remove the presence of insurgent rebel groups in the area. Secondly, smelting, technology and many other companies dependent on minerals began refusing or avoiding minerals from the DRC due to the compromising association they may face by purchasing minerals from the area. It is therefore rather unclear how much of a true positive impact Section 1502 has actually had in the DRC, but the unwillingness of companies to engage with minerals from DRC has had a directly negative affect in a country that largely depends on its mining. Mining tends to be the only source of income in the area and the effects of the reluctance around minerals from the DRC has been an ‘unintended...[by the author] disaster for the already fragile economy of the eastern D.R. Congo’.

After Section 1502 was legislated, pressure also grew in other large market areas, not only in the EU, but also other countries. China adopted voluntary conflict minerals guidelines in 2016. The China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters worked with the OECD in drafting the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains. The aim of the Guidelines is for companies ‘to identify, prevent and mitigate their risks of directly or in-directly contributing to conflict, serious human rights abuses and risks of serious misconduct’.

Before the local and regional regulative measures, the OECD had already enacted their own due diligence scheme. The OECD Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas was ‘the first example of a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas,’ and wishes to provide recommendations. It is a non-binding due diligence guidelines.


688 Seay (n 649) 9.

689 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016).
framework for all three mentioned conflict mineral regulative measures due to its clear establishment of a five-step framework for companies to identify and address potential risks. It supports due diligence and supply-chain monitoring and goes clearly further and into more specifics than the OECD Guidelines.\(^{690}\) The UN Group of Experts has also developed due diligence guidelines which are compatible with the OECD Due Diligence Guidance.

It is evident that companies which source, use or purchase minerals can avoid due diligence requirements on the origin of minerals. Section 1502 was a local regulation, but all public-listed companies wishing to operate within the US market were forced to adhere to the requirements. A number of scholars have noted that the Dodd-Frank section would have been more affective if it had been rather made an inter-state initiative like the Kimberley Process.\(^{591}\) The effects in Congo might not have been what was hoped or conclude the conflict, but it had a wide effect on industries using minerals. Companies were forced to conduct due diligence on the origin of minerals, which unintentionally made companies in the affected sectors expand their country of origin knowledge. This is specifically because due diligence on minerals has to be done before minerals are refined into metals as it becomes impossible to distinguish refined minerals.\(^{692}\)

Much like “blood diamonds”, conflict minerals became first a trend topic in business and human rights and then gathered the attention of the media. Unfortunately the consumer’s interest in specific is often short. However the scrutiny and public pressure were answered with a regional disclosure law in the US, but it had spillover effects to the whole industry due to the importance of the US as a market area. Companies that managed not to be affected by Section 1502 will most likely be compelled to adhere to due diligence requirements in the EU for conflict minerals. Due diligence on conflict minerals has become a sector course of action.

\(^{690}\) Cullen (n 675) 758.

\(^{691}\) Amy Factor, ‘Dodd-Frank’s Specialized Disclosure Provisions 1502 and 1504: Small Business, Big Impact’ (2014) 9 The Ohio State Entrepreneurial Business Law Journal 89, 113; Narine (n 651) 395; Sells (n 644) 634.

7.2 Oil, Nigeria and the Alien Tort Statute

7.2.1 Nigeria’s Complex Relationship with Natural Resources

In 2013, Shell announced they were going to reduce their presence in Nigeria. The announcement was not a surprise, after various allegations and court proceedings regarding the company’s operations in the area, specifically in the Nigeria Delta. Royal Dutch/Shell is a leading energy and petrochemical company and one of its most prominent host countries for its operations has been Nigeria, in which it has had operations for more than 70 years. The country is known for its oil reserves. The government has earned an estimated 300 billion US dollars solely from petroleum.693 However, like many other countries, such as Congo, Nigeria suffers from the resource course, which notes the negative relation between an abundance of natural resources and economic growth.694

To understand the complexities surrounding human rights protection in Nigeria, first the country’s versatile history of government, its economic hardships and cultural diversity must be discussed. Nigeria, like many other states in Africa, was part of the British imperial colony, with its colonial history beginning when Britain acquired a number of territories in Africa, including Nigeria, which it governed within its colonial administration.695 Therefore English remains Nigeria’s official language, but the country’s varied cultural sphere with ethnic, religious and linguistic diversity means that there are also over 250 other languages spoken inside its borders. For a state enriched by natural resources, the country is severely impoverished compared to other major petroleum producers.

In 1914, all the heterogeneous ethnic nationalities were brought together into one political union, which was called Nigeria. The pressure of decolonisation led to the devolving of power to the locals.696 Nigeria gained its independence on 1 October 1960 and was quickly recognised as an independent state, becoming a member of the United Nations on 7 October 1960.697 Since the state’s independence there have been six constitutions and two that were not used as a new one was already being ushered in.698 The 1999 constitution was the first to truly have some

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696 Obiagwu and Odinkalu (n 693) 212.
human rights guarantees, such as right to life, right to personal liberty and right to peaceful assembly and association.

Nigeria has been mostly governed by military regimes since its independence.\textsuperscript{699} This has meant grave violations of human rights, abrogation of the constitution and disregard for the rule of law.\textsuperscript{700} Human rights and fundamental rights did not exist in practice during the military regimes. The military regimes suspended the parts of the constitution stating the bill of rights and introduced various draconian decrees. Although it is common for military juntas to disrespect and disregard human rights litigation, in Nigeria the varying military regimes in the 31 years made it impossible to uphold any factual level of human rights protection. The regimes left their mark on the state’s legal structure and legislation.

Nigeria is an important producer of oil, in 2013 the sixth-largest oil exporter and thirteenth-largest oil producer in the world.\textsuperscript{701} Shell and Nigeria have a special relationship. Shell’s exclusive right has been one of the key factors in shaping their dominant role in the region. Already in 1937, Shell D’Arcy was granted sole concessionary rights in the exploration of crude oil by the British colonial government, later succeeded by the Shell Petroleum Development Company.\textsuperscript{702} The Shell-BP Petroleum Development Company first discovered oil in Nigeria in January 1956.\textsuperscript{703} After the Second World War, Shell was joined in Nigeria by British Petroleum, which established Shell-BP, and in 1959 rights were extended to other non-British foreign companies.\textsuperscript{704} After the country’s independence, interest in operating in the region grew rapidly amongst oil companies. Today Nigeria is dependent on its oil as hydrocarbon activities count for 65% of government revenue and 95% of export revenues, with oil constituting most earnings.\textsuperscript{705}

By all accounts, Nigeria is a Petro-State as described by Michael J. Watts. Nigeria has a statutory monopoly over mineral exploitation and a nationalised oil company that operates through joint ventures with oil majors who are granted

\textsuperscript{699} A variety of military regimes have staged coup d’états starting from the one in 1966. The civil war in Nigeria from July 1967 to January 1970 could be described as genocide and control over the Niger Delta and its oil production was a main component in the war. Finally in 1999, a civil government was elected with a general election.

\textsuperscript{700} Obiagwu and Odinkalu (n 693) 212–213.


\textsuperscript{702} Obiagwu and Odinkalu (n 693) 225.

\textsuperscript{703} Burns (n 697) 304.

\textsuperscript{704} ibid.

\textsuperscript{705} Nigerian Ministry of Finance and Budget Office of the Federation 2008 as stated in Mark C. Thurber, Ifeyinwa M. Emelife, And Patrick R.P. Heller, ‘NNCP and Nigeria’s oil patronage ecosystem’ in ed. Victor, Huults, Thurber, Oil and governance: state-owned enterprises and the world energy supply (Cambridge University Press 2012) 701
the security apparatuses of the state ensure that costly investments are secure, the oil-producing communities themselves within whose customary jurisdiction the wells are located and a political mechanism by which oil revenues are distributed. Nigeria is clearly dependent on its oil revenue at all levels of government and the governmental role of the state has been built to accommodate the oil industry.

7.2.2 The Alien Tort Statute

The Kiobel v. Royal Dutch Petroleum Co. judgment is best known for its dismissal of the Alien Tort Statute (from here the ATS) on the grounds that the statute did not reach extraterritorial conduct abroad. Before the Kiobel judgment, the narrative for this chapter could have been widely different and could have made statements that the ATS could develop from a traditional human rights protection tool into its glorious future as a corporate responsibility system. Although the ATS came into force in 1789 and the ATS statute allowed district courts 'jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations,' it was not until the Filartiga v. Pena-Iral judgment that it actually gained influence. The resurrection in 1980 of the ATS is specifically interesting as it stayed in hiding for over two hundred years and dealt with piracy and other matters that did not exist in the same manner in the modern world. However, Filartiga v. Pena-Iral, which related to the torture of nationals in Paraguay by a national governmental official, brought out its new teeth.

The ATS reads 'courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' The law of nations can be used as a synonym to customary international law. Thus the ATS gives protection for victims of human rights abuses in US federal courts for crimes such as genocide, slave trading, slavery, forced labour and war crimes, which can be adjudged accordingly with the ATS even

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706 The Nigerian government initially became involved in the oil sector with the establishment of the Nigerian National Oil Corporation in 1971, which evolved into the present-day Nigerian National Petroleum Corporation (Olubayo Oluduro, Oil Exploitation and Human Rights Violations in Nigeria’s Oil Producing Communities (Intersentia Publishing Ltd 2014) 38.) That same year, Nigeria joined the Organization of Petroleum Exporting Countries which aims at redefining relations between the private oil companies and the producing countries. (ibid).


708 ibid 384.


711 Alien Tort Statute (n 709).

712 It is important to note that US law permits civil torts and criminal prosecution of corporate entities.
without any state action.\textsuperscript{713} The ATS actually proceeds to solely allow claims by non-American plaintiffs, but some type of connection between the US and the accused corporation is however required. It hence allows federal courts jurisdiction over torts by reference to international law,\textsuperscript{714} as claims of non-citizens regarding violations of international law that occurred outside the US against non-citizen plaintiffs can be adjudged under the ATS jurisdiction. The claims must be based on customary international law, which has a universal, specific and obligatory norm on the subject.

The \textit{Kadic v. Karadzic} judgment in 1995 extended the scope of the ATS to non-state actors and \textit{Doe I v. Unocal Corp}\textsuperscript{715} in 2003 specifically to multinational corporations. The \textit{Doe I v. Unocal Corp} case concerned Unocal's oil pipe construction in Myanmar. The Unocal project in Myanmar was licensed by the state owner, the Myanmar Oil and Gas Enterprise. To ensure the security of the construction against rebel activity, Unocal engaged military groups and as was later claimed, the military forces in question used forced evictions and forced labour to construct the oil pipe, and raped, tortured and killed inhabitants of the area. Although the case was settled and the judgment of the Court of Appeals validated, its significance reigned from its admissibility to a US court and stating of complicity criteria regarding corporate conduct. The application of the ATS affected not only the specific cases in the court system, but also generally the overall legal responsibility of companies.\textsuperscript{716} Although the ATS has proven its significance in human rights protection, it is impossible to compare ATS cases, as most of them are settled before reaching trial. The Second Circuit of Appeal has made only nine significant decisions on the ATS since 1980,\textsuperscript{717} which has caused wide uncertainty on the extent of the ATS.

\textbf{7.2.3 The Niger Delta and Shell}

The \textit{Kiobel} case was one of the many claims made in a long line of accusations against Shell’s operations in the Niger Delta. The area is known for its oil; it is considered the best spot for oil in the world and this has been the key factor in actuating its demand.\textsuperscript{718} The Niger Delta not only has its natural resources, but

\begin{itemize}
\item \textsuperscript{713} Clapham (n 243) 906.
\item \textsuperscript{714} Beth Stephens, ‘Extraterritoriality and Human Rights After Kiobel’ (2013) 28 Maryland Journal of International Law 256, 261.
\item \textsuperscript{715} United States Court of Appeals, \textit{John Doe v. Unocal Corporation et al}, 395 F.3d 932, 947, 9th Circuit, (18 September 2002),
\item \textsuperscript{716} Andrew Clapham (n 67) 253.
\item \textsuperscript{717} \textit{Kiobel v. Royal Dutch Petroleum Co.} (n 219), Majority Opinion, 4.
\item \textsuperscript{718} Chukwumerije Okereke, ‘Oil Politics and Environmental Conflict: The Case of Niger Delta, Nigeria’ in Bülent Gökay (ed), \textit{The politics of oil : a survey} (Routledge 2006) 112.
\end{itemize}
also a unique ecology. The area of the Niger Delta is actually quite difficult to define, but it is usually qualified as the area covered by the natural delta of the Niger River, which covers all oil-producing areas and almost 75,000 square kilometres.

Today unfortunately the area is also infamous for the violence occurring against the multinational oil corporations operating in the region and the federal government. The security threat of the region has meant that 20% of Shell employees in Nigeria were devoted to security. Also vandalism of oil pipelines and bunkering occur in different parts of the region. In a country dependent on the peacefulness of the oil trade, the effects of such attacks can be catastrophic. The mentioned attacks in 2008 and 2009 halted oil production and vandalism cost Shell losses of $2.27 million a day in 2006.

The United Nations Environment Programme (from here UNEP) issued a report in 2011 on the environmental assessment of the oil spills in Ogoniland. The key finding UNEP made was that oil contamination was widespread and had severely impacted the environment. In the report, UNEP suspected that the environmental restoration of the area might take up to twenty years, which will demand the largest clean-up in history to be completed. Ogoniland hosts a variety of Shell’s facilities and UNEP clearly stated that Shell had clearly operated below national standards in regard to the clean-up operations of oil spills. The Shell Petroleum Development Company’s own procedures that are set by the company have not been applied either. Shell had certificated contaminated sites as assessed and cleaned sites. On a number of occasions, any action was taken on the sites only after considerable amounts of time had gone by or with ineffective measures. Shell has admitted liability for two oil spills in Bodo, Ogoniland in 2008 to 2009.

The oil industry as a whole has been problematic for the area. Canalisation has caused saltwater intrusion, which has killed a number of species and deeply affected the freshwater ecosystem. The pipelines have caused wide-scale environmental affects, but spills have also led to deadly explosions. Between 1976 and 2001 there

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719 The region contains the world’s third largest wetland with the most extensive freshwater swamp forest. The fragile ecosystem hosts countless species of plants and animals. The Nigeria Delta area alone holds 60-80 percent of all Nigerian species.
720 Oluduro (n 706) 16.
721 Michael J Watts (n 707) 391.
722 Okereke (n 718) 113.
724 ibid 224.
725 ibid 150.
726 ibid.
727 ibid 151.
occurred 6,817 oil spills. The environmental impacts of oil spills can be grave, but visible pipelines are not however as much of a problem as the daily flare fumes, which have led to air pollution. Although gas flaring has become illegal in most countries, it still occurs in Nigeria. In 2000, Nigeria still had the highest flaring rating in the world.

In 1998 plaintiffs alleged in three lawsuits that Shell allegedly had assisted the Nigerian government in the torture and killing of Nigerian Delta activists, including Ken Saro-Wiwa. In 1994, Ken Saro-Wiwa and other Ogoni activists were arrested, detained illegally under unreliable conditions for eight months and tried in 1995 in manner which violated fair trial standards. They were convicted of murder and later executed. The claims centred around the financial and logistical assistance given by Shell to the Nigerian government, which committed various crimes against the people of the Nigeria Delta. On 20 January 2013, the District Court of The Hague adjudged on five cases regarding specific oil spills in the Niger Delta in 2006 and 2007. The Nigerian farmers, Goi, Ikot Ada Udo and Oruma, and the Dutch environmental NGO Milieudefensia claimed that the Nigerian Shell Petroleum Development Company and Royal Dutch Shell Plc were liable for the damages caused by oil spills and the inadequate cleaning operations that followed. The plaintiffs demanded that Shell cleaned up all the damage caused by the oil spills and better secured the pipelines under the companies’ management. Shell stated that oil spills were caused by vandalisation and not by the actions of the companies. In the UK, the Nigerian-based SPDC found itself once again on trial for claims regarding the Niger Delta. In the Bodo Community and Other v. the Shell Petroleum Development Company of Nigeria Limited, the claimant sought damages arising from two oil spills in 2008 in Bodo, Ogoniland, Nigeria. The case never made it to trial after the ruling, as Shell settled with the Bodo Community for a reported £55 million in an out of court settlement in January 2015.

7.2.4 The Kiobel Judgment

In the Kiobel case, the petitioners, Nigerian nationals from Ogoniland in the Niger Delta residing in the US in consequence of political asylum, filed a suit against Dutch Royal Petroleum Co., British Shell Transport & Trading Co., Plc and the

729 ibid.
730 Watts (n 707) 388.
Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd. The petitioners claimed that Shell and its subsidiary aided and abetted the Nigerian government in committing violations of Nigerian law during the environmental protests in the area. Dutch Royal Petroleum Co. and the Nigerian subsidiary had decided in 1993 to suppress the Movement for Survival of Ogoni People (MOSOP) to be able to continue operations in the area, and the Shell Petroleum Development Company of Nigeria, Ltd requested assistance from government groups. A similar case was brought to trial in the US, but was quickly settled for $15 million, after Royal Dutch Petroleum was found subject to jurisdiction.

The suit was filed under the ATS with the District Court who dismissed several claims, but the case was interlocutory appealed. In the opinion of the US Court of Appeals based on the facts of the case, the court did not view that mere corporate presence of the company sufficed to apply extraterritoriality. The presumption against extraterritoriality should be forsaken if there was indication of conduct in the US, conduct by a national of the US and cases in which the US could be seen as providing ‘safe harbour’ to a gross human rights violator. The court did not deny the admissibility of cases where ATS would be applied, but rather authenticated the significance of a case’s relation with the US.

The entire complaint was dismissed due to customary international law not recognising corporate liability. In the court’s view, customary international law did not include the liability of legal persons, but solely natural persons. As pointed out, the ATS relies on customary international law to determine the jurisdiction over ATS against a particular defendant. If international customary law does not establish corporate civil liability for violations of international human rights, the ATS cannot do so either. The court viewed that corporate liability does not exist as a specific, universal and obligatory norm, and hence it is not considered customary law which could be applied in the case in question.

An opposing view existed, however, as Judge Leval’s opinion found that corporate liability is a matter of remedy that has been left to the independent

732 Due to corporate form changes the Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC are currently known as Shell Petroleum N.V. and Shell Transport and Trading Company, Ltd, respectively.
733 Kiobel v. Royal Dutch Petroleum (n 219) 75.
734 ibid 18.
737 ibid 7.
738 ibid 20.
739 ibid 43.
determination of each state. As Leval points out, there does not exist a customary norm on the appliance of international human rights on company conduct, nor does there exist a treaty mentioning these types of principles, but the view that a company cannot violate international law due to international law not being applicable to them is highly problematic.

The US Supreme Court eventually decided on the case on 17 April 2013. It remained the view that the adjudication of violations arising from outside the US should be dealt with in the nation where they occurred. It would require a statute more specific than the ATS if it were decided to also hold multinational corporations in such situations accountable in the US. The Chief Justice noted that the claims must ‘touch and concern’ the territory of the US with sufficient force for the application of the ATS. Without a distinct statement in a statute against the presumption of territoriality, it does not exist. It is evidently clear that according to the Court the ATS does not offer authorised universal jurisdiction. In the case in question, all relevant conduct took place outside of the US.

7.2.5 Liability Through the Alien Tort Statute

No court has previously dismissed a civil claim in which a corporation has violated customary international law on the grounds that juridical entities do not possess legal liability under customary international law. The US courts themselves ruled in Doe I v. Unocal Corp that a private entity could be held liable for aiding and abetting violations of customary international law even without the involvement of state action. This shade of an oblique liability can be found in a number of other claims submitted under the ATS that have in some manner depicted an underlying liability for corporate action. The same type of presumption on liability was made in Sinaltrainal v. Coca-Cola Co., in which the court recognised corporate defendants to be subject to liability under the ATS and possibly for violations of customary international law, and also in Romero v. Drummon Co., Inc., in which it was stated that the ATS does not provide an exception for corporations. In other

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740 ibid, 44.
741 ibid 3–4.
742 ibid IV.
743 ibid 1669.
744 ibid 1669.
cases, the differentiation between private individuals and corporations in regard to liability has been viewed as misguided.\textsuperscript{747}

In \textit{Presbyterian Church of Sudan v. Talisman Energy Inc.}, it was viewed that the idea of corporate liability not being sufficiently adopted in international law was misguided.\textsuperscript{748} Civil liability claims should not be coincided with the fact that the jurisdiction of international criminal courts does not apply to corporations, because criminal liability demands criminal intent, and corporations as legal entities cannot possess intent in the required manner.\textsuperscript{749} It is true that international law does not dictate civil liability, but this could be seen as an issue left up to state actors to determine.\textsuperscript{750}

In \textit{Abdullahi v. Pfizer, Inc.} the US Court of Appeals reviewed that a claim for violations of customary international law was considered to be under the jurisdiction of the ATS.\textsuperscript{751} Pfizer, Inc. had allegedly involuntarily tested medication on children in Nigeria. The court viewed that non-voluntarily medical experimentations by a non-state actor were forbidden by customary international law.\textsuperscript{752} In 2007, the court renewed its stand on corporate liability for collaborating with illicit state activity with the \textit{Khulumani v. Barclay National Bank} judgment, in which the US Court of Appeals stated they ‘held that the ATS conferred jurisdiction over multinational corporations that purportedly collaborated with the government of South Africa in maintaining apartheid because they aided and abetted violations of customary international law’.\textsuperscript{753} In the light of the mentioned cases, it is clear that the US courts are themselves willing to impose some form of civil liability on corporate conduct.

\subsection*{7.2.6 Extraterritoriality After Kiobel}

The Supreme Court in \textit{Kiobel} applied the domestic law presumption against extraterritoriality\textsuperscript{754} and hence adjudged that the ATS does not offer extraterritorial jurisdiction. Extraterritoriality is a complex field of law without distinct clear
guidelines or rules in place. Its notion already goes against key features of international law, such as sovereignty and non-intervention. Although it has been seen to plausibly further human rights, extraterritoriality has also been criticised for threatening the core ideas of human rights and the foundations of international law.

Jurisdiction, according to Oppenheim, ‘concerns essentially the extent of each state’s right to regulate conduct or the consequences of events’. Traditionally states were considered to have jurisdiction in accordance with the territoriality principle, as noted already in the *Lotus* case by the Permanent Court of International Justice. The principle of territoriality however is not absolute, as problems with jurisdiction only arise in situations which have a transnational quality, and derivation from territoriality is acceptable in accordance with the rules of international law. International law governs the rules which determine whether extraterritorial jurisdiction can be applied to a specific instance. The *Lotus* case noted that domicile laws could be applied extraterritorially unless there are prohibitive rules in international law forbidding extraterritorial jurisdiction. Extraterritorial prescriptive jurisdiction is accepted if there is a connection between the state and the conduct it is regulating. As noted certain international conventions accept extraterritorial jurisdiction.

The *Kiobel* judgment not only disregarded extraterritoriality, but also universal jurisdiction, which is connected to serious infringements of human rights, as

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755 Colangelo (n 57) 1021.
757 Jennings and Watts (n 52) 456.
758 *The objective territoriality principle and the effects principle are typically considered to fall within territoriality principle*.
760 Mann (n 56) 14; Brownlie (n 53) 165.
761 O’Connell (n 58) 599.
762 “Lotus” (n 759) 19.
763 Lowe (n 59) 312; O’Neill (n 59) 353.
764 Such a connection must typically exist for extraterritoriality to be appropriate and a variety of situations can be considered in which the relation is considered to approve extraterritoriality. For example, the active and passive nationality principle allow states to have jurisdiction in cases where the offender or the victim is a national, whilst the protective principle gives jurisdiction to a state when its vital interests are at stake. Specifically the active nationality principle is widely used by domicile courts as grounds for extraterritorial jurisdiction.
765 For example, The Convention Against Torture demands that states have jurisdiction over matters ‘when the alleged offender is a national of that State; or when the victim is a national of the State if it considers it appropriate’. However, as researched in the State Responsibilities to Regulate and Adjudicate Corporate Activities under the core UN Human Rights Treaties - the Individual report on the International Covenant on Civil and Political Rights, the HRC has not been eager to comment on the requirement for such actions from states. The HRC has also not noted that such actions would not be permitted. Therefore the actual obligation to set extraterritorially applying legislation is not clear.
jurisdiction arises solely from the nature of the crime without the demanded nexus as other principles of jurisdiction.\textsuperscript{766} The principle hence allows jurisdiction without any connection between the state and the offence. It therefore surpasses the basic rules of not only territoriality and sovereignty, but also extraterritoriality. Often the reasons for universal jurisdiction are that other states cannot exercise jurisdiction in accordance with the traditional rules and no other states have a direct interest, but the international community has an interest, which allows the state to act as a surrogate for the international community.\textsuperscript{767}

The application of the presumption of extraterritoriality has been considered as misconstrued by a number of scholars.\textsuperscript{768} Firstly, the legal praxis regarding the ATS has mostly not been limited to territoriality. The presumption against extraterritoriality in ATS claims was first established in the \textit{Morrison} judgment in which Australian plaintiffs sued an Australian bank for securities violations.\textsuperscript{769} However, the presumption was clearly not used in a variety of judgments in which the ATS was applied. In addition, the ATS specifically gives universal jurisdiction to the US courts over violations of international customary law. Already in \textit{Sosa v. Alvarez-Machain} the universal jurisdiction in regard to the ATS was noted.\textsuperscript{770} Secondly and even more importantly, the ATS was initially constructed for claims regarding piracy to which international law notes universal jurisdiction can be applied.\textsuperscript{771} It is rather interesting according to Sarah Cleveland that universal jurisdiction could be applied to piracy in 1789, but not to matters which are also widely accepted to have universal jurisdiction, such as torture, in 2013.\textsuperscript{772} Justice Bryer noted that if the ATS should apply to piracy, it should also apply to the crimes of torture and genocide.\textsuperscript{773} The Court however concluded that there was no clear indication of extraterritoriality. The \textit{Kiobel} judgment also does not attempt to explain why the Court has accepted extraterritoriality previously, but restrains it in this case.\textsuperscript{774}

\begin{enumerate}
\item[766] Bassiouni (n 62) 81; Colangelo (n 62) 150–151.
\item[767] Bassiouni (n 62) 96.
\item[771] Cleveland (n 735) 18.
\item[772] ibid 19.
\item[773] \textit{Kiobel v. Royal Dutch Petroleum} (n 736) Justice Bryer concurring opinion.
\item[774] Stephens (n 66) 269.
\end{enumerate}
7.2.6.1 The Touch and Concern Test

The Kiobel judgment itself does not fully exclude the future of foreign claims made under the ATS. The reasoning of the court was that ‘all the relevant conduct took place outside the United States’ and hence the Court did not see that the case touched and concerned the territory of the US. The Court did not offer any real guidelines or rules to which situations could touch and concern the US with sufficient force. Justice Bryer even criticises the ruling for offering very limited assistance in understanding what facts would allow an extraterritorial claim. It can be assumed from the Court’s ruling that as long as the cases ‘touch and concern’ the US with sufficient force, the presumption again is that extraterritoriality may be replaced. What specifically is considered to pass the test is not answered in the judgment. Some judges have attempted to shine light on the ‘touch and concern’ requirement. Justice Bryer notes that for the presumption to be overruled, the alleged tort occurred on American soil, ‘the defendant is an American national, or the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind’.

Although universal human rights litigation may have stalled, domestic US companies can satisfy the said standards and can find themselves adjudicated for human rights violations. As R. G. Steinhardt points out, ‘the international law standards of prescriptive jurisdiction will provide at least analogical authority for determining which claims “touch and concern” the United States’. The ascent of the ATS has not faded, but might in fact continue to evolve, but only in regard to US-based multinational corporations and their actions. However the defendant in Kiobel was American, but the presumption was based on the fact that all the conduct occurred abroad. As many of the world’s largest and most influential corporations are US-based companies, the ATS might prove still to be highly influential and significant. It does however create a different set of rules for American and non-American companies. The ATS might even at a minimum level hence still influence at least the actions of US-based multinational companies when they are operating abroad.

776 Kiobel v. Royal Dutch Petroleum (n 736) 1669.
777 Ibid 1673.
778 Ibid Justice Kennedy concurring opinion 1674.
779 Steinhardt (n 18) 843
In October 2017, the Supreme Court announced it would decide whether multinational corporations could actually be sued in accordance with the ATS for complicity in international crimes. With the judgment of *Jesner v. Arab Bank, Plc*, the Supreme Court adjudged that aliens cannot bring claims against foreign companies under the ATS and thus ending the conversation surrounding the possibility of extending ATS to a formal level of corporate accountability.

### 7.2.7 Civil Liability in the Context of Business and Human Rights

As was earlier evidently shown, the allegations against Royal Dutch Petroleum show various problems surrounding human rights and multinational corporate activity. *Kiobel* did not adjudicate the company violate human rights, but focused on the complexity between the application of ATS and foreign companies. Civil human rights litigation generally continues to be viewed as a peculiarly US phenomenon. The problems emerge when foreign nationals are proceeding with civil liability claims for violations which occurred out of the state of the court in question. Even though currently the decision not allow aliens to make claims against foreign companies may seem as step backwards, many of the justifications stated in *Kiobel* seem understandable. To demand a certain level of connection between the case and the US seems justifiable. The country’s court system would otherwise be filled with cases where the only thing national would be the court.

Civil remedies do not set companies accountable for their actions in a similar manner as criminal proceedings, but could provide clear remedies for victims. Yet only if it was on a national level, the impacts of such an evolution of a possible level civil liability could be widespread and begin a new way of conceiving civil corporate liability. Even at its minimum, they provide enough bad publicity for companies to change their manners or shed light on situations that would be otherwise ignored. At their best, they can place a financial burden on a company which will impact the company’s revenue, stock market and shareholder interests. As the company was the party making a profit with illegal actions, it should be the company, not its individuals, who pay compensation to the people who have suffered from such violations. Civil liability attempts to compensate victims of illegal conduct for the harms inflicted on them and to restore to them what is rightfully theirs. Civil liability provides the quickest relief in situations where the nation-state has failed its citizens and the corporate entity has benefited from the lack of protection and control. However based on the discussion in this chapter it

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781 *Kiobel v. Royal Dutch Petroleum* (n 219) Leval opinion.
782 Ibid 37
is clear that civil remedies do not offer at least in the context of the ATS a solution for business and human rights problems.
III DISCUSSION ON THE EVOLUTION OF HUMAN RIGHTS DUE DILIGENCE
8 STATUS OF MULTINATIONAL CORPORATIONS IN RELATION TO INTERNATIONAL HUMAN RIGHTS

8.1 Globalisation and Human Rights

Globalisation can often be an over-used and misinterpreted term.\textsuperscript{783} It can be thought to represent the economic trade liberalisation of the last decades and the diffusion of the open-market trade that followed. From a narrow view ‘globalization occurs when multinational enterprises engage in foreign direct investment to create foreign subsidiaries which add value across national borders’.\textsuperscript{784} From any point of view, globalisation entails a transnational quality of interaction between nations from across the world and makes them more interdependent on each other.\textsuperscript{785} Human rights are also a part of, but separate from globalisation,\textsuperscript{786} as the relation can be seen as mutually reinforcing or as threatening human rights.\textsuperscript{787} The entrance of multinational corporations has positively contributed to severe poverty considerably decreasing in recent decades. In addition, the protection of certain rights, such as physical integrity, has improved through the world.\textsuperscript{788} Of course globalisation has had its negative effect on human rights, as has been pointed out throughout this research, but there has also been positive changes. Rights such as freedom of speech, freedom of political participation and worker’s rights have had a beneficial effect compared to the protection of physical integrity.\textsuperscript{789}

Globalisation has led some to believe that states are not a sufficient source in regulating multinational corporations.\textsuperscript{790} As Theo Van Boven remarks ‘one of the consequences of globalization of the world economy has been the weakening of the role of the state and, on the other side of the coin, an increase in the powers and

\textsuperscript{783} Reinisch (n 151) 76.
\textsuperscript{786} McCorquodale (n 88) 91.
\textsuperscript{789} ibid 846.
\textsuperscript{790} Ratner (n 9) 461; Deva (n 87) 1; Deva (n 611) 42.
influence of non-state entities.\footnote{Theo Van Boven, ‘A Universal Declaration of Human Responsibilities?’ in Bahia van der Heijden, Barend; Tahzib-Lie (ed), \textit{Reflections on the Universal Declaration of Human Rights, A Fiftieth Anniversary Anthology} (Martinus Nijhoff 1998) 76.} Scholars have tried to build ideas of new global governance, excluding the vital role of nations and focusing on international organs instead. Susan Strange, for example, has attempted to argue that, based on their political and economic power, multinational corporations could rival the power of nation states.\footnote{Susan Strange, \textit{The Retreat of the State} (Cambridge University Press 1996) 16–43.} In her argument, the authority and power of a state is diminishing as exclusive authority belonging to the state is now shared with other actors.\footnote{ibid 82.} States are not the only source of legislation as illustrated throughout Part II of this research. The current form of the so-called \textit{meta-regulation}, which encompasses legal, non-legal and self-regulation, demonstrates that vertical and hierarchical state-enacted law is not the only source of important regulation.\footnote{ibid 210–211.} The ‘hollowing out of the state’ in this view is happening due to the growing number of governance networks consisting of states, business entities, NGOs and individuals.\footnote{ibid 211.} In this new form of governance, state action can have a greater or lesser role depending on the topic.\footnote{ibid 189.}

The power has been subdivided, as Susan Strange expresses, firstly from weak states to powerful ones and secondly from states to the markets, whilst some power has altogether disappeared from state actors.\footnote{ibid 189.} The power states possess can be seen to illustrate the capability to regulate multinational corporations, which is often directly linked to their influence in the world economic order.\footnote{Wells and Elias (n 91) 146.} This means that all states have lost levels of ingrained power to the globalised market economy and its actors, but specifically weak states are at a clear disadvantage in today’s world order. It is clear that through globalisation, international trade liberalisation and privatisation, certain amounts of power that sovereign states used to possess have been lost. This does not however mean that the power lost by states has directly flooded directly and solely to multinational corporations. The distribution of power has also made supranational, international and non-governmental organisations and also the individual more powerful and their role more substantial. For example, countries belonging to the EU have abjured levels of sovereignty and power to the EU, but it has not made them any less meaningful as states. Power distribution might adjust levels of power between actors, but not abolish the powers of the state.
This research has not demonstrated that multinational corporations would in any way be comparable to nation states in their role in the current global order. The loss of power has not meant that the state is not still the most important actor in the international community. This can be based on four conclusions. Firstly, even with all their abilities, multinational corporations are non-state actors and even with any level of international legal personality they are unable to act in a role comparable to state entities. There is no need to re-establish the international order or the system of international law by establishing state and non-state actors as similar actors in the international arena. States have and should continue to have the primary responsibility in the protection and promotion of human rights. Even with the political and economic power multinational corporations possess, they cannot and should not contend for the role of the state. This does not mean that they could not be viewed to have some level of international obligations, which will be discussed in Chapter 9. All such standards should however be kept clearly separate from states.

Secondly, a multinational corporation exists as a composite of legal companies due to domestic laws stating their requirements to be registered and considered a company. Each company acts in accordance with the laws of each jurisdiction. The existence of a company is built from domicile corporate law and hence on the concept of domestic law. States also act as the jurisdictions in which non-state actors operate. States set the borders for their jurisdictions. The political and economic order of the world is built on the assumptions of domicile jurisdictions. The relation between a company and the domestic laws of the jurisdiction it operates in are therefore indispensable.

Thirdly, national states control transnational regulation and thus their governments are the primary actors in global economic governance. International law as a horizontally aligned law system is made by states for states, and it is state actors that define its requirements and more importantly its actual effects. States are currently the bearer of human rights duties directly and the human rights regime is dependent on the willingness and capability of states to enforce those duties. Ian Brownlie noted that states would continue to be the primary actor until and only ‘if national entities, as political and legal systems, were absorbed in a world state’. To diminish the role of the state in human rights would diminish the entire international law system and thus human rights law in the process. This does not however mean that the international order could not simultaneously incorporate other actors, but this must occur without limiting the role of the state.

800 Brownlie (n 53) 58.
Globalisation has led to the weakening of the powers of states in some aspects, but this has not been the case in relation to business and human rights. Trade liberalisation and the global economic order have not made the state less important, but highlighted its role as the primary bearer of the international order and the obligations granted by it. When issues such as climate change or the global refugee movement arise, the role of the state has actually only increased. In the field of globalisation and environmental law, evidence points to the fact that the role of nation states has not decreased either. Actually globalisation has maybe even enforced the role of states as certain states share common goals and values. Even though some have expected international organisations to carry these tasks, it is still in the hands of intergovernmental cooperation between nations and their governments. Similarly, even though various actors act in the sphere of human rights, the role of the state has not deteriorated.

8.2 State Duty to Protect in Relation to Business and Human Rights

The SRSG noted in 2008 that all relevant actors ‘must learn to do many things differently’ and all developments should happen coherently and cumulatively. The role of states is vital in ensuring that corporate entities play a central role in the protection of human rights. States and companies both play a role in fixing the current regulative problems, and their regulation must exist in harmony. If mandatory regulation is the goal for business and human rights, all actors need to evolve together with states being the focal and primary actor.

Following the Draft Articles, actions by companies could be attributed to the state when a company exercises governmental authority in accordance with Article 5 or a company acts directly under the control of the state in accordance with Article 8. Privatised entities which act in accordance with a legal mandate from the government who exercise governmental tasks could therefore be seen to act as an actor of the state. Similarly, in accordance with Article 8, companies act under the direct supervision and control of states. For example, acts of security

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802 Protect, Respect and Remedy Framework (n 238) 189.
forces and private security companies could be attributed to states when they act with governmental authority or under the control of a state. As shown in Section 2.3.2, however, the threshold is rather high for such attributions. In the above-mentioned situations there is a move away from the realm of non-state actors to discuss whether a non-state actor was in practice acting as a state actor. The interest of this research is clearly in when multinational corporations act as non-state actors without involvement from any state organ and the capabilities of states to regulate such behaviour.

As noted in Section 2.3.1, the duty to protect is widely accepted. States have the duty to ensure rights are also protected in the private sphere. States should, based on their duty, take all necessary and reasonable steps to protect individuals in their territory from violations, address violations when they occur and offer remedies to victims. The Guiding Principles follow this view by issuing the primary responsibility in human rights protection to states, with companies having a baseline expectation to respect rights. Similarly, all other international business and human rights instruments set obligations to the state to ensure rights are protected and respected. The Treaty Draft specifically centres around the state’s duty to ensure rights in the private sphere. As discussed in Section 4.4, the Treaty Draft specifically uses the terminology of the duty to protect and lays out its key characteristics. If the treaty was to evolve as currently depicted in the Treaty Proposal, the duty in relation to business operations would be clearly and distinctly enacted in an authoritative international treaty.

The direct responsibilities of multinational corporations will be focused on in Chapter 9. The following will discuss the state’s vital role in forming mandatory business and human rights regulation and how this is formed on the familiar ground of the duty to protect. However the text will conclude that the duty to protect will include an extraterritorial feature to actually assist in solving the business and human rights dilemma that can be found with home and host states.

### 8.3 Extraterritoriality and the State Duty to Protect

Government gaps continue to be at the core of business and human rights complexities. Human rights violations typically occur in host states that are unwilling to address infringements. Home states that might wish to tackle such issues are unable to do so as sovereignty, which depicted in Chapter 2, prohibits states from extraterritorially regulating multinational corporations from their own jurisdiction. The problem emerges that home states cannot extraterritorially

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804 Creutz (n 128) 79.
regulate their multinational corporations over state borders. However after reviewing the current domestic regulative measures depicted in Chapter 6, states are increasingly attempting to find solutions by using domestic legislation with a level of extraterritorial reach.

The CESR has noted that states should ‘prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law’. States should therefore ‘take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant’. Similarly, the CESCR notes that ‘state parties have to respect the enjoyment of the right to health in other Countries, and prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means’. The CESCR therefore asks states to have an extraterritorial level to their responsibilities of the duty to protect and to apply this responsibility to multinational corporations. This means that the responsibility extends from their jurisdictions to a global responsibility.

Extraterritorial regulation was discussed in Section 2.1.3, which illustrates that in certain situations states can enact domestic laws with extraterritorial effects. According to Peter Muchlinski, three of the discussed acceptable justifications of extraterritoriality can be used in relation to multinational corporations: the nationality, the protective and the objective territorial principle. Without an in-depth conversation on the other plausible principles, the use of the national principle is widely used in the various domestic laws that have been reviewed. The nationality principle can be used through shareholder nationality of the parent to exclude the foreign nationality of subsidiaries to follow home country standards.

The state’s right to regulate human rights norms of companies extraterritorially by imposing and enforcing an exterritorial law has been defended by Surya Deva. Deva argues that business and human rights regulation implements international policies instead of national ones and this it is also more acceptable to have domestic laws with extraterritorial reach than typical domicile laws. The same human rights

805 General Comment No. 14 (n 125) 39.
808 Muchlinski (n 149) 126.
809 Muchlinski (n 97) 126.
810 Deva (n 611) 40.
811 ibid 48.
instrument should be anyway enforced based on the duty to protect in home and host states, which make the extraterritoriality more substantiated in this sense. In this aspect, the less universal the policy becomes, the less acceptable using extraterritoriality becomes. When both the extraterritorially regulating state and the country which is impacted by the foreign extraterritorial policy share a common value encompassed in the policy, the extraterritorial feature may be thought of as more acceptable.812

Others argue that home states may regulate their companies extraterritorially if the requirements do not breach the laws of the host state.813 This applies to home states which can regulate the parent ‘in relation to the extraterritorial action of a subsidiary’.814 In many states, national laws can actually protect rights or the environment, but national enforcement by the state is lacking. For example, Nigeria has strict environmental laws, but has not enforced them. Extraterritorial laws, which discuss fundamental rights, should not therefore breach the laws of any country, which would make their extraterritoriality acceptable. Not all rights are however universally accepted. For example, equality between the sexes or non-discrimination against LGBT individuals in hiring practices of companies may violate domestic laws in countries where women are not allowed in the workforce or laws forbid homosexuality. Similarly, not all nations accept unionisation and hence organisation rights may violate domestic laws. In these situations, an extraterritorial domestic law requiring non-discrimination or rights of unionisation could not have an extraterritorial effect.

Extraterritorial laws obviously may be seen as Western countries enforcing their domestic view on human rights in other parts of the world.815 Human rights are already a politically charged field and the strengthening of Western domicile courts could lead to international political conflicts between countries not only fighting for jurisdiction, but also attempting to restrict each other’s jurisdiction. The best example of the watchdog phenomena can be seen in domicile US courts. Although the US itself is not a party to various key human rights treaties and has not accepted the Rome Statute and hence the jurisdiction of the ICC, it has been handling international human rights cases in the form of torts under the ATS.

812 Muchlinski (n 97) 175.
813 McCorquodale (n 88) 99.
814 ibid 100.
8.4 Domestic Regulation with Extraterritorial Effects

Extraterritoriality is not a completely new idea in business regulation. Multinational corporations are regulated with extraterritoriality in a variety of international and national regulative measures. National legislation in the US, for example regarding anti-trust and securities law, has had clear extraterritorial features. Internationally, the OECD’s Convention on Combatting Bribery of Foreign Officials in International Business Transactions, the UN Convention Against Corruption, The UN Convention on financing of terrorism, and the UN Convention on Transnational Organized Crime require statehoods to impose criminal sanctions on legal persons. If such is not plausible under domicile law, they are obliged to find other sanctions in accordance with their domestic legal principles. Corporations can hence become subject to extraterritorial jurisdiction for such offences. The UN Convention on Financing of Terrorism and UN Convention on Transnational Organized Crime actually solely apply to situation where the offence involves more than one state.\textsuperscript{816}

The OECD Bribery Convention and the UN Convention against Corruption are good examples of regulating extraterritorial jurisdiction regarding corporate conduct. The Bribery Convention offers national jurisdiction in accordance with territoriality\textsuperscript{817} and the horizontally aligned enforcement is discussed in Article 4, which makes clear that states are responsible for extending jurisdiction for their nationals for offences committed abroad. Jurisdiction thus becomes extraterritorial in matters regarding bribery and is enforced by domicile regulation. The national mechanism can be founded upon criminal or civil administrative law.\textsuperscript{818} Individuals and legal persons should similarly be held liable in accordance with the OECD Bribery Convention.\textsuperscript{819}

Within the OECD Bribery Convention context, states must cooperate in order to find one appropriate jurisdiction with cooperation. Recognisable multinational corporations have found themselves in multi-jurisdictional bribery cases in recent years in which the Bribery Convention has facilitated the cooperation.\textsuperscript{820} Siemens was part of bribery investigations in the cooperation of Germany and the US in 2007. Siemens had committed systematic bribery, which was estimated at more

\textsuperscript{818} ibid 6–7.
\textsuperscript{820} Unlike the OECD Convention, the UN Corruption Convention does not ask jurisdiction to centralize.
than $1.4 billion to public officials in sixty-five countries around the world.\textsuperscript{821} The scale of the bribery was considered ‘unprecedented in scale and geographic reach’.\textsuperscript{822} The legal assistance of German and American officials was given under the OECD Bribery Convention.

The SRSG on the issue of human rights and transnational corporations and other business enterprises notes that extraterritorial jurisdictions have not been used by states in regard to business and human rights, although it has been widely accepted in certain domains such as anti-corruption.\textsuperscript{823} The link between companies and bribery is rather obvious, as the aim of bribery is to better business opportunities within the state. Corruption is a deep-rooted problem in various countries around the world where it is considered part of culture, and historically foreign businesses have operated in these countries by means of corruption. In developing countries, corruption has far-reaching effects as it causes problems in its surrounding society as markets become illegitimate and distort. In the US, President Obama has called corruption ‘a profound violation of human rights’.\textsuperscript{824}

### 8.5 The Future of the Duty to Protect in Relation to Business and Human Rights

Business and human rights regulation with a direct extraterritorial reach has been attempted in the US and Australia,\textsuperscript{825} but both failed to become valid as noted in Sections 6.1 and 6.3. Other domestic laws however show levels of extraterritoriality. The Modern Slavery Act specifically asks companies to consider their global supply chains for forced labour and they are required to report on their enquiries. Similarly, the Dodd-Frank Act requires companies to consider the origin of their minerals. Both do not judicially require behavioural changes outside the borders of the UK and US, but do ask companies to look at their supply chains abroad. The French due diligence laws goes even further by demanding due diligence in supply chains. They are domestic laws which require companies to follow their standards and requirements abroad and hence have an extraterritorial reach.


\textsuperscript{822} ibid.

\textsuperscript{823} Protect, Respect and Remedy Framework (n 238) 46.


\textsuperscript{825} See more chapters 6.1. and 6.3.
It is obvious that although states are not required to extraterritorially regulate companies’ human rights obligations, they are not prohibited from doing so, either. The Guiding Principles requests states to regulate corporate obligations with domestic legislation. These regulative measures could have extraterritorial reach and should if they truly wish to require companies to conduct proper due diligence. If the Treaty follows the ideas of the Treaty Proposal, states would be required by an international treaty to comply with their duty to protect, which may even require states to enforce this duty extraterritorially. Domicile regulation could be a plausible choice for extending the responsibility of multinational corporations in the face of the lack of international regulation.

Extraterritorial home state regulation may provide more of a viable option than host regulation.\(^{826}\) By using domicile extraterritorial regulation, the home state can proceed with human rights violation claims even when they occur outside their territory. In matters of corruption, effective domicile extraterritorial regulation existed before the international initiatives. Domicile courts could solve the problems associated with international tribunals and international law in general. International structures take time to change in accordance with the world and the global problems it is facing. Extraterritorial jurisdiction could provide remedies that the international community cannot currently offer.

States using extraterritorial domestic regulation to regulate the actions of their own national multinational corporations abroad could have widespread effects even without the ratification of a treaty requiring them to comply with their duty to protect extraterritoriality. If powerful states with vast market power regulate their national companies, this will have global effects in two aspects. Firstly, already with solely certain market areas such as the US and the EU extraterritorially regulating companies in relation to human rights, a portion of companies will fall within the scope of such regulation. It is important to note the presumption that the world’s largest and thus most powerful multinational corporation and business actors originate from the US, the EU and Japan. This is obviously not the case with the ever-increasing economic powers of China and India and the fast-developing countries in Latin America and Africa, which are already generating some of the world’s leading companies in a variety of sectors. This however brings us to our next effect, as secondly the incorporation of extraterritorial standards in one jurisdiction may and can lead to similar policy changes in other countries. This will be further discussed in Chapter 10.

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\(^{826}\) Deva (n 611) 51.
9 HUMAN RIGHTS OBLIGATIONS OF MULTINATIONAL CORPORATIONS

9.1 Multinational Corporations in International Human Rights Law

The research has now concluded that states have the primary duty to protect the human rights of individuals within their territory and to some extent also outside their jurisdiction. It is however much more difficult to find a clear conclusion on whether companies have obligations or the obligations of multinational corporations. Without clear standards to follow, companies which would want to act ethically may struggle to find appropriate ways in which to operate.\textsuperscript{827} This research emphasises the need to find whether there exist international norms directly addressing the responsibilities of companies in relation to human rights. Even if the research concludes that states have the primary responsibility, we must still answer the question, can multinational corporations still possess some or any obligations in relation to human rights? First the chapter will review whether companies have obligations overall and then attempt to find any specific obligations which may have emerged.

There exist three theories in promoting obligations directly towards businesses. Firstly, some would wish to demand direct legal accountability of multinational corporations through international legal norms. A number of scholars have made the case for distinct and direct judicial human rights obligations.\textsuperscript{828} Even in this situation, states would continue to have clear international obligations, which would remain separate from other actors. The second alternative is accepting the primary role of states in human rights protection, but allowing the establishment of a simultaneously secondary responsibility of multinational corporations with international norms. This is similar to the idea presented in the UN Norms, which continued the traditional vertical aligned status of human rights in relation to the primary obligations of states, but noting the secondary responsibility of multinational corporations within their sphere of influence. Compared with the first possibility, the obligations of companies may be less direct and more attached to the sphere of influence or complicity than being binding judicial obligations.

\textsuperscript{827} Deva (n 87) 18.
The third alternative is to continue to solely regulate companies through domestic law. The state duty to protect plays the vital role of ensuring that rights are also protected in horizontal relations. Even this viewpoint opens up the possibility to include a level of legal obligations to states directly from international law. David Bilchitz attempts to define the obligation of multinational corporations through the duty to protect of states. In accordance with international law, states are demanded to protect individuals from violations of their rights and thus companies must be obligated themselves not to violate rights, as, ‘if the third parties were not bound by international law to comply with such requirements, then there would be no reason for the state to ensure that they do so’.

9.2 Multinational Corporations as Subjects of International Human Rights Law

The research has illustrated that multinational corporations can possess a certain level of international legal personality. This is based on the conclusion that companies are able to possess rights, as shown in Chapter 3. This does not denote that multinational corporations would possess the same range of rights as individuals. In the context of the ECHR, they possess at least some specific rights and theoretically could possess all international human rights. As the ECHR does not exclude any of its rights from legal persons, it is plausible that the ECtHR could extend the rights of multinational corporations even further than currently. It is evident that multinational corporations are capable of possessing rights.

The research has however not indicated in previous chapters that clear judicial duties exist in international human rights law. This does not mean that multinational corporations would be unable to violate rights. The fact that multinational corporations do not have legal liability in direct relation to international human rights law for human rights violations does not mean that they have no responsibility in relation to them. The opposite of liability is immunity, and correlative to it is power, but judicial liability only represents one aspect of responsibility. It was demonstrated that companies could violate international law as illustrated in Chapter 3. Multinational corporations can thus violate a variety of rights and it is even safe to say that they can have a direct or indirect impact on all human rights in a variety of ways. Violation of rights may occur through complicity or through the company acting as an instrument in abuse.

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829 Bilchitz (n 454) 208.
830 Ibid.
831 Hohfeld 1913 (n 274) 53.
Based on these two discussions, it can be contended that multinational corporations could possess a certain level of international legal personality in relation to their rights and duties. As international legal personality could extend to company actors, this means that they could be bound by international law and they could possess rights and could be granted judicial obligations by international law in a manner compatible with the first possibility demonstrated earlier. Extending judicial obligations directly to multinational corporations through the authority of a treaty without the interference of domestic law or state enforcement is thus plausible in theory and also in practice. That multinational corporations can possess international legal personality does not mean that they would simultaneously contend for the role and duties of a state. The differences between state and non-state actors, as illustrated in Chapter 2, may not be as vast as they have been, but they are still divergent actors with utterly different functions in the world.

Just because something is plausible it does not make it desirable. As illustrated in discussions surrounding the UN Norms in Section 4.2 or the Treaty process in Section 4.3, it becomes evident that states do not wish to extend direct international obligations to companies in relation to international human rights law. This could be due to fears that the extension of subjects would ultimately lead to a decrease in state power and status. Moreover, multinational corporations have been vocal in their desire to pursue ethical goals through international soft-law standards or domestic regulation, but without international law enforcing mandatory global requirements on their operations. Without such support, the possibility of even more fragmentation in regulation becomes increasingly likely.

9.2.1 Review of Current Obligations

The regulation of multinational corporations has derived from internal and external sources which depict the internal self-regulation of companies and the external regulation of states and international organs, on institutional, national, regional and international levels. The UN and the OECD have been the main sources of international regulation and were the focus in Chapter 4 in relation to the review of international soft-law mechanisms. It is apparent that none of the current international instruments are in a judicial sense binding. As the UN Norms do not even hold any legal status or used by companies, they will not be discussed any further in this chapter, but we instead discuss the Global Compact, the Guiding Principles and the OECD Guidelines. The current treaty negotiations will be discussed in relation to the current Basis Draft, and it is important to note

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832 Deva (n 611), 42; Deva (n 87) 1; 4.
that the treaty does not at this time have any clear solution on the its obligations, status or even the outcome of the negotiations.

Similarly, international instruments do not carry any sanctions or enforcement mechanisms. The Global Compact, the OECD Guidelines and the Guiding Principles are non-enforceable on the international level. Neither the Global Compact or the Guiding principles have an effective enforcement mechanism. The remedy solutions of providing a NCP are mandatory for states in relation to the OECD Guidelines, but they have a wide scope of leeway in how they comply with the requirements. NCPs also struggle with problems with transparency and cooperation as noted in Section 4.4. Even though the Guiding Principles dedicate their third pillar to remedies, the third pillar has been criticised for its implementation not making clear progress in practice.833

None of the international instruments that were reviewed directly impose specific obligations on multinational corporations. The Global Compact is merely a soft-law mechanism which gives general standards for companies to include in their consciousness and introduce into their operations. Neither of the human rights principles from the Global Compact depict any specific requirements or standards. Both these principles however demand some insight into the company’s operations to ensure that violations do not occur and thus require due diligence on the company’s part. Supporting and respecting human rights and not being complicit in abuse could be deduced already from the Universal Declaration, which can be assumed to include multinational corporations as organs of society in its scope as illustrated in Section 2.2.3. Obviously as a soft-law instrument this responsibility is not streamlined into an enforceable binding obligation, but exists as a general expectation of multinational corporations as well.

The Guiding Principles and the OECD Guidelines have more depth and specifically more clear and precise human rights standards to follow than the Global Compact. The duty of the state remains the core of the Guiding Principles. The Guiding Principles do however set a baseline expectation for companies to respect human rights, but the actual content of the corporate responsibility in the second pillar is largely based on due diligence. The due diligence process and requirements are set out in the Guiding Principles and in its Commentary. The current Draft Treaty has a surprisingly limited idea of the specific obligations of multinational corporations. Specifically it mentions due diligence when proposing that companies adopt internal policies for due diligence even without using the terminology and that states require companies to implement and adopt due diligence processes. Even if the Treaty is built more on the strengthening of the Guiding Principles, it

833 Cassell and Ramasastry (n 456) 9.
will still play a role in enforcing human rights due diligence (from here HRDD) due to the significant role due diligence plays in the Guiding Principles.

As the OECD Guidelines were specifically made compatible with the Guiding Principles, they also focus on due diligence as the responsibility of companies to ensure their adherence with human rights. Neither of them set any judicial obligations, but in both the due diligence requirement is at the centre of corporate responsibility. Apart from the OECD Guidelines, the OECD in 2011 also produced their Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. The OECD Guidance does not specify that its due diligence requirements are human rights due diligence, but it is evident that it measures adverse human rights impacts in accordance with the ideas of HRDD.834

When the research reviewed the examples of domestic business and human rights instruments, a similar due diligence requirement became apparent. The Modern Slavery Act requires companies to report on the findings or mechanisms related to slavery and human trafficking in their supply chains as plausibly will the similar Australian modern slavery regulation. The Swiss and French laws obviously specifically require due diligence from larger national companies and express sanctions on failure to do so. Similarly, the Dutch due diligence law will require Dutch companies to conduct due diligence on child labour. The Swiss, French and Dutch legislation focuses firstly on due diligence and reporting as an aim to enhance transparency on the issue. The UK Modern Slavery on the other hand focuses first on reporting with an expectation of due diligence required in order to be able to compile a statement on the matter. Some, such as the UK and Dutch legislation, attempt to tackle due diligence from a single problem like forced or child labour whilst the Swiss and Dutch regulation has more of a general concept. The French law and the EU accounting directive set different threshold for companies to be in the scope of the law unlike the Guiding Principles, which asks all companies to respect human rights regardless of their size. All the instruments specifically require multinational corporations to conduct some level of due diligence or at least be transparent if they have decided against conducting such a process.

The reviewed conflict mineral regulation is also centred around due diligence. The Dodd-Frank Act may demand firstly reporting, but simultaneously demands supply-chain due diligence in order for companies to be able to determine whether they must file reports in accordance with Section 1502. Obviously the due diligence is focused solely on minerals and the area of Congo and its surrounding areas. The EU conflict mineral regulation will similarly primarily require reporting, but in order to fulfil such demands, companies must conduct due diligence within

834 Cullen (n 675) 759.
their operations. Similarly to Section 1502, the focus is on minerals, but the EU regulation will have a larger geographical scope than its American counterpart.

Human rights due diligence can be distinctly found in the review of this legal research. There appears to be at least an expectation of due diligence in international initiatives, whilst a judicial obligation of due diligence exists in domestic legal measures. In certain situations, the due diligence acts as the background for the mandatory reporting requirement, whilst in others the due diligence is the actual requirement with additional reporting obligations. Scholars have noted that a corporate responsibility is emerging at least for companies to exercise levels of due diligence towards their actual and potential adverse human rights impacts.835 In certain instruments, the requirement may be rather vague and general, whilst in others it is more specific. Also some due diligence responsibilities are in relation to a specific problem, such as forced or child labour, and attempt to tackle that one issue with companies focusing their due diligence on the specific topic.

9.3 The Obligation of Human Rights Due Diligence

It is now apparent that the interest of this research should be the emerging terminology and concept of a specific model of due diligence in business and human rights, which is more clearly articulated as HRDD. HRDD does not have the same meaning that due diligence has in corporate or international law. Due diligence in relation to the state’s duty to protect has already been discussed in Section 2.3. It illustrates the requirement of states to take all necessary and reasonable steps in order to protect the human rights of individuals from private actors. In the corporate law context, due diligence is specifically used by corporate law lawyers in relation to initial public offerings and mergers and acquisitions. This process attempts to find the plausible business risks in the company and review any plausible risks and red flags that may appear. Due diligence in these circumstances is done typically by corporate lawyers without the involvement of human rights specialists. Companies are not asked to report on human rights under the EU Prospectus Directive, nor do they typically list human rights as a specific category of due diligence in mergers and acquisitions.

HRDD however differs from corporate due diligence specifically because it does not focus on risks, but on impacts. More specifically, HRDD does not focus on

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human rights risks, but on human rights impacts. HRDD does however establish a link between corporate law and human rights law, which was thought to be non-existent. In practical terms, HRDD has created a common language between the corporate and human rights sides. Due diligence has common terminology which human rights specialists and corporate officials will understand and defines a process which both sides can understand. In international law and corporate law, due diligence is done to avoid liability, as it demonstrates the level of care the state or company took to fulfil its obligations either to take appropriate action or to identify risks.

The Guiding Principles truly started the conversation on HRDD and set corporate responsibility as the responsibility to act with due diligence to avoid infringing rights. Even though the corporate responsibilities of the Guiding Principles were largely built on the concept of HRDD, they failed to define the term. The corporate responsibilities in the Guiding Principles are distinctly linked and built on due diligence. There is however no legal obligation to conduct a due diligence process in any manner.

John Ruggie discusses due diligence in his 2008 Report as ‘the steps a company must take to become aware of, prevent and address adverse human rights impacts’. The Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, discussed in Chapter 7, determines due diligence as an ‘an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict’. Due diligence establishes a standard of ‘what a company could reasonably be expected to know under the circumstances’. HRDD therefore goes further than merely abstaining from doing harm.

Unlike corporate due diligence, HRDD is an on-going and dynamic process and not linked to a specific time or event as corporate due diligence is.
the United Nations High Commissioner for Human Rights has defined HRDD as ‘an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights’.845 HRDD, unlike corporate due diligence, therefore should not be an one-time occurrence, but a process the company continues to use as its operations change over time. HRDD should therefore also be operationalised in all levels of the company and throughout its decision-making.

HRDD will not be similar with all actors, but will change based on ‘the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations’.846 HRDD is specific in its context, as its specific characteristics will vary based on the country in question and the nature of activities of each business.847 As noted by the Special Rapporteur on the Rights of Indigenous Peoples, ‘due diligence is not limited to respect for the domestic regulations of States in which companies operate, which are inadequate in many cases, but should be governed by the international standards that are binding on those States and on the international community as a whole’.848 Companies need to be aware of the specific human rights issues in the countries in which they operate and take into account the human rights impacts their operations may have in that specific area.849 For example, conflict zones demand special attention from companies before they even decide to operate in the area. Similarly risk countries or risk raw materials should have special attention in the process. Ruggie notes that failed states also demand more of a proactive stance, failed states being categorised as states with an absence of the rule of law, suffering from governance breakdown or in a situation of sustained violence.850 Companies should use the leverage they have in this situation, but as noted in the Framework ‘should not be held responsible for the human rights shortcomings of their sovereign hosts, even if they possess leverage, nor is it desirable for such entities to act whenever and wherever they possess influence’.851

In accordance with the Guiding Principle, HRDD can be categorised into three phases: identifying human rights impacts; acting upon the findings and addressing issues; and tracking and communicating how impacts were addressed. HRDD

846 The UN Guiding Principles (n 373) 17.
847 Cullen (n 675) 757.
849 Protect, Respect and Remedy Framework (n 238) 20.
850 ibid 48.
851 ibid 69.
encompasses all of these components. HRDD is not therefore merely assessing impacts, but is also about the prevention and mitigation of impacts. The OECD Guidelines after their 2011 revision include due diligence requirements. The revision, as noted previously, was based on making the OECD Guidelines compatible with the Guiding Principles. The Guidelines ask companies to ‘identify, prevent and mitigate actual and potential adverse impacts’, which should be an on-going process. Similarly to the Guiding Principles, companies should assess their impacts; act on those findings; and track and communicate how the impacts were addressed.

The Guiding Principles insist that due diligence will not exclude liability from companies. In earlier reports Ruggie had discussed the relation of complicity and due diligence in which companies can avoid complicity by employing due diligence. The aim of HRDD should not be to avoid liability, but for companies to be able to truly understand their adverse human rights impact and to address their corporate behaviour based on the findings. If companies wish to respect rights so that rights exist in practice, they must first understand how they impact rights in order to be able to change their operations when needed. An important part of HRDD is addressing any issues that arise. There is however an underlying problem, as companies may fear reacting to problems they have found as it could be seen as a level of acknowledgement or admission of guilt.

9.3.1 The Process of Human Rights Due Diligence

The Guiding Principles ask companies to consult with stakeholders, analyse impacts in Principle 18; address and mitigate adverse impacts with appropriate action in Principle 19; track the response to impact in Principle 20; and communicate to stakeholders on how impacts have been addressed in Principle 21. Therefore in general, HRDD includes adopting human rights policies; conducting on-going human rights impact assessments; integrating human rights in all levels of the company by for example training; and tracking and reporting on performance. HRDD should, according to McCorquadale and others, for example include initial identification and assessment of risks with HRIA; prioritisation of impacts; development of action plans; strategic direction; integration; inclusion in contract
provisions; establishing codes of conduct and internal policies; training personnel; and ensuring effective grievance mechanisms.\\(^{857}\)  

The Due Diligence Guidance builds a five-step plan for companies to conduct due diligence. First, companies built a strong company management system. This includes establishing grievance mechanisms, publishing a company policy and engaging with suppliers. Secondly, companies identify and assess risks in the supply chain. Thirdly, companies design and implement a risk management strategy to respond to any identified risks and monitor the strategy in practice. Fourthly, companies take part in independent and competent third-party audits on the supply chain. Fifthly, companies report annually on their supply-chain due diligence.  

Clearly human rights impact assessments (from here HRIA) are an important part of HRDD. The Guiding Principles themselves require companies to assess impacts and the HRIA displays a formulation of process for the assessment. HRIA is the ‘assessment of the affairs of a company which reveals (potential) human rights impacts of the company’s activities, leading to recommendations on how to improve performance’.\\(^{858}\) A HRIA studies the actual relation of specific business operations and chosen human rights indicators. Indicators should typically be chosen as all human rights in accordance with UDHR. Importantly, during the HRIA the negative and positive impacts a company has in its surrounding society can also be taken into account. Therefore unlike a risk assessment a HRIA does not simply carve out sectors or countries, but attempts to understand the true and actual impact of business operations to specific human rights. There are number of instruments to be used for HRIA, such as the Human Rights Compliance Assessment by the Danish Institute for Human Rights and the UN Guiding Principles Guidance Framework, but other models are often used as well. The process of HRIA is unregulated, which means that various models exist with different levels of authencity.  

Parent companies should in accordance with the “business relationship” stipulations in Principles 13 and 17 exercise due diligence towards their subsidiaries.\\(^{859}\) The Guiding Principles discuss leverage, which is defined as ‘the ability to effect change in the wrongful practices of an entity that causes a harm’, as the defining nexus for companies to attempt to prevent and mitigate the adverse impacts of subsidiaries.\\(^{860}\) The OECD Guidelines specifically note that due diligence

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857  McCorquodale and others (n 836)  224.
858  ibid 441.
859  Doug Cassel, ‘Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence’ (2016) 1 Business and Human Rights Journal 179, 186.
860  The UN Guiding Principles (n 373) 19 Commentary.
should extend to the entire ‘enterprise group,’ which also includes actors in the supply chain and other business partners.

For example in regard to conflict minerals, supply-chain due diligence demands that companies track the supply chain of minerals, found a database, independently audit the process and monitor the chain with an auditor. A complex or lengthy chain does not offer an excuse for companies not to conduct HRDD, but if ‘business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all’. The depth of HRDD into the supply chain may vary on the available possibilities; range of human rights issues; best practices of the industry; and the availability of certified operations. Supply-chain due diligence requires companies to have a level of control over the actors in that supply chain. For example, leverage as used in the Guiding Principles sets a fair expectation on the extent companies need due diligence. The Protect, Respect and Remedy Framework notes that ‘companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence’.

9.3.2 Human Rights Due Diligence in Practice for Multinational Corporations

In a study conducted by Robert McCorquadale and others, corporate respondents were asked to consider HRDD within their operations. Out of 150 responders almost 50% had never conducted a deducted HRDD or HRIA. The importance of properly conducting a dedicated HRDD or an HRIA directly is illustrated in the results of the process of HRIA and HRDD: ‘nearly 80 per cent of companies using dedicated HRDD do identify adverse impacts, whereas over 80 per cent of companies using non-specific HRDD do not identify adverse impacts’. It is now evident that companies with dedicated HRDD processes did not have more adverse impacts in practice than the ones that did not in a way that would explain such an extensive difference in the figures. Companies which conduct dedicated

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862 Liberti (n 508) 39.
863 Hofmann, Schleper and Blome (n 692) 3.
864 The UN Guiding Principles (n 373) 17 Commentary.
865 Lambooy (n 837) 445.
866 Protect, Respect and Remedy Framework (n 238) 68–69.
867 ibid 205.
868 ibid 207.
HRDD instead of including human rights in some form of due diligence are much more likely to uncover adverse human rights impacts.869

The research shows that companies are undertaking HRDD processes in growing numbers and the ones who conduct dedicated HRDD processes will be able to find adverse impacts. The truth of the matter is that it is likely that most companies, if not all, will uncover some level of direct or indirect adverse human rights impacts. All companies have some level of direct or indirect negative impacts. This does not denote them abusing or violating rights more than others or them being complicit in human rights violations. The essence of HRDD is indicating to companies where and how they are causing adverse impacts and thus allowing them to address all such impacts. Truthfully, the due diligence requirement does not demand things that most companies do not already do on some level. For example, supply-chain due diligence, human rights impact assessments, human rights training and reporting on non-financial information are not new to many multinational corporations.

Companies that have not undertaken HRDD might do so out of fear that HRDD processes will uncover impacts and problems which will make them liable for these violations. HRDD makes the knowledge of the company clear and legally visible and they cannot hide behind the excuse of being unaware of the actions of, for example, their subsidiaries. However this might not be the clear case. Firstly the hope is that the adverse impacts decrease through HRDD as companies will become more aware of the impact they cause and the impacts which have occurred are quickly revised. In situations of human rights violations it is in the interest of both parties, the company and victim, that the victim goes through appropriate remedies in order to have a legally enforceable verdict. Secondly in some instances HRDD there is a relation between lower litigation cost and due diligence, at least when using due diligence as a defence against claims under the ATS.870 HRDD may also offer testimony and verification that the company has taken reasonable steps in examining its impacts and risks.

One of the most controversial but most critical parts of HRDD is supply-chain due diligence. Companies fear that they will be expected to know all aspects of their complex supply chains. Current HRDD requirements do not expect this, as the Guiding Principles indicate. However it is important to ask whether reasonable knowledge of subsidiaries and supply chains is too stringent a requirement. If adverse impacts can be found through common HRDD processes, this will lead to most companies wanting to use reasonably acceptable means try to uncover them. It is important to set fiscally reasonably requirements regarding HRDD and

869 ibid 221.
870 Dhooge (n 855) 488.
its scope, extent and expectations. This means that the closer the relationship is between the company and the actor, the more HRDD can be required.

The more global and economically powerful a multinational corporation is, the more it should be expected to understand and assess its adverse impacts. The HRDD and specifically HRIA does however break through the corporate veil better than other types of obligations may, as it specifically relies on companies assessing to a reasonable scope all plausible adverse impacts, which will include their subsidiaries, business partners, supply chain and any other party it may conduct business relations with who may be assessed and present adverse impacts.

HRDD always includes not only assessing, but also as addressing the adverse impacts. In this manner, a pivotal point can be made in the conclusions of this research. Through the due diligence requirement, companies are subversively asked to address their adverse human rights impacts and thus respect human rights. HRDD therefore is not solely about conducting a HRIA, and thus knowledge of impacts or understanding how business operations may cause adverse impacts on companies’ stakeholders, but actually HRDD asks companies to address these impacts and redress any problems that may have been exposed. Therefore HRDD actually has an underlying expectation of all companies wanting to act ethically and avoid adverse human rights impacts and thus HRDD requires companies to act in accordance with human rights and correct the situation if any violations of human rights have occurred.

9.3.3 Regulating Human Rights Due Diligence with Domestic Laws

HRDD actually continues the ideology on the separation of international obligations between states and non-state actors. It sets out that unlike states, non-state actors do not have the duty to protect, but that they do have the responsibility to assess and address their impacts. Therefore HRDD sits well with the traditional international law system of state and non-state actors whilst including that multinational corporations are not free from any responsibility towards its global surroundings.

States have started regulating HRDD, as illustrated earlier. A number of states have decided to judicially require HRDD from their multinational and national corporations. Many of them have done so without being obliged by the international community. Business and human rights soft-law mechanisms have already noted HRDD as an appropriate avenue of regulation. The Guiding Principles apply to all

871 ibid 484.
states and under “General State Regulatory and Policy Functions” they ask states to ‘advise on appropriate methods, including human rights due diligence’.\textsuperscript{872} The OECD asks member states to promote the OECD Guidance within their territories.\textsuperscript{873} Even without the upcoming Treaty, it already appears that HRDD is gathering consensus on the national, regional and international fronts and between states, NGOs, academics and multinational corporations themselves. However often these laws do not regulate the actual process of HRDD or HRIA, which may lead to problems in the interpretation of these laws.

\textsuperscript{872} The UN Guiding Principles (n 373) 68–69.
\textsuperscript{873} OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016) Foreword.
10 CONCLUSION ON THE FUTURE OF BUSINESS AND HUMAN RIGHTS

10.1 The Relation between State Duty to Protect and Human Rights Due Diligence

After concluding that states are the correct forum for mandatory business and human rights in Chapter 8, the following chapter will continue with the notion. The second conclusion in Chapter 9 outlined that in the realm of business and human rights, HRDD is the only obligation that can be found not only in domestic regulation, but also in international mechanisms. HRDD is therefore an obligation which may be regulated by domestic law, but plausibly in the future in some manner by international mechanisms. Such mechanisms may even only enforce states through their duty to protect to enforce HRDD on multinational corporations in their jurisdiction and extraterritorially on “national” multinational corporations.

The third conclusion will be that HRDD will become a social expectation, but more importantly a judicial obligation of multinational corporations. Through domestic regulation of HRDD, multinational corporations could find themselves in a situation where they will not be able to escape HRDD requirements. This will not however happen by states randomly regulating themselves or without the involvement of international organs. To further illustrate the third conclusion, the following section will first discuss policy convergence and secondly its relation to the future of business and human rights.

10.2 Policy Convergence

Globalisation has led to global complexities, but it has also sometimes resulted in common solutions around the world. Nation states appear to find similar answers at similar times to similar problems. It would be too easy to describe this as a direct product of globalisation, as it would be too simple to merely say that states happen to independently find common answers to identical problems without any influence from each other. Instead, theories of policy convergence have emerged in political science in recent decades to answer the question of what happens during this phenomenon.
It is important to note that policy convergence, although a familiar concept in political science, struggles with drawing a homogenous picture and can leave its terminology, content and processes rather unclear. It may not be a universally agreed theory, but has been theoretically and empirically proven in such a manner that it can be considered acceptable in the argumentation of this chapter. The term is associated with other concepts describing policy change, such as policy transfer and policy diffusion. Policy convergence focuses on the effects of policy change regardless of the process, whilst policy transfer and policy diffusion refer to the actual process resulting in similar policies, which may then lead to policy convergence. Scholars often define policy diffusion as a separate phenomenon from policy convergence and wish to separate the terminology, whilst others have described policy diffusion as a process of policy convergence.

Cross-national policy convergence is defined as ‘any increase in the similarity between one or more characteristics of a certain across a given set of political jurisdictions over a given period of time’. It can also be explained as an increased policy similarity with ‘movement over time toward some identified common point’ between countries at a defined period at time. Therefore policy convergence focuses on the end result, not the process of policy similarity between states. Scholars assume the backing force behind policy convergence to be either economic or ideational. Economic factors include the realities of trade liberalisation and competition, which will be discussed later. However, common values between states may also play a crucial role in policy similarities. Western affluent countries focus often more on greener values, such as environmental standards, as countries

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878 Knill (n 876) 768.


880 Drezner (n 875) 57.

with higher levels of economic development are willing to have and also able to bear the costs of more stringent environmental policies.882

10.2.1 Processes of Policy Convergence

Policy convergence, as described by Busch and Jörgens, can occur through three processes. Firstly, policy convergence may occur through harmonisation by international agreements or supranational law in which states deliberately negotiate, implement and comply with common policies;883 secondly by coercive imposition and economic and political conditionality, where states do not voluntarily partake in policy convergence;884 thirdly, policy diffusion is in this situation viewed as a process plausibly leading to convergence. Policy diffusion in this sense is defined as a ‘process by which policy innovations are communicated in the international system and adopted voluntarily by an increasing number of countries over time’.885 States do not learn about policies randomly or in a vacuum, but the actions of other states impact their operations. Policy diffusion is agentless compared to the other processes, as the mechanism is based on the pure voluntarism of states and cross-national communications between them. Diffusion is therefore ‘the result of multilateral interdependence’.886 As noted by Elkins and Simmons states act in uncoordinated interdependence, as ‘governments are independent in the sense that they make their own decisions without cooperation or coercion but interdependent in the sense that they factor in the choices of other governments’.887

Christoph Knill explains policy convergence as stemming from either causal mechanisms or facilitating factors. Causal mechanisms can be traced to five central factors: similar and independent responses of national states to parallel complexities; imposition of policies by other states or international organisations; harmonisation through international or supranational law; regulatory competition; and transnational communication.888 Facilitating factors depend more on factors which direct the effectiveness of the causal mechanisms. Other scholars have identified various other processes of policy convergence. For example, Bennett

884 ibid 863–864.
885 ibid 865.
886 Katharina Holzinger, Helge Jörgens and Christoph Knill, ‘State of the Art - Conceptualising Environmental Policy Convergence’ in Katharina Holzinger, Christoph Knill and Bas Arts (eds), Environmental Policy Convergence In Europe (Cambridge University Press 2008) 10.
887 Elkins and Simmons (n 876) 36.
888 Knill (n 786) 769–770.
describes them as emulation, elite networking, harmonisation and penetration.  
Penetration focuses on the role of multinational companies attempting to harmonise domestic standards to a common framework globally. 
On the other hand, Simmons and Elkins also find direct economic competition on top of informational networks and emulation as processes towards convergence. Holzinger and Knill define the processes as imposition, international harmonisation, regulatory competition, independent problem-solving and transnational communication, which includes lesson-drawing and transnational problem-solving.

As drawn together by Plümper and Schneider, the theories highlight competition, learning, cooperation and common responses to shock. In the various classification of processes three processes emerge, and in the interest of this research we will focus on competition, cooperation and communication.

10.2.1.1 Competition

As globalisation and trade liberalisation have formed global markets and abolished trade barriers, states are under growing pressure to compete for foreign investment and business interests. Domicile regulation is designed to compete by attracting businesses with laxer regulation. With each country constantly craving to improve its own standing in the world economic order, countries begin competing with each other’s regulation. It has been assumed that regulatory competition would therefore lead to a race to the bottom as governments adopt laxer regulation to attract business. The “Delaware effect” portrays the phenomenon when jurisdictions regulate less stringently than others to gain competitive advantage. In the US, the state of Delaware deliberately undercut other states’ regulation to improve its own competitive standing.

From such a viewpoint, tight and strict regulation exists as a detriment and deregulation is favourable to appear more attractive to corporate operations. As countries try to compete by continuously lowering their regulative standards, a downward spiral of deregulation occurs between jurisdictions. Typically this happens specifically in the fields of environmental and labour standards, but other policy areas may be subject to similar patterns. In the field of business and human rights, the race to the bottom is typically used as an example of government

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889 Bennett (n 879) 215-219.
890 ibid 228.
892 Holzinger and Knill (n 874).
893 Plümper and Schneider (n 875) 991.
gaps and is illustrated as the scary monster waiting in the closet. This phenomenon has been used as a fundamental and crucial aspect of demanding international and congruent regulation globally. However, there exist other illustrations of the effects of regulation competition.

The “California effect”, coined by David Vogel, depicts the opposite development. He bases his theory on the phenomena that followed the automobile emission standards enacted in California, which were stricter than federal law required. California chose an option for stricter emission standards based on the 1970 Clean Air Act Amendments, which made its emission laws the strictest in the US. The emission standards not only allowed California to have more stringent standards, but also to exclude products from their market that did not comply with their standards. What followed did not however follow the theory of the race to the bottom, but instead the rest of the US followed suit in raising their emission standards to the California levels in the following decades. California did not then lose due to their stricter regulation, but instead their policies shaped the rest of the country’s emission standards in a stricter direction.

The California effect can also be used to illustrate the “ratcheting upward of regulatory standards in competing political jurisdictions” in international instances. Trade liberalisation can be followed by either a race to the bottom or a phenomenon comparable to the California effect in which national regulation extraterritorially forces other nations to raise their regulation standards, called a race to the top. In an international setting, the California effect depends on the competitive advantage it can give domestic firms, the association between market access and compliance with the regulation and the capabilities to pressure others to stricter regulation. Therefore, the theory has been revised by amending the regulatory context of the EU and its capability to export norms to non-EU nations. The EU may only be competent to regulate its international market, but due to its market power, foreign companies must comply with its regulation if they wish to trade in the large market area, and as companies wish to standardise their production, the EU’s regulations may become global standards as companies lobby for similar standards globally. The EU also has the regulatory capacity to

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897 Vogel (n 895) 259.
898 ibid 260.
900 ibid 45.
produce and enforce regulation and the preference to regulate stringent standards and rules.\textsuperscript{901}

\textbf{10.2.1.1 Race to the Top}

Empirical literature and research does not typically support the race to the bottom phenomenon.\textsuperscript{902} This does not however mean that automatically on the flip side there will be a race to the top, either. Certain criteria must occur for a possible California effect to ensue. Firstly, the country in question regulating stricter standards must be considered an important market area in size and power.\textsuperscript{903} Compliance with the stricter regulation becomes vital for companies outside the nation that wish to enter the market area and be able to compete with domestic companies, otherwise they will lose out on conducting business in the entire nation or area. To meet the criteria, they might have to modify their business operations, after which they may streamline all operations to meet the stricter criteria or at least wish for the stricter standards to be met in other nations where they operate as well. Companies will not be interested in doing this unless the country with stringent regulation is a significant market area.

Secondly, for regulation competition to materialise, the country in question must be subject to international market pressure. In today’s globalised world even a country like North Korea takes part in some form of international trade. Through competition, governments are more likely to be affected by the policy changes of their most important foreign economic competitors, but without common markets convergence will not occur between countries.

Thirdly, the California effect is more effective for product standards than process standards\textsuperscript{904} and specifically situations in which products are exported

\textsuperscript{901} Ibid 12–16. Bradford describes states needing apart from market power also regulatory capacity and regulatory propensity.


\textsuperscript{903} Vogel (n 895) 261.

\textsuperscript{904} Scharpf (n 896) 526; Holzinger and Knill (n 875) 7; Knill, Tosun and Heichel (n 882) 1021.
A race to the top does not transfer easily to production standards as most production is controlled in less regulated areas by local contractors and Western countries’ consumer interest is highly selective of which products’ production process they are interested in. Process standards also suffer more from the pressure for a race to the bottom as stringent regulation drives the cost of production and hence products higher without increasing the quality of the product. It is important to note that competition does not of course directly impact all policy areas.

10.2.1.2 Cooperation

Policy convergence may not only occur due to competitive pressure, but also by governments intentionally acting together to harmonise their regulation. Harmonisation typically occurs based on international requirements set by international organisations. Supranational organisations, such as the EU, demand their members follow obligatory policies to access the organisation. International organisations, such as the OECD, the UN and others, may have some obligatory treaties or policies, but typically mandatory legal requirements are given on a minimum level.

Accession to international institutions therefore has a significant impact on policy convergence. The pressure to harmonise typically arises from international organisations setting presupposed obligations on their member states. States cooperate with each other in adopting common standards or minimum levels of standards. Minimum harmonisation typically leaves plenty of leeway for states to adopt more stringent regulation themselves whilst protecting the countries involved from racing to the bottom. With full harmonisation, there is more likely to be a race to the top as countries harmonising are less likely to lower their standards to harmonise than they are to adopt stricter standards. Quite often the conclusion is a compromise between stringent and lax regulation. International organisations can also promote policy convergence by reducing the transaction costs associated with bargaining and enforcement between the states.

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906 ibid.
907 Scharpf (n 896) 522.
908 Holzinger, Knill and Sommerer (n 902) 579.
910 Drezner (n 875) 61.
911 ibid 64.
Policy harmonisation can however only occur when ‘great powers act in concert’, and when they disagree there will only be partial convergence.\textsuperscript{912} Drezner points out that when great powers first coordinate regulatory standards, rapid global convergence will be the likely outcome.\textsuperscript{913} States may not adopt policies voluntarily, but it may be the result of coercive action by an external actor or actors. The external actor may be a state, a supranational organisation or an international organisation that pressures the adoption of a policy using political or economic threats.\textsuperscript{914} A clear example in which countries have had the adoption of economic policies imposed on them has been as a condition of receiving loans from the International Monetary Fund.\textsuperscript{915}

\textbf{10.2.1.3 Transnational Communication}

Countries do not often have unique problems and in order to find appropriate solutions for common and global complexities, states may voluntarily and purposefully look at the policy decisions of other states and adopt new policies based on the information supplied by the policies taken by others.\textsuperscript{916} The processes determined to belong to transnational communication often include processes of lesson-drawing and elite networking. Unlike competition or cooperation, transnational communication processes are entirely voluntary and based solely on communication between the governments of states.

With lesson-drawing, countries voluntarily learn solutions from other countries to a common problem.\textsuperscript{917} Governments can learn positive lessons on what to do and negative lessons on what to avoid.\textsuperscript{918} Communication may also be instigated and promoted by elite groups of experts interacting on a transnational level to solve transnational problems\textsuperscript{919} or by international organisations and other non-state actors, such as consultancy firms, promoting a voluntary standard or policy.\textsuperscript{920} Experts may exchange knowledge on best practices that they then render to governments to use. Organisations such as the UN and OECD offer an arena not


\textsuperscript{913} ibid 849.

\textsuperscript{914} ibid 852.


\textsuperscript{917} ibid 4.

\textsuperscript{918} ibid.

\textsuperscript{919} Bennett (n 879) 224.

only for experts to learn best practices and solutions for various global problems, but also non-governmental organisations offer with non-binding international law initiatives goals, objectives and general ideas for nations to construct regulative measures.

Communication may also occur due to emulation, which is driven more by governments wishing for conformity with others than effective solutions.\(^{921}\) Being in the right pack can be reason enough for governments to adopt policy to impress and join other countries in adopting similar policies. Smaller countries with less power may emulate other governments’ policies to be seen to share common values and norms. Governments may also wish to adopt similar policies to legitimise their policy choices without deep analysis of policies.\(^{922}\) It is easier to argue for policy choices if surrounding countries have made similar choices.

States hence draw inspiration from each other on complexities affecting many countries. It however appears that states are more likely to adopt the policies of countries that share a similar religion or culture.\(^{923}\) This may be caused by countries which share similar cultures having policies which are more transferable between them. The religious background or shared values may make it easier to adopt similar policies. Common membership in an international organisation may also increase communication, as countries with similar interests, values or power may have their own organisations.

Imitation and learning typically occur more with general ideas and concepts.\(^{924}\) A policy is more unlikely to transfer if the outcomes are more complicated, detailed and unsure.\(^{925}\) As each country’s domestic characteristics affect the specifics of policies, the general aspects of policies can be transferred to other countries better. Specifically, countries with similar cultural or religious backgrounds states can smoothly adopt their own specific version of a general policy idea for their country’s distinct needs.

\(^{921}\) Katharina Holzinger and Christoph Knill, ‘Theoretical Framework: Causal Factors and Convergence Expectations’ in Katharina Holzinger, Christoph Knill and Bas Arts (eds), Environmental Policy Convergence In Europe (Cambridge University Press 2008) 46.

\(^{922}\) Bennett (n 879) 223.


\(^{924}\) ibid 579.

\(^{925}\) Dolowitz and Marsh (n 915) 335; Rose (n 916) 132–134.
10.3 Policy Convergence in the Evolution of Mandatory Business and Human Rights Regulation

Why discuss a political science theory such as policy convergence in relation to the topic of business and human rights? Convergence theories have been discussed in relation to constitutional law and human rights law before, but often the concept of policy and regulation convergence is used to discuss the phenomenon without reviewing the theory behind convergence and how it occurs. Even when the theory of policy convergence is illustrated, it is typically only noted and not used to argument the convergence of human rights. This research however sees value in the policy convergence theory to help us explain the global changes that have occurred in business and human rights regulation and to illustrate a plausible description for its future. As this is legal research, the research will not be using calculations or other research models typical of political science research on the subject and hence will only review the subject using literature and empirical reviews.

Based on the theoretical and regulation review, certain further conclusions can be made. R.G. Steinhardt uses the historical Lex Mercatoria to interpret the growing likeness of market-based regulation, domestic laws, civil liability and international regulation in relation to business and human rights. He notes that even though business and human rights standards are not yet fully accepted and embraced by the corporate or human rights communities they still offers ‘fertile ground for the emergence of a similarly stable and significant body of commercial standards’ similar to the historical Lex Mercatoria. The research will move away from historical concepts such as Lex Mercatoria, which existed centuries before globalisation and instead focus on the policy convergence of business and human rights.

Chapter 9 concluded that the general obligation for due diligence can be detected in international soft-law initiatives and mandatory domestic regulative measures. Firstly, clear questions emerge: how did various regulative measures decide on the same approach and can policy convergence be detected in these events? Secondly, the conversation continues to what the future holds for policy convergence in the field of business and human rights. Will its values and ideas spread, and more specifically will due diligence obligations become mandatory in national jurisdictions around the world? The search for answers to both questions will be done by using the theory of policy convergence and more specifically the

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928 Steinhardt (n 18) 225.
929 ibid 224.
processes of competition, cooperation and transnational communication. What these three have in common is that national states are the main actors in policy change and hence it will be argued that the state actor will also be at the centre of business and human rights regulation in the future.

When we consider policy convergence, we must specify the policy in question, the set of political jurisdictions and the time period in which we expect convergence to occur. We also measure the policy output, meaning the policies’ adoption and not the actual outcomes of policies. This is due to the effects of policies being strongly influenced by countless factors which are irrelevant to convergence. This research has already demonstrated that through various regulations an obligation of due diligence has begun to emerge. Now this idea is taken further. The following sections will illustrate that various processes of policy convergence have caused the regulation of due diligence in various nation states, international organisations and international soft-law tools. Various processes of policy convergence will spread the idea of due diligence policies globally. Next convergence will be considered through the empirical regulation review conducted in earlier chapters.

10.3.1 Competition

Policy convergence theories offer us a new perspective on the conversation surrounding the “race to the bottom”. Human rights advocates and international organs have for decades been discussing how the lack of international common regulation leads to a “race to the bottom” in which countries everywhere deregulate and enforce human rights in laxer ways to gain competitive advantage and attract foreign investments. There are obviously elements of truth as for decades that has appeared to be a growing trend. It appears that host countries with laxer regulation attract foreign investment. However if this theory had fully materialised it would have meant that in recent decades countries worldwide would have regulated laxer and also deregulated human rights orientated regulation. Although this has occurred in some countries, it is obvious that an overall global race to the bottom has not occurred in regulative measures. Industrialised countries, which could have been assumed to fear losing trade in competition to laxer regulated developing nations, should have regulated laxer to compete. Instead they have regulated more
human rights orientated regulation and progressively regulated more stringent national laws with extraterritorial effects.

It would be too quick to make a judgement that even if industrialised countries have avoided a race to the bottom, the same could not be said of developing countries, even though in some instances it is clear that developing countries have regulated laxer due to regulation competition. Likewise even with stringent regulation, countries may enforce regulation in a very different matter. However there has been a shift in attitudes at least in recent years. There has been growing interest in many developing countries in more binding and stringent international regulation, and treaty negotiations specifically demonstrate the changing culture in developing economic countries. Countries from Latin America have been key in the formation of the treaty process, whilst developing economic powers China and India voted in favour of the UN proposal.

It is likewise incorrect to assume that companies always want laxer regulation or inconsistency in regulation. It has often been noted that companies themselves want consistent regulation due to their global operations and are disadvantaged by not all companies having to act in a sustainable and ethical manner. The arguments for example behind the Modern Slavery Act were to level the playing field between companies which decided to act ethically and those which did not. 934 Policy convergence in minimum due diligence requirements and hence ethical standards for multinational corporations will actually benefit companies when they all have to play with the same rules.

Specifically in business and human rights, states have decided to act alone in tackling the issue. Even when a state wishes to regulate a certain standard more stringently, it either needs to be a powerful country or then critical other countries or a mass of them have to adopt a similar standard. 935 For a country or region to have proper “go-it-alone” power it needs to be a powerhouse such as the US. 936 Small countries with smaller markets, such as Finland, have more to gain by harmonising and following the regulations of larger markets than vice versa. Countries that have similar standings in economic competition, such as the US and the EU, on the other hand can decide not to follow or bring their regulation into accord with another.

934 Lindsay, Kirkpatrick and Low (n 578), 31.
935 Lazer (n 909) 477.
936 Bradford (n 899) 9.
10.3.2 Cooperation

Complete harmonisation is evidently impossible in the field of business and human rights. The soft-law instruments show a growing interest and acceptance from international organisations to regulate multinational corporations. Minimum harmonisation is however clearly plausible. Not only would it give an equal playing field for companies, it can give ideas for states to evolve their domestic regulation towards coherent standards and further from minimum standards. Convergent minimum standards, which have gained a level of international consensus, are the baseline of standards, with states being able to exceed them.

The Guiding Principles for example specifically ask states to nationally implement the Guiding Principles in their jurisdiction and indicate with NAPs the steps they are taking in practice. Through the Guiding Principles, all states should be implementing and applying some level of coherent policies. Similarly OECD countries and other adjoining countries are required to implement the OECD Guidelines and are requested to apply the OECD Guidance. These instruments are moving policies in a convergent direction.

The problem with a binding treaty is the global consensus demanded for such global treaty to come in to force and the treaty process could actually have negative effects on the international development of business and human rights initiatives. As noted by Ruggie, ‘where states are reluctant to do very much in the first place, as is the case for quite a few states in the business and human rights area, they may invoke the fact of treaty negotiation as a pretext for not taking other significant steps, including changing national laws – arguing that they would not want to “pre-empt” the ultimate outcome’. A Framework treaty could however, as noted in Section 4.3, provide the appropriate base for cooperation. States would be held to some minimum standards whilst having a wide margin of application. Similarly, through cooperation states could find a minimum level of consensus.

Importantly the current treaty would with its distinct status and authority not only develop international norms, but also highly influence and impact norm creation on a national level. Finding consensus on the definite global obligations of multinational corporations which states should enforce, can drive states to implement these standards even without the coercion of a binding treaty. This outcome could however also be reached with the enforcement and strengthening of the Guiding Principles. As noted, this is still a possibility if the treaty negotiations fail.

937 Kinley and Tadaki (n 149) 952.
938 Ruggie (n 461) 43.
939 Bilchitz (n 454) 213.
10.3.3 Transnational Communication

European countries are evidently learning lessons from each other in domestic due diligence regulation. Firstly France, Switzerland and the Netherlands have all been inspired by the domestic regulation of their neighbours. All three countries have similar European backgrounds, are home to many large multinational corporations, which operate globally and have vocal NGOs and consumer groups specifically promoting national regulation. Correspondingly Australia is following the model of the UK in due diligence on forced labour. They share a long cooperation history. Specifically the relation between the UK’s and Australia’s similar regulation indicates the desire of Australia to follow the UK in policy changes. Furthermore, the Dodd-Frank and the European Conflict Mineral Regulation have a similar relation as they share a vast amount of similarities. The EU’s regulation was clearly the European counterpart of the US regulation, as pressure was mounting in Europe for the EU to take similar steps.

All three examples show signs of emulation and developing countries are feeling the urge to be on the “right side of history” as leaders of new regulation and be seen as leaders. Similarly, through international cooperation experts change ideas, which are brought back to governments all over the world. This does not only happen through international organisations or NGOs, but also through private consulting firms. With the influx of reporting requirements, auditing and consultancy firms have more of a growing role in assisting companies in their human rights-related issues. Therefore the general principles, standards and processes of international private consultancy firms can have an impact on the future evolution of national regulation.

Human rights can be criticised for their Westernised values and through globalisation these values and ideas have spread through the world. Compared to distinct obligations in relation to specific rights, the concept of HRDD is a general enough standard to be implemented in the legal sphere of almost any country. Similarly, even though it encompasses the idea of the respect of all human rights, it does not stipulate strict obligations or clear human rights, which may be against the legal or religious culture of a certain country. Due to their similar backgrounds, Western developed countries will be able to adopt similar due diligence policies through communication, but countries all over the world can as easily attach themselves to the concept of HRDD and include it their regulation without having similar cultures. As illustrated earlier, the actual content and scope of HRDD depends on each specific situation. HRDD does not in any current regulation specifically describe the scope for this reason and even when HRDD is focused on a certain subject, HRDD processes are still flexible for each individual situation.
10.4 Policy Convergence of Business and Human Rights in the Future

States could have decided to have similar independent solutions for the same problem. It is however evident this has not been the case in business and human rights thus far. This phenomenon could be called human rights due diligence convergence. Further policy convergence will be discussed in the context of how it has occurred in other areas of state legislation in relation to business operations. Both environmental law and anti-trust legislation illustrate how standards can converge.

10.4.1 Policy Convergence in Environmental Law

Environmental policy convergence offers us a good example of the possibilities of policy convergence for business and human rights. In the environmental field, regulatory competition had been thought to drive environmental standards to ever-laxer degrees. Since the 1960s, environmental law regulation however has become more stringent in every industrial nation and many developing nations.940 Specifically in Europe it is apparent that environmental policies have converged very strongly.941 Therefore it can be argued that this has been caused by states having the same answer to environmental problems without intergovernmental interaction, but it is evident that this is not the case after what has been discussed regarding policy convergence.

Stricter regulation may actually become a competitive advantage as companies wish to standardise their production by following stringent regulation and hence lobby for similar standards in other states.942 As noted by Scharpf, ‘high levels of regulation may create a competitive advantage for the firms subjected to them, and thus exert a competitive pressure on other governments to raise their own levels of regulation.’943 Pioneering countries that take the lead in advanced environmental regulation are the ones who push these standards globally.944 Typically the cost of stringent environmental regulation does not affect costs of production in such a manner that countries lose competition due to environmental standards.945 It has been also shown that, for example, local stringent environmental regulation

940 Vogel (n 895) 265; Holzinger, Knill and Sommerer (n 902) 554.
941 Knill, Holzinger and Arts (n 902) 228.
943 Scharpf (n 896) 523; Drejer (n 904) 61 ; Holzinger and Sommerer (n 902) 319.
944 Jänicke and Jacob (n 801) 37.
945 Vogel, (n 895) 273; Vogel (n 881) 559.
does not play a major factor in plant location decisions. These costs are too low to affect the determination of host countries compared for example to labour and tax costs, and hence companies do not leave a jurisdiction due to stringent environmental regulation.

International law began regulating environmental matters with soft-law mechanisms which slowly formed into mandatory minimum obligations and countries wishing to join more stringent international regulation. These soft-law mechanisms have through cooperation helped governments to find similar policy positions on environmental matters. Specifically through voluntary standards, companies have been encouraged to adopt more stringent environmental standards than their operating states require. Syria and Nicaragua were the only non-signatory countries for the Paris Climate Accord, and it holds tremendous global governmental cooperation value. A study shows that environmental policy convergence in Europe could also be attributed to transnational communication, which has not only led to convergence, but also accounted for increasing the strictness of policies. In regard to environmental policy convergence, international harmonisation and transnational communication clearly explain convergence whilst regulatory competition does not play such a key role.

10.4.2 Policy Convergence in Anti-Corruption

Milton Friedman, who believed companies do not have any social goals except to generate profit for their shareholders, still had two exceptions to his view: fraud and competition. The free market needs to be protected from the distorting effects of fraud. Anti-corruption, similarly to business and human rights, is not an issue that can be tackled by countries alone, but demands cooperation between states. As demonstrated by Ramasastry, the key factor of the international anti-corruption regulation was the strong actions of the US with its go-at-it-alone attitude and “first mover” regulation. The US legislated in 1977 with the US Foreign Corrupt Practices Act on the anti-corruption of US stock exchanged companies, which

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946 Levinson (n 902) 26.
948 Nicaragua decided not to sign the Accord as they felt the Accord was not going far enough and was too weak.
949 President of the United States Donal Trump announced the US was withdrawing from the treaty in June 2017.
950 Arts and others (n 902) 221.
951 Knill, Holzinger and Arts (n 902) 229.
953 Ramasastry (n 358) 183.
requires companies to demonstrate a level of due diligence on complying with FCPA regulation outside the US as well. Starting from 1992, anti-trust regulation has had extraterritorial effects against which various governments protested the extraterritorial application of anti-trust regulations.954 Other countries did not automatically follow suit. Through the pressure imposed by the US and the growing wish to harmonise regulation voiced by its competitors in the OECD, the regional OECD Anti-Bribery Convention came into force in 1999.955 The US however continued global pressure and the UN Convention against Corruption (later on UNCAC) was opened for signatories in 2003.

The US and EU initially had divisive differences in their anti-trust regulations956 and most countries dealt with anti-trust with solely local laws. After the creation of the Financial Action Task Force Forty Recommendations the US and the EU began moving towards regulatory harmonisation and by 2001, 140 countries had followed suit in accepting the FATF standards.957 The adjustment costs were considerable for certain countries for new and counter-measures towards those countries, but over 73% of targeted countries followed the standards.958 As noted by Drezner, it is clear that the countries changed their regulation in response to the threat of economic coercion instigated by the US.959

The story of the anti-corruption movement can be described as gradual legalisation.960 All three noted processes of convergence also affected the convergence of anti-trust. The US acted as a strong first mover which initiated competition with other competing nations through the will of companies to harmonise standards. Later by the use of pressure and cooperation the US was able to internationally regulate anti-trust issues and ensure that other countries followed suit.

10.5 Assessing Policy Convergence of Human Rights Due Diligence

As illustrated, various levels of policy convergence have already occurred in relation to HRDD. Based on the empirical desk review, traces of convergence based on regulatory competition, regulatory cooperation and transnational communication

955 ibid 177.
956 Bradford (n 899) 20.
957 Drezner (n 799) 851.
958 ibid 852.
959 Drezner (n 912) 852.
960 Ramasastry (n 358) 178.
can be uncovered. The interaction of various convergence processes increases the likelihood of cross-national policy convergence. Further discussion on how these processes will only continue to strengthen and lead to clearer policy convergence in relation to HRDD will follow in this chapter. However it is important to remember that this classification of processes is utterly theoretical and the causal connections between various processes and legal changes are not as straightforward in practice. Matters not associated with policy convergence in relation to, for example, domestic politics may cause impacts and effects.

Dodd-Frank provides an example of policy convergence towards more stringent regulation. As a large market area and powerful regulative state, the US enacted Dodd-Frank without the cooperation of other states. Companies complied with the regulation as the US offered them a lucrative domestic market they were not ready to abandon due to tightening regulation. Similarly the US has been willing in the past to usher in more stringent regulation than its competitors in for example anti-trust legislation, and is not afraid to assert its regulative power extraterritorially. Remi Mocel was already discussing the clear plausibility of Dodd-Frank influencing a race to the top with other jurisdictions in 2016. The impending EU conflict mineral regulation and the Chinese soft-law measures have indicated this notion to be correct, as other market leaders are regulating similar stringent due diligence requirements in their market areas. Lessons have also been learned from the Dodd-Frank Act as the EU conflict mineral regulation will have a wider geographical scope and hence hopefully less of a practical embargo effect on the regions in question.

HRDD can be viewed as more than a procedural standard and thus not a product standard. As noted in this chapter, policy convergence through competition is more likely to occur in relation to product standards than procedural ones due to the rising costs of procedural standards for actual business operations. A procedural standard could however still have race to the top effects in convergence as has been seen in the earlier illustrated policy convergence in the field of environmental and anti-corruption regulation. HRDD is however such a general standard that it can be planted generically in all situations.

Similarly, large multinational corporations often adhere to more stringent OECD environmental standards even when not forced to do so by local laws. By adopting the same environmental standards globally, companies export stringent environmental standards to less environmentally friendly states. Multinational corporations would benefit if multinational corporations everywhere

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961 Holzinger and Knill (n 875) 36.
962 Moncel (n 671) 234.
963 ibid 241.
964 Wheeler (n 838) 10.
965 Vogel (n 881) 564.
were held to some level of HRDD standard and their operational location would
determine whether they comply with HRDD requirements. As in the case of the
Dodd-Frank Act or in other domestic examples, multinational corporations are
not currently ready to discontinue their operations in these countries, but rather
would comply with HRDD requirements. When large market areas or otherwise
important jurisdictions enact more stringent regulation, multinational corporations
typically have decided to remain in that country, but obviously some companies
have decided to leave. However as convergence of HRDD continues, the areas with
such standards will only widen and it will be more difficult to carve out areas in
which to operate without adhering to HRDD processes.

Regulatory competition is obvious in the field of business and human
rights. Specifically in due diligence, powerful countries such as the US setting
extraterritorial requirements can cause regulative competition in neighbouring
countries. Regulatory competition is even desired, but even competition benefits
from regulatory harmonisation through cooperation.966 Even in certain fields in
which competition benefits states, it is still important to set a common minimum
standard or agree on restrictions for regulation.967 The plausible treaty would
therefore as a binding instrument not negatively affect the current trend of policy
convergence. Instead, if it offered some level of minimum standards which would
be beneficial for companies, if the treaty is aimed more towards states and thus not
directly binding on multinational corporations it will provide coercive reasons for
all states to continue regulating HRDD. As seen in the earlier anti-trust example,
national and regional laws may grow consensus to an international treaty, which
will push the remaining states without such national laws on the topic to enact
their own legislation in accordance with the treaty.

Even if the treaty negotiations fail and we are left without a treaty, the current
international soft-law mechanisms will offer an appropriate reason for state
cooperation. The Guiding Principles offer HRDD standards which states should
adopt into their legislation without coercion. Even though policy convergence
typically occurs more in obligatory trade-related policies,968 this research most
definitely indicates that non-binding international instruments help states to find
appropriate and reasonable standards to impose on corporations. Through the
UN’s work, experts are able to exchange information which states can use to their
advantage. International cooperation in business and human rights will remain at
the forefront, even without binding instruments.

   of International Economic Law 257, 260.
967 ibid 261.
968 Knill, Holzinger and Arts (n 902) 228.
Globalisation and trade liberalisation will eventually lead governments to slowly converge their business- and human rights-related policies in relation to due diligence requirements and thus successfully enforce a more global standard. The HRDD requirements as generic and general standards may not seem satisfactory to many, but they offer a realistic approach to finding a nexus between corporate action and human rights.
11 EPILOGUE

The core of human rights law demands that all actors who have the capability to violate and have adverse negative impacts on human rights should be recognised to have obligations in relation to protecting those rights. Multinational corporations are obviously capable at the very least of causing adverse impacts and at the end of the spectrum also of violating human rights. Through intentionally or unintentionally exploiting their lack of international status, multinational corporations can in some situations act in such manners without legal accountability. Often there does not exist any form of adequate checks and balances for multinational corporations when they operate globally in relation to human rights, which can lead to abuse of their economic power. Gross human rights violations, such as forced labour, still occur in modern times and the role certain profit-driven companies play in these situations should not be under-estimated. The complexities surrounding the issue do not just stem from lack of status. The transnational character of multinational corporations which allows them to operate globally as multinational corporations also limits their liabilities as independent entities through their subsidiaries. Similarly, the governmental gaps left by national laws leave a patchwork of legal obligations behind, which combined with ever-growing international soft-law mechanisms blur the lines of the real judicial responsibilities multinational corporations have and the suggestions they should follow.

Throughout this research, the main objective has been to answer whether mandatory regulation in relation to business and human rights exists and secondly if it does not, can it evolve? These two questions have been answered in Chapters 8, 9 and 10. Chapter 8 concluded that states are and will continue to be the primary actors in protecting, respecting and ensuring human rights in every jurisdiction in the world. This role should not be contended to be given to any other actor. Through the enhancement of the duty to protect principle and its enforcement in practice extraterritorially, states can also have a better position in protecting human rights in horizontal relations between multinational corporations and individuals. Through the principle of the duty to protect, home states can reach the actions of their own national corporations abroad and hold them accountable in accordance with national laws.

This does not however mean that multinational corporations could not be directly obliged to have divergent and clearly secondary obligations from states. It has been evidently shown that currently multinational corporations do not have direct obligations in relation to human rights in the context of international human rights law. From the patchwork of international, regional and national regulation, the research however uncovered a responsibility or a level of duty of human rights
due diligence. Therefore it was noted in Chapter 9 that multinational corporations have the responsibility to reasonably and properly assess and address their adverse human rights impacts. The accentuation of the reasonability assists companies in being able to follow such a responsibility with the process easily fitting into the corporate world. More importantly the actual responsibility to assess leads companies into shedding their excuse of lack of knowledge. Even though HRDD may be considered a responsibility solely orientated towards a simple process, it does however also incorporate the responsibility not to violate human rights, because with HRDD, multinational corporations are expected to also address any adverse impacts they come across and thus they are also expected to respect human rights.

Similarly, it can be expected that when companies are aware of their adverse impacts or violations, they will want to amend and mitigate such impacts before they become public. It is likely that most, if not all, multinational corporations will find negative and adverse impacts during their HRDD. HRDD pushes multinational corporations not only towards a level of transparency, but even a level of so-called nakedness in relation to their human rights impacts. When there is full transparency on the nature of a company’s impact on human rights within its sphere of influence, it will directly affect which types of impacts multinational corporations wish to have and thus wish to show to the public. Similarly companies will through transparency realize that all their competitors suffer with similar adverse impacts and complexities. Transparency on adverse human right impacts may not directly have judicial responsibilities in relation to respecting human rights, but knowledge of adverse impacts will undoubtedly eventually lead to more ethical behaviour in relation to human rights.

HRDD will continue its evolution in domestic regulative instruments and in international mechanisms as discussed in Chapter 10. International mechanisms, even if they do not become binding, already incorporate the concept of HRDD and will likely focus more on HRDD in the future. More importantly, HRDD will through the processes of policy convergence spread to more domestic jurisdictions. As the number of jurisdictions which expect a level of HRDD grows, multinational corporations will be more likely to be operating in a country which demands HRDD. In this situation, it will benefit the multinational corporations themselves to ensure that all companies will have to follow some level of HRDD requirements. To streamline their investments towards HRDD, larger multinational corporations will welcome other countries incorporating similar ideas. Due to this evolution, HRDD will eventually become an obligation from which many or even most multinational corporations cannot escape.

Multinational corporations themselves require that human rights materialise in the societies around them. Mary Robinson, the UN Human Rights Commissioner, noted that business and human rights need and require each other, because
companies cannot strive economically if human rights are not respected. Business is therefore better when it is conducted in functioning states with free markets. It is in the interest of multinational corporations to ensure that not only are human rights respected in their operations, but that they attempt to operate in areas where human rights are protected. It is also always good to remember that behind the legal person there are humans and behind the negative impacts are also individuals. Human rights is not therefore a distant context from multinational corporations. Neither should they be exclusive to them, because striving profit is an amoral goal, but striving for profit regardless of morals and ethics is immoral.

969 As quoted by Mary Robinson in Muchlinski (n 97) 10.
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