Julia Ruth-Maria Wetzel

Human Rights in Transnational Business

Translating Human Rights Obligations into Compliance Procedures

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Luzerner Dissertation 2015

ISBN 978-3-319-31324-5 ISBN 978-3-319-31325-2 (eBook)
DOI 10.1007/978-3-319-31325-2

Library of Congress Control Number: 2016938803

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer International Publishing AG Switzerland

I dedicate this book to my loving parents, who have never ceased to encourage and inspire me. I am eternally thankful to my mother, Anna-Maria Wetzel, for her compassion and kind heart. I am deeply grateful to my father, Prof. Dr. Hartmut Wetzel, for his insight and guidance in this process; his support was and remains irreplaceable. I owe them every success.

In loving memory of Rose Marie Nesbit and Johann Schuster

Acknowledgments

This book was written between 2013 and 2015 and was accepted as a dissertation at the University of Lucerne School of Law in the Fall of 2015.

I am deeply thankful to Prof. Alexander Morawa for his kind supervision and advice as well as to Prof. Chang Wang for his valuable criticism and insight.

A special thank you must go to Prof. Martina Caroni, to whom I remain forever in debt for her support, guidance, and friendship.

I am grateful to Sina Tannebaum for being a wonderful best friend and a constant source of positivity, motivation, and strength.

Thank you Ariel Steffen, Uta Dietrich, Isabel Keiser, and Désirée Guntli for your kindheartedness throughout the years. I am blessed to be surrounded by such inspiring individuals.

Finally, I would like to express my gratitude to Dr. Brigitte Reschke, Julia Bieler and Adeitia Kalyann B and the Springer Team for their hard work in publishing this book.

Contents

Abbreviations

AFNOR	Association Française de Normalisation (France)
Art.	Article
ATS	Alien Tort Statute
BSI	British Standards Institution
BV	Bundesverfassung der Schweiz (Swiss Constitution)
CADO	Sugar Cane Farmers' Cooperative
CAS	Court for the Arbitration of Sports
CDDH	EU Steering Committee for Human Rights
CEHRD	Center for Environment, Human Rights and Development
CEO	Chief executive officer
CG	Corporate governance
COP	Communication on Progress Tool (Global Compact)
CSI	Corporate social irresponsibility
CSR	Corporate social responsibility
DEA	Drug Enforcement Administration (United States of America)
DQS	Deutsche Gesellschaft zur Zertifizierung von Managementsystemen (Germany)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECO	Ethics and compliance officer
ECtHR	European Court of Human Rights
Ed.	Editor
Eds.	Editors
et al.	And others
et seq.	And the following
EU	European Union
EY	Ernst & Young
F. 2.d.	Federal Reporter for the Second District (United States of America)
F. 3d.	Federal Reporter for the Third District (United States of America)

F. Supp.	Federal Supplement (United States of America)
FTSE	Financial Times Stock Exchange
HRIA	Human Rights Impact Assessment (Yahoo)
IC	Investment Committee (OECD)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and Communication Technology
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labor Organization
ISO	International Organization for Standardization
MNE	Multinational enterprises
MOSOP	Movement for the Survival of the Ogoni People
NAP	National Action Plan (United Nations)
NCP	National Contact Points (OECD)
NHRI	National Institutions for the Promotion and Protection of Human Rights
NGO	Nongovernmental organization
NYSE	New York Stock Exchange
OECD	Organization for Economic Co-operation and Development
p.	Page
pp.	Pages
para.	Paragraph
QM	Quality management
SCOTUS	Supreme Court of the United States
SGS	Société Générale de Surveillance SA (Switzerland)
SJZ	Schweizerische Juristen-Zeitung (Switzerland)
TNC	Transnational corporations
TVPA	Torture Victims Protection Act (United States of America)
U.S.	United States Reports (United States of America)
U.S.C.	United States Code (United States of America)
UK	United Kingdom
UN	United Nations
UNEP	United Nations Environment Programme
UNOP	Unrepresented Nations and People Organization
UPR	Universal Periodic Review (UN)
USA	United States of America
v.	Versus
VCLT	Vienna Convention on the Law of Treaties
VP	Voluntary Principles
vol.	Volume
WTO	World Trade Organization

Chapter 1
Introduction

Abstract The rising influence of corporate actors on the international stage meant that they became involved more frequently in human rights violations in their places of operation. To date, these violations cannot be addressed judicially because existing legal frameworks target individuals for human rights violations rather than the complex judicial entity. Adjudicating corporate misconduct abroad has become a pressing issue for both the law and the economy, as corporate human rights violations have become costly, both for companies and indigenous peoples.

Keywords Corporations • Human rights • Shell • Oil • Nigeria • Consumer

The importance, influence and power of transnational[1] corporations developed with expanding global trade.[2] With this growing corporate impact on economy and human society, however, came increasing human rights problems: native tribes complained of human rights violations including murder, property destruction, rape or expropriation committed by national governments with the backing of transnational corporations.[3] However, these allegations of corporate human rights violations could not be adjudicated under *ius cogens* or customary international law, as they lacked the international consensus necessary. This consequently raises the question as to how violations of human rights included in international human rights treaties can be tackled legally if no such obligations can be extrapolated for corporations from *ius cogens* or customary international law.

A prime example of corporate human rights violations is the 2013 United States Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*.[4] A class action suit, *Kiobel* had the possibility to place "*a large and real price tag on human rights violations for which companies were allegedly responsible*".[5] Esther Kiobel, widow

[1] The terms transnational corporations, corporations, multinationals and companies will be used in an interchangeable fashion when referencing any judicial person engaged in business ventures in more than one country.

[2] Schniederjahn (2013), p. 101; Shinsato (2005), p. 187; Feldberg (2008), p. 36.

[3] Koeltz (2010), p. 44; Cernic (2006), p. 20; Ratner (2001–2002), p. 447.

[4] *Kiobel v. Royal Dutch Petroleum*, 569 U. S, 10-1491 2013. Karp (2014), p. 15.

[5] Karp (2014), p. 19. Class actions, unlike traditional dispute cases, have the ability to considerably affect the bottom line of corporations.

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DOI 10.1007/978-3-319-31325-2_1

of Ogoni Protest leader Dr. Barinem Kiobel, and several other Nigerian nationals had fled from Nigeria to the United States of America following rising violence in the 1990s and brought a suit in New York against Royal Dutch Petroleum under the Alien Tort Statute for aiding and abetting the Nigerian government in property destruction, forced exile, extrajudicial killing and violations of the rights to life, liberty, security, and association in 2002.[6] Royal Dutch Petroleum had been invested in Nigeria since 1958 when, in the 1990s, the Ogoni Peoples Movement repeatedly alleged that Royal Dutch Petroleum, by aiding and abetting the Nigerian government, committed torture, extra-judicial killings and other crimes against humanity.[7] In 1993, Royal Dutch Petroleum withdrew its staff from Ogoniland, effectively ending oil exploitation in the Ogoni region but remaining active in other parts of Nigeria.[8] Nonetheless, even though Shell ceased its activities in the Ogoni region, the alleged human rights violations were never investigated or judicially assessed. To date, Shell has repeatedly called the allegations of its alleged cooperation in the violence "*false and without merit*".[9] In 2009, Royal Dutch Petroleum settled a first case relating to Ogoniland violence with the widow of Ken Saro-Wiwa for 15 Million US Dollars in order to help the reconciliation process in the Ogoni Region.[10]

Anticipated as the opportunity to bring clarification and aid to victims of corporate human rights abuses, *Kiobel* caused disturbance when it established that the Alien Tort Statute did not apply extraterritorially. The statute, originally the only legal tool for human rights advocates to bring corporate entities to justice was drastically reduced, leaving many to wonder how corporate human rights accountability[11] could be solved in the future. *Kiobel* litigation took 12 years and represents only the second time that the United States Supreme Court granted *certiorari*[12] to hear a case pertaining to the Alien Tort Statute. The case is significant for international human rights law and the future for human rights and business because with the Alien Tort Statute now moot for cases having no nexus

[6] Alien Tort Statute, 28 U.S.C. § 1350.

[7] *Kiobel v. Royal Dutch Petroleum*, Case No. 10-1491 (2011), Petitioners Brief, p. 3: "The Nigerian military, aided and abetted by respondents and their agents, engaged in a widespread and systematic campaign of torture, extrajudicial executions, prolonged arbitrary detention, and indiscriminate killings constituting crimes against humanity to violently suppress this movement."

[8] Nigeria: Potential, Growth and Challenges.

[9] Nigeria: Potential, Growth and Challenges.

[10] Nigeria: Potential, Growth and Challenges.

[11] Corporate responsibility refers to the legal, social and moral obligations imposed on a corporation with regard to international human rights law. Corporate accountability refers to the actual mechanism of holding corporations liable under international law because they have infringed human rights law.

[12] The party seeking the Supreme Court to review a case does so by asking the Court to issue a *writ of certiorari*. If the Court decides to review a case, it *grants certiorari*. If the Court decides not to review the case it *denies certiorari*. Cornell Law School.

to the United States, new legal methods must be found to ensure corporate human rights compliance and relief for their involvement in human rights violations.

To date, corporations operate in a vacuum of ineffective national laws and unenforceable international standards.[13] As victims of corporate human rights violations are often unable to obtain justice in their home state, the appeal of human rights litigation in the USA as a vehicle for the implementation of international human rights law is undeniable.[14] The additional appeal of US litigation is the prominence such suits receive from the media, adding value by generating public attention.[15] The significance of the ATS is considerable: until 2013, it offered the only possibility for victims of corporate misconduct abroad to gain access to courts. This is partly due to the traditional orientation of international law, deeming only states responsible for human rights violations.

Due to globalization however, the economy has reduced the transactional costs of doing business in several jurisdictions and has conferred remarkable wealth on multinational corporations.[16] By pressuring states to remove trade barriers, reducing the public sector and liberalizing economic controls, globalization has moved some regulatory authority from popularly elected national representatives to less democratically accountable private economic institutions.[17] This new public order has led to a shift of rights and obligations.[18] "*The economy is gaining influence - of the 100 biggest economic entities of the world, 52 are corporations and only 48 are states. More influence also means more responsibility*."[19]

This inability to regulate transnational corporation's human rights compliance at international level as a result of the Supreme Court's *Kiobel* holding has resulted in the growth of a vast system of soft law initiatives attempting to bridge the corporate human rights compliance gap.[20] The role of corporate actors is undergoing considerable change and their purpose is being re-evaluated: what is their relationship to society and by which standards should they be held accountable?[21] Moreover, the case highlights an important emerging issue: if corporations can do just as much harm as states, how does one hold a legal entity responsible if said entity currently has no binding human rights obligations under international law?[22]

[13] Fowler (1995), p. 3; Shinsato (2005), p. 186; Ratner (2001–2002), pp. 452 et seq.

[14] Bradley (2001), p. 458.

[15] Slaughter and Bosco (2000), p. 106.

[16] Paul (2001), p. 286; Shinsato (2005), p. 188; Pegg (2003), p. 9.

[17] Paul (2001), p. 286; Ratner (2001–2002), p. 458.

[18] Hristova (2012–2013), p. 89; Fabig (1999), p. 309.

[19] York Lunau, Economic ethic of the University of St. Gallen in an Interview with brand eins magazine in 2004, Volume 10/2004, p. 74. Compare Loomis 1999, p. 155.

[20] Amao (2011), p. 1.

[21] Wilson (2000), p. 13. See also Amao (2011), p. 3.

[22] Karp (2014), p. 152; Compare Forstmoser (2008), p. 198; Roth (2014), p. 11; Cernic (2010), p. 19; Paust (2002), p. 802; Ratner (2001–2002), p. 460.

Traditionally, the law has followed the developments of society, translating the needs of the people into legal texts. It therefore seems odd that, with regard to corporate human rights issues, the law seems rigid and resistant. The fear of opening *Pandora's Box* has become so great with lawmakers that any development of the law attempting to unite human rights and business is nipped in the bud. Yet, the business and human rights problem cannot be fixed without legal intervention. Although corporations should behave morally responsible and respectful towards the communities in which they operate, often times they have chosen profit over morale. Without legal intervention, the moral obligation of corporations to act according to established human rights law will remain a fata morgana.[23]

International trade and foreign investment are fundamental to the functioning of society. The crude oil industry is particularly important in this regard: it is a billion dollar business, creating millions of jobs and supplying the necessary raw materials to fuel almost every other industry in the world. Every year, countries around the world consume about 30 million barrels of oil, 25 % of which are consumed by the USA alone.[24] Statistically, the United States consume 19,000,000 barrels of oil per day, 15 % of which comes from Africa,[25] followed by China with 9,500,000 barrels, Japan with 4,470,000 barrels and India with 3,300,000 barrels.[26] Of the top 35 oil producing nations, a considerable number are deemed to be developing nations or nations undergoing considerable change and development including Nigeria, Angola, Iraq, Algeria, Kazakhstan, Congo and Libya.[27] It comes as no surprise therefore, that developing countries, such as Nigeria, depend greatly on the foreign investment of the oil industry in their country: "*Shell is Nigeria's oldest energy company, and all Shell Companies in Nigeria have a long term and continuing commitment to the country, its people and the economy*."[28]

Undeniably, developing countries and international oil exporting corporations are in a co-dependent relationship.[29] Consequently, a new path must be found to ensure that international trade and investment will become more sustainable and respectful of human rights by demonstrating that human rights compliance is beneficial for multinational corporations and society.

[23] Roth (2014), p. 18.

[24] Economy Watch.

[25] Oil in Africa, The Boston Globe, http://www.boston.com/news/specials/oil_q_a/.

[26] World Consumption Per Country, Global Firepower, http://www.globalfirepower.com/oil-consumption-by-country.asp.

[27] World Factbook, Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2241rank.html.

[28] Shell Interests in Nigeria.

[29] Karp (2014), p. 18.

1.1 Aim and Argument

This investigation seeks to determine how human rights law can be applied to corporate entities. To date, insufficient international legal mechanisms exist to bring corporations to justice for their misconduct abroad. Rather than trying to solve the problem locally, with different regulations from state to state, an international approach to corporate human rights compliance needs to be sought out to prevent future corporate human rights abuses.

The starting point of this research is *Kiobel v. Royal Dutch Petroleum* which provided the key questions that were subsequently addressed in this research. The Alien Tort Statute (ATS) and its case law will be analyzed to show that the Supreme Court decision in *Kiobel* was flawed. By reviewing the landmark ATS decisions and applying their holding and reasoning to *Kiobel*, it will be shown that the limitation applied to the statute is inconsistent with previous legal decisions and does not hold up to close inspection. The case study and the comparison with previous decisions on the same topic enabled a profound understanding of why the *Kiobel* decision is flawed and the repercussions this flaw will have on future litigation. The considerations as to the application of the Alien Tort Statute to foreign cases, the possibility of holding corporations liable at a global level and the questions of enforceability and feasibility are what drove the discussion in the direction this paper has ultimately taken.

With the Alien Tort Statute now practically inoperative, other ways and methods need to be found to address corporate misconduct. In order for this to be possible, however, it needs to be shown that human rights are, in fact, applicable to corporate entities. Human rights law can be derived from human nature and the notion of a transcendental standard of justice. International human rights law is rooted in the liberal commitment to the equal moral worth of each individual because human rights embody the minimum standards of treatment. Even if some scholars seem to dismiss the idea of corporations having human rights obligations, the origin, aim and purpose of human rights clearly includes corporations in their realm of action. It will be shown that the original idea behind human rights was to safeguard the inherent dignity of human beings. Allowing corporations impunity when they aid in the violation of human rights defies the funding principle of human rights and modern business.

In a next step, existing international instruments targeting corporate human rights conduct will be analyzed. The tools used today to hold corporations responsible in international law are few and often lack enforceability, thus by comparing and contrasting, it will be determined which framework or legal mechanism is best suited to address the needs of human rights in the business world. The analysis of existing frameworks targeting human rights conduct has led to the clarification of both benefits and shortcomings these initiatives have. The existing international initiatives are insufficient in addressing the underlying problem of corporate human rights accountability because they try to impose a top to bottom approach onto corporations. These initiatives can only function appropriately if the business

entities they are targeting have themselves understood how fundamental human rights are for their business. By uniting all relevant international initiatives for the extractive sector, this research provides the possibility for a quick and simple comparison which hitherto had been a task of considerable magnitude.

Finally, based on the results of the investigation on the benefits and shortcomings of the existing initiatives, a human rights strategy for businesses was developed, taking into consideration the lessons learnt from *Kiobel* and the fears of corporations with regard to human rights duties. This strategy will seek to translate human rights obligations for business entities, showing that human rights can be implemented by corporations in a sustainable and business-friendly manner, rather than having states intervene in business activity. This will not only curb the current problem of human rights violations but it will also demonstrate that an effective human rights strategy will increase profit and shareholder value. Through the creation of such a strategy, the existing multitude of approaches has been unified and clarified, contributing to the establishment of clear, binding standards for all business entities, which respect the aim of businesses as profit generators while also paying due respect to the modern understanding of corporations as members of society.

The conclusion will show that by taking adequate steps today, corporations can tackle their adverse human rights impacts, reduce litigation cost and improve consumer good will. By considering human rights to be an inherent part of their business strategy, corporations will be well equipped to meet national and regional business and human rights standards, which will inevitably be implemented in the next few years. The creation of national and regional plans will then serve to elaborate a strategy at international level that will be business friendly and protective of human rights.

1.2 Vision

Consumer education has led to a widespread understanding that corporations with low human rights standards can and will be blamed, as the examples of Nike[30] and Coca-Cola[31] illustrate.

Corporations today have come to realize in order to achieve growth, prosperity and consumer goodwill, their *anything goes* approach in foreign investment, specifically in developing countries, must be abandoned for more sustainable and

[30] Nike has been accused of poor working conditions, human trafficking and child labor. See: How Nike solved its sweatshop problem, Business Insider, http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5?IR=T.

[31] *Sinaltrainal v. Coca-Cola Company*, 578 F. 3d 1252 (2009). Coca-Cola was accused of aiding paramilitaries in Colombia in the killing of several trade union members: Union Says Coca-Cola in Colombia Uses Thugs, The New York Times, http://web.archive.org/web/20051109163731/http://www.usleap.org/Colombia/Coke/NYT7-26-01UnionSaysCocaColainColombiaUsesThugs.htm.

respectful investment practices. Companies with sustainable development plans proudly display them on their websites and on their products while those with tarnished reputation hide behind their corporate veil. Consumers expect socially accountable corporate behavior and will punish corporations if they fail to act accordingly. The power of the consumers in a competitive market has never been greater and a dubious human rights record can directly influence sale, profit and reputation.[32] Foreign investment respectful of human rights is thus economically more profitable in the long term.

The oil industry remains controversial.[33] Industries can be deemed polemic due to the goods or services that they provide or how they conduct their business objectives. Some industries are controversial because their products are viewed as negative based on their addictive nature or the potential undesirable social consequences resulting from their consumption.[34] Other times, an industry can be deemed controversial when there are industry-wide practices that violate stakeholder interests or social expectations, such unethical behavior and socially or environmentally irresponsible practices.[35] The oil industry, with its recurring human rights violations, is a leading example.[36] High profile tragedies such as Shell's involvement in the Ogoni violence, Chevron's ties to the violent Nigerian dictatorship, Exxon Mobil's crackdown against Muslim separatists in the Aceh province in Indonesia and BP's involvement in crimes against humanity in South Africa during Apartheid have triggered public outcry and litigation.[37] This criticism has led to tarnished reputations, loss of profit and considerable litigation costs.

Although human rights law has largely been ignored by corporate actors in the past, societal developments and the emergence of an informed consumer have led to a shift in the balance of power in the private sector. Corporations can no longer behave like a *bull in a china shop* and expect the consumer to turn a blind eye. By implementing effective and enforceable human rights compliance policies at corporate level, businesses will be able to prevent negative human rights impacts such as loss of revenue, high litigation costs and reputational damages and establish themselves on the forefront of a movement largely gaining momentum and financial power: the movement for corporate accountability for human rights violations.

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[32] Examples include: When it comes to branding, just do it right, World Finance, http://www.worldfinance.com/strategy/corporate-governance-strategy/when-it-comes-to-branding-just-do-it-right.

See also: Coca-Cola boycott launched after killings at Colombian plants, The Guardian, http://www.theguardian.com/media/2003/jul/24/marketingandpr.colombia. Additionally: How activism forced Nike to change its ethical game, The Guardian, http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike.

[33] Roth (2014), p. 40.

[34] Du and Viera (2012), p. 1.

[35] Roth (2014), p. 40.

[36] Du and Viera (2012), p. 1.

[37] Du and Viera (2012), p. 2.

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Chapter 2
Nigeria, Shell and the Ogoni People

Abstract This chapter will give an overview of the situation in Nigeria between 1958 and 1995. It reveals the power imbalance between the indigenous people of the Niger Delta and the oil corporations exploiting the region's natural resources. Understanding the context of the situation in Nigeria will enable a better grasp of the root problem, namely the powder keg created by the impotence of minorities in the face of weak state governance and powerful corporate influence.

Keywords Nigeria • Shell • Ogoni people • Oil • MOSOP

The Ogoni people are a minority of approximately 500,000 people living in Ogoni region of the Niger Delta in Nigeria. With the discovery of large oil reserves in and around the delta in 1958, multinational oil corporations began to exploit the natural resources, significantly affecting the Ogoni people and their environment.[1]

Shell Royal Dutch Petroleum in particular has been invested in Nigeria since 1958, when it discovered commercially sustainable oil fields.[2] Shell pumps approximately 949,000 barrels of oil a day and has earned the Nigerian government 42 billion US Dollars between 2008 and 2012 alone.[3] It employs around 6000 workers directly in Nigeria and 35,000 indirectly through third party contractor staff.[4] Shell thus not only contributes to the gross income of the Nigerian Government, it is also a major employer for Nigerians.[5]

Aside from generating jobs and revenue for Nigeria, Shell Royal Dutch Petroleum and its subsidiaries are active in aiding small businesses, promoting education, agriculture and capacity building.[6] Most of this community development work

[1] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2nd Cir. 2010), p. 123. See also the UNEP Environmental Assessment of Ogoniland Report (2011). Shinsato (2005), p. 186.

[2] Cayford (1996), p. 183; Shinsato (2005), p. 191.

[3] Nigeria: Potential, growth and challenges.

[4] Nigeria: Potential, growth and challenges.

[5] Cayford (1996), p. 184.

[6] Shell in Nigeria: Our Economic Contribution.

J.R.-M. Wetzel, *Human Rights in Transnational Business*,
DOI 10.1007/978-3-319-31325-2_2

is done in partnership with the Niger Delta Development Commission to which Royal Dutch Petroleum contributed 178 million US Dollars in 2012.[7] Shell also donated a share of its profits into the government education fund, which targets the rehabilitation, restoration and consolidation of education in Nigeria and partners with the United Nations Development Program.[8] Between 2008 and 2012, Shell paid a total of 635 million US Dollars forward into the Nigerian Education Fund.[9]

The modern day image of Shell drastically contrasts with that of the company between 1990 and 1995 where it became one of the most prominent companies accused of human rights violations.[10]

2.1 The Movement for the Survival of the Ogoni People

The Movement for the Survival of the Ogoni people (MOSOP) was created in response to the oil exploitation in the Ogoni region.[11] It published the Ogoni Bill of Rights in 1990 as a symbolic beginning of the intended nonviolent struggle against the oppressive Nigerian government and the oil companies in Ogoniland under the leadership of Ken Saro-Wiwa and Dr. Barinem Kiobel.[12] The bill highlighted the lack of social services, the political marginalization of the Ogoni people, and their maltreatment by the oil companies.[13] The bill furthermore demanded environmental protection for the Ogoni region, self-determination for the Ogoni nation, cultural rights for the Ogoni people, representation in Nigerian institutions and a fair proportion of the revenue from the sale of the region's oil.[14]

After 2 years of little progress targeting the Nigerian military dictatorship government, the conflict escalated in 1992–1993.[15] Due to Ken Saro-Wiwa's fame as an acclaimed poet, MOSOP protests received considerable media attention from all over the world.[16] It was this media attention, as MOSOP would later argue, that led to a crackdown of the Nigerian military on the movement. Although Shell has continuously denied these allegations, the company did later admit to funding

[7] Shell in Nigeria: Our Economic Contribution.

[8] Shell in Nigeria: Our Economic Contribution.

[9] Shell in Nigeria: Our Economic Contribution.

[10] Buntenbroich (2007), p. 12.

[11] See generally Cayford (1996), pp. 187 et seq; Koeltz (2010), p. 45.

[12] Frynas (2003), p. 99. Ogoni People Struggle. Cayford (1996), p. 187.

[13] Ogoni People Struggle.

[14] Ogoni People Struggle.

[15] Cayford (1996), p. 189.

[16] The Curse of Oil.

daily rations of troop patrols in specific instances.[17] Arguably, it is irrelevant whether and how much Shell effectively paid the Nigerian Government when considering how much money passed between the two parties during the oil extraction in the 1990s and the benefit they both had by having MOSOP protests quelled.[18] Stevyn Obodoekwe of the Center for Environment, Human Rights and Development (CEHRD) even went so far as to argue that:

> The killing was done by Nigerian government but it was Shell that brought in soldiers to unleash mayhem on the people (. . .) Shell and the Nigerian government were working hand in glove. Crimes were committed, everybody knew it, so Shell is only making a mockery of itself saying 'we did nothing' because the world knows.[19]

Despite increasing violence, MOSOP decided to focus its energy on the three largest oil companies operating in the region: Shell, Chevron, and the Nigerian National Petroleum Company. Of these three, Shell had the largest share in the area[20] and, as such, became the primary target of the MOSOP protests. The group presented the companies with an ultimatum demanding 10 billion dollars in damages and royalties to the Ogoni people, as well as an immediate end to the destruction of the Ogoni region's environment.[21] MOSOP threatened that if its demands were not met, it would rally the Ogoni people in widespread popular resistance to the companies' presence.[22] In response to these threats made by the MOSOP, the Nigerian government announced that all disturbances of oil production were punishable as treason and banned all public meetings and assemblies.[23] In spite of the ban, at the beginning of the *Year of the Indigenous People* on January 4th 1993, MOSOP organized a peaceful protest that more than 300,000 Ogoni participated in, known as the first "Ogoni Day".[24]

Even though MOSOP intended all activities to be nonviolent, angry protesters beat a Shell employee to death that same month. After the events of January 1993 and further protests, Shell pulled its personnel out of the region in order to protect

[17] The Curse of Oil. See also: Shell oil paid Nigerian military to put down protests, court documents show, The Guardian, http://www.theguardian.com/world/2011/oct/03/shell-oil-paid-nigerian-military.

Furthermore: Secret papers 'show how Shell targeted Nigeria oil protests', The Independent, http://www.independent.co.uk/news/world/americas/secret-papers-show-how-shell-targeted-nigeria-oil-protests-1704812.html.

[18] The Curse of Oil. The Unrepresented Nations and People Organization (UNOP) notes: "However, there is little doubt that the international oil companies in Nigeria not only sponsor military personnel in the Niger Delta, but they also use their immense resources to manipulate government officials. In 2010, secret cables from the US embassy in Abuja spoke of Shell's "tight grip" on the nation." Ogoni: Individual Testimonies Highlight Human-Rights Abuses, UNOP, http://unpo.org/article/14922.

[19] Ogoni: Individual Testimonies Highlight Human-Rights Abuses, UNOP, http://unpo.org/article/14922.

[20] Amao (2011), p. 154. Shell produces half of Nigeria's daily oil production.

[21] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, p. 189.

[22] Ogoni People Struggle.

[23] 621 F.3d 111, p. 189.

[24] 621 F.3d 111, p. 189.

their workforce from the increasingly insecure climate.[25] Shell's withdrawal from Ogoniland considerably reduced the amount of petroleum being extracted and cutting profits by 200 million dollars in 1993 for the oil companies operating in the area.[26] However, this withdrawal paired with the comments made by Shell Executives to Nigerian officials about "*taking care of the issue*"[27] further advanced the crackdown of Nigerian forces on the Ogoni villages.[28]

The violent suppression of MOSOP protests, the death of a Shell employee and the withdrawal of Shell from Ogoniland can be seen as the turning point in Nigeria. Up to this point, violence could still have been prevented through the use of negotiations and mediation. However, once the situation had destabilized to the point where people were being killed and villages raided, any potential dialogue window was inevitably shut:

> During these raids, the security forces broke into homes, shooting or beating anyone in their path, including the elderly, women and children, raping, forcing villagers to pay 'settlement fees,' bribes and ransoms to secure their release, forcing villagers to flee and abandon their homes, and burning, destroying or looting property.[29]

An estimated 750 people were killed in the series of attacks on Ogoni villages, and 30,000 were left homeless.[30] In April 1994, the Rivers State Military Administrator ordered the military forces to "*sanitize Ogoniland, in order to ensure that those carrying out ventures (. . .) within Ogoniland are not molested*."[31]

After the repeated arrests of Ken Saro-Wiwa and Dr. Barinem Kiobel throughout 1993 and 1994, Greenpeace and Amnesty International led widespread campaigns for their release.[32] In 1995 however, Saro-Wiwa and Kiobel were sentenced to death by the Nigerian Special Tribunal established by the Nigerian government to deal with the Ogoni violence.[33] The activists were hung on November 10th 1995, their bodies burnt and buried in unmarked graves.[34]

In response to these highly disputed executions and further killings of the Ogoni people, Nigeria was suspended from the Commonwealth of Nations.[35] Supporters of the Ogoni people held protest marches at Nigerian embassies and Shell offices around the world. Many world leaders called for an oil embargo, economic

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[25] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, p. 189.

[26] Ogoni People Struggle. Cayford 1996, p. 191. In 1993 Shell, Chevron and NNPC issued statements estimating a loss of 230 million US Dollars due to the unfavorable conditions and called on the government to take action.

[27] Karp (2014), p. 153.

[28] Shell execs accused.

[29] 621 F.3d 111, p. 190.

[30] Buntenbroich (2007), p. 12. See generally Cassel (1996), p. 1966.

[31] 621 F.3d 111, p. 189. Cayford (1996), p. 191.

[32] Buntenbroich (2007), p. 13; Cassel (1996), p. 1963.

[33] 621 F.3d 111, p. 190. Cayford (1996), p. 192.

[34] Shell Execs Accused.

[35] Shell Execs Accused.

sanctions, and bans on arms sales.[36] Shell, on the other hand, published a statement that the company was "*. . .shocked and saddened when we heard the news (. . .) the allegations made against Shell are false and without merit. Shell in no way encouraged or advocated any act of violence against them or their fellow Ogonis.*"[37]

2.2 Evaluation of Shells Involvement in Nigeria Until 1995

The events that took place in Nigeria and specifically in the Ogoni region are testament to the inherent problems arising when unstable governments and large corporations engage in joint business activities. The unpredictability of Nigerian government in the 1990s, paired with the aspirations for self-determination of the Ogoni people and the economic implications of Shells oil exploitation created a powder barrel of irreconcilable aims and aspirations. While the Nigerian government depended on the financial income of the oil industry, the Ogoni people became victims of the rapid advancement of globalization. The oil industries, on the other hand, needed to exploit the oil reserves in Nigeria in order to meet the demands of the economy.

In their decision on the impact of oil industry on Ogoniland, the African Commission on Human and People's rights held Nigeria responsible for considerable human rights violations:

> Despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis.[38]

Even though the African Commission deemed Nigeria responsible for the human rights violations in Ogoni, the oil companies too have to take some responsibility.[39] With the development of modern society, corporations have gained considerable influence over governments and politics.[40] Considering that revenues from oil accounted for 80 % of Nigeria's income and that 14 % of Shell's oil comes from Nigeria, a fundamental co-dependence between both parties exists. Consequently, it is irrefutable that Shell had considerable influence over the Nigerian Government.[41] Even though it was up to Nigeria to provide Shell with the adequate information

[36] Shell Execs Accused.

[37] Shell global spokesman, Shaun Wiggins, in: Shell Execs Accused.

[38] African Commission on Human and Peoples' Rights, Decision on communication of The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria (155/96), decision made at the 30th ordinary session of the African Commission of Human and Peoples' Rights, Banjul, 13–27 October 2001.

[39] Frynas (2003), p. 101.

[40] See Sect. 4.4.1.1.

[41] In 2010, secret cables from the US embassy in Abuja spoke of Shell's "tight grip" on the nation. *Ogoni: Individual Testimonies Highlight Human-Rights Abuses*, UNOP, http://unpo.org/article/14922.

about the territory they would find themselves in, Shell had the moral duty to respect the land they were allowed to exploit. Shell should have taken all necessary measures in order to ensure that the people and the environment would suffer as little as possible from their exploitation practices.[42]

Had Shell conducted its business operations in a more sustainable fashion, violence and tragedy in Nigeria could have been avoided, saving hundreds of lives and millions of dollars in litigation fees, settlements and profit decline.[43] With the beginning of violent protests and the death of a Shell worker, Shell should have actively participated in finding a solution to the apparent problem, rather than depending on a military dictatorship to take care of the issue.

When facing allegations of human rights violations, Shell often points to the difficult political and social environment in which it conducts its operations:

> Major human rights violations do not generally exist in a vacuum, but within a nexus of corruption, poverty, poor public services and infrastructure, governmental instability and other factors which make it difficult for business to operate.[44]

Despite its undisputed position of power in Nigeria, Shell failed to speak out against the Wiwa and Kiobel trials instead, persisting on the apolitical role it played in Nigeria and the apolitical nature of corporations as a whole: it would be "*dangerous and wrong*" for Shell to "*intervene and use its perceived 'influence' to have the judgment overturned*" because it cannot be the role of "*a commercial organization like Shell… to interfere with the legal processes of any sovereign state*".[45] Shell's perception of itself as an apolitical institution and its decision to remain silent as an expression of neutrality was misguided. Shell's position of power in Nigeria and its possibility to speak out and exercise positive influence implied that the company was operating in a public and political role irrespective of whether or not they kept silent.[46]

As relevant actor, Shell's silence must be deemed politically much more relevant than an explicit opposition could have been.[47] For institutions and corporations in positions of authority with considerable power and influence, silence cannot be considered neutral but must be understood as an expression of support or, at least, acquiescence. Shell knew of the debate surrounding its ventures in Nigeria and it knew of the ongoing protests with regard to the deterioration of relations in Ogoniland and so should have objected. The fact that there was no complaint from Shell at the time of the deterioration of the situation even though it could have can only be interpreted as Shell having acknowledged and accepted the actions of the Nigerian government.[48]

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[42] UNEP Environmental Assessment of Ogoniland Report 2011.

[43] Shell: Clean-up goes on for Niger Delta—and oil company's reputation, The Guardian, http://www.theguardian.com/business/2011/feb/03/shell-nigeria-analysis-environmentalist-criticisms.

[44] Boele et al. (2001), p. 82.

[45] Wettstein (2010), p. 40.

[46] Jungk (1999), p. 171; Wettstein (2010), p. 40.

[47] Wettstein (2010), p. 40.

[48] Jungk (1999), p. 172.

Shell had two options, both of which were inherently relevant: remaining silent and becoming complicit in human rights violations or voicing their concern and pressuring the Nigerian government to rethink their policy decisions.[49] Unfortunately, Royal Dutch Petroleum chose to make their political statement by remaining silent.

The controversy surrounding Shell's involvement in Ogoni has not ceased, even 20 years later. The 2011 report by the United Nations Environment Program highlighted acute deficiencies in the way Shell withdrew from Ogoniland, failing to secure the pipelines and extraction site, leading to grave oil pollution and continuing flares at various sites.[50] Still today, the Ogoni region is severely contaminated and quasi-uninhabitable, a sad remnant of the regions violent past.[51]

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[49] Wettstein (2010), p. 40. Furthermore, Jungk (1999), pp. 172 et seq., Figures 1 and 2.

[50] UNEP Environmental Assessment of Ogoniland Report. See also Amnesty International and CEHRD Reports (2013).

[51] Amnesty International and CEHRD Reports (2013). Frynas (2003), p. 112.

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Chapter 3
The Alien Tort Statute

Abstract Having understood the background situation in Nigeria, the next step is grasping the Alien Tort Statute, as it was the legal instrument used to bring Shell before the U.S. Judiciary. Understanding the origin of the Statute, its aim and the previous case law will underline why it was the only statute at the disposal for human rights suits against corporations. Considering the US approach of using case law as precedent, the two major Alien Tort Statute cases will be discussed in detail to ensure a profound understanding of the judicial foundations. In a further step, and keeping in mind the corporate nature of *Kiobel*, significant Alien Tort Statute cases concerning oil corporations will be assessed. Finally, a case study on *Kiobel* will be undertaken.

Keywords ATS • Sosa • Filartiga • Kiobel • Supreme Court

The U.S. Alien Tort Statute (ATS) was enacted as part of the Judiciary Act in 1789 and was the first statute establishing the judiciary at federal level.[1] Following the ratification of the Constitution in 1787, the thirteen original American colonies became one nation and, as such, had to regulate their relationship with foreign states and the law of the nations.[2] In order to create the *more perfect Union* after the gain of independence the law of nations became a federal concern.[3]

Today codified under 28 U.S.C. § 1350, the Alien Tort Statute grants "*jurisdiction of any civil actions by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*." It is a jurisdictional statute that allows non-American nationals to bring a claim in the United States for a tort committed in violation of the law of nations.[4] US federal courts only have jurisdiction to hear cases if said jurisdiction is expressly granted in a statute. In order for an ATS claim to go ahead in federal court, the court needs to investigate whether the alleged harm is a violation of an international norm or the law of nations.[5] The law of nations can

[1] Koebele (2009), p. 3. Van der Heijden (2012), p. 41. Feldberg (2008), p. 9.

[2] *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980) at 877.

[3] 630 F.2d 876 at 878.

[4] Köster (2010), p. 49.

[5] Köster (2010), p. 50. See generally Bellia and Clark (2011), pp. 445 et seq.

J.R.-M. Wetzel, *Human Rights in Transnational Business*,
DOI 10.1007/978-3-319-31325-2_3

be defined as a set of principles recognized in state practice and doctrine.[6] The law of nations can be understood as a core component of what states understand to be core values of a just world.[7] Despite its prominence in corporate human rights cases since the late 1980s,[8] the ATS remained largely unused following its enactment.[9]

3.1 Landmark Decisions

Up until *Kiobel*, there were two major decisions pertaining to the Alien Tort Statute: *Filartiga v. Pena-Irala* and *Sosa v. Alvarez-Machain*. These decisions are significant, as *Filartiga* represents the first modern ATS decision since the enactment of the statute and because *Sosa*, as the first Supreme Court ATS case, significantly limits the original understanding of the statute. Understanding these milestone decisions is fundamental for the grasp of the significance of the *Kiobel* decision in 2013.

3.1.1 Filartiga v. Pena-Irala

The first modern case to make use of the ATS was *Filartiga v. Pena-Irala* in 1980.[10] Dr. Joel Filartiga, Paraguayan citizen, known critic of the Paraguayan dictator Alfred Stroessner, filed a complaint against a former Paraguayan police officer, Americo Pena-Irala, for torturing and killing his son. Joelito Filartiga had been held in a prison in Paraguay, where he was tortured and killed in an effort to stop Dr. Filartiga from criticizing the Paraguayan regime.[11] The Court of Appeals for the Second Circuit, after initial dismissal of the case at first instance, held that international law expressly prohibited torture and that, as a result, the case could be heard in the United States.[12]

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[6] Brierly (1963), p. 2.

[7] Ratner (2015), p. 73.

[8] Amao (2011), p. 251. See generally Colliver et al. (2005), pp. 169 et seq.

[9] The ATS afforded jurisdiction for a child custody suit in 1961 in *Adra v. Clift* 195 F.Supp 857, and was used as an alternative basis for jurisdiction for a suit to determine the title to slaves onboard an enemy vessel on high seas in *Bolchos v. Darell*, 3 Fed.Cas. 810 in (1795). Van der Heijden (2012), p. 53. Hailer (2006), p. 35.

[10] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2nd Cir. 1980). See generally Feldberg (2008), p. 14.

[11] 630 F. 2d 876 at 878.

[12] See generally Danaher (1981), pp. 353 et seq.

3.1.1.1 Violation of the Law of Nations

The intent of the ATS was to open federal courts for adjudication of the rights already recognized by international law.[13] This was to pay attention to the overarching concerns of the framers of the Judiciary Act that control over international affairs be vested in the new national government to safeguard the standing of the USA amongst the nations of the world.[14]

The issue to be resolved in *Filartiga* was thus whether the alleged conduct of Pena-Irala violated the law of nations. Based on the universal condemnation of torture in numerous international agreements and the renunciation of torture as a means of official policy, any act of torture committed by a state official against an individual violates established international legal norms and the law of nations.[15] In its case law, the Supreme Court has long established which sources of international law are appropriate to discern whether a certain type of conduct violates the law of the nations: treaties, executive acts, judicial decisions, customs of the civilized nations and the works of jurists having made themselves particularly well acquainted with the subject in question.[16] The outcome of the *Paquete Habana*[17] was especially instructive for the Court of Appeals in *Filartiga*, as it held that a standard having begun as one of coming, had only just ripened over the following century into a settled rule of international law by the general assent of civilized nations:

> But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.[18]

Courts therefore must not interpret international law as it stood at the time of the drafting of the provision in 1789, but rather consider international law as it has evolved among the nations of the world at the time they hear a case.[19] The prohibition of torture has become part of established international law, as defined by the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and numerous other treaties establishing the international consensus that torture is universally prohibited.[20] The prohibition of torture is clear, unambiguous and permits no distinction between

[13] *Filartiga v. Pena-Irala,* 630 F. 2d 876 at 887. Feldberg (2008), p. 9.

[14] 630 F. 2d 876 at 887. Stephens (2000–2001), p. 404–405. Feldberg (2008), p. 9.

[15] 630 F. 2d 876 at 880.

[16] *United States v. Smith,* 18 U.S. (5 Wheat.) 153 (1820), *The Paquete Habana*, 175 U.S. 677 (1900). *Paquete Habana* concerned a case where two fishing vessels were stopped by American blockade squadron after having fished off the coast of Cuba.

[17] 175 U.S. 677 (1900).

[18] 175 U.S. at 694.

[19] 630 F. 2d 876 at 881.

[20] 630 F. 2d 876 at 883.

nationals and non-nationals.[21] Even though the court does recognize that the ultimate scope of the rights falling under the law of nations remains to be subject to continued refinement and elaboration, the right to be free from torture is an inalienable part of the law of nations and as such, the grants ATS jurisdiction.[22]

3.1.1.2 No Exercise of Federal Jurisdiction

The defendant, Pena-Irala, submitted that even if torture was found to be a violation of the law of nations, the USA could not exercise jurisdiction over the case because this would contravene Art. III of the US Constitution.[23] Art. III Section 2 of the US Constitution states:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

As established in *Illinois v. City of Milwaukee*, a case properly arises under the laws of the United States if it is grounded upon statutes enacted by congress or upon common law of the United States.[24] Against the defendant's opinion, the court found that the law of nations formed an integral part of the common law of the USA, as it became part of common law with the ratification of the Constitution[25]:

> It is an ancient and a salutary feature of the Anglo-American legal tradition that the law of nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.[26]

Common law courts regularly adjudicate tort claims of a transitory nature between individuals over whom they exercise personal jurisdiction, wherever the tort may have occurred. The constitutional basis for the ATS is the law of nations, which has always been part of federal common law. It is thus not unusual for a court to adjudicate claims arising outside of the territorial jurisdiction if the legitimate interest of the court lies in finding a resolution for disputes among those within its jurisdiction with the intent to give effect to the laws of the state where the wrong occurred.[27] As established by *Paquete Habana*, international law is part of the law

[21] *Filartiga v. Pena-Irala*, 630 F. 2d 876 at 884.

[22] 630 F. 2d 876 at 885.

[23] 630 F. 2d 876 at 885.

[24] *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100.

[25] 630 F. 2d 876 at 886.

[26] Dickenson (1952), p. 26, 27.

[27] 630 F. 2d 876 at 885.

of the United States and must be administered and considered by courts of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination.[28] The Alien Tort Statute, consequently, is an opening of the federal courts for adjudication of the rights already recognized by international law.[29]

3.1.1.3 Course of Consideration

In the twentieth Century, the international community had begun to recognize the common danger posed by disregard for human rights, especially with regard to torture.[30] Humanitarian and practical considerations have led to the civilized nations of the world recognizing that respect for fundamental human rights is in their individual and collective interest.[31] As a result, the torturer has become, like the pirate and the slave trader before him, *hostis humanis generis*, an enemy of all mankind.[32]

Based on the afore mentioned considerations, the court recognized that foreign victims of international human rights violations may sue their malefactors in federal court, even for acts abroad, as long as the court has personal jurisdiction over the defendant.[33] The holding by the Court of Appeals in *Filartiga* gave effect to the jurisdictional ATS provision and fulfilled the "*ageless dream to free all people from brutal violence*".[34]

3.1.1.4 Critical Reception of Filartiga

The *Filartiga* decision was hailed as one of the most significant domestic cases of the century dealing with international law[35] and that it "*did as much to assist the development of this body of law as Fuji did to retard it*".[36] The decision in Filartiga "*provides the best means by which to hold an individual, or perhaps, a nation responsible for violation of human rights committed abroad*".[37] The court was saluted as one "*educated in modern international law which recognized its*

[28] *Paquete Habana,* 175 U.S. at 700.

[29] *Filartiga v. Pena-Irala,* 630 F. 2d 876 at 887.

[30] 630 F. 2d 876 at 890.

[31] 630 F. 2d 876 at 890.

[32] 630 F. 2d 876 at 890.

[33] See Centre for Constitutional Rights on *Filartiga v. Pena-Irala*, http://ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1-irala.

[34] 630 F. 2d 876 at 890.

[35] Louden (1981), p. 177.

[36] Lilich (1985), p. 399. Johnson (1921), p. 335.

[37] Bazyler (1985), p. 721.

constitutional authority and responsibility to apply international law in the appropriate cases."[38] The recognition of international law as a part of national law reflected the proper role of the courts as being an activist one.[39]

It was thought that the participation of the Justice and State Departments would lead to a dismissal of the case, because courts should refrain from addressing issues pertaining to foreign relation due to policy concerns.[40] Yet, "*a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights*."[41] Judge Kaufman, author of the *Filartiga* opinion, even went so far as to claim that "*the articulations of evolved norms of international law by courts form the ethical foundations for a more enlightened social order*."[42]

Blum and Steinhardt view the primary impact of *Filartiga* in the dissuasion of torturers and other human rights violators to seek refuge in the United States for fear of being sued by their former victims under the ATS.[43] Dictators can no longer rely on a safe haven in the United States[44] and the United States will no longer be considered the "*rest home for retired torturers*".[45] *Filartiga* is consistent with the commitment of the USA in promoting human rights internationally.[46] In addition, cases such as *Filartiga* can be beneficial for the prevention of further human rights violations because they generate publicity and media attention and encourage victims to sue.[47]

Equally important is the formation and clarification of international law, to which *Filartiga* undoubtedly contributed.[48] International courts can now turn to the *Filartiga* decision as evidence of how other states conceive the statute of international law with regard to torture and, as a natural extension, other violations of core human rights.[49] *Filartiga* is therefore also important from a comparative perspective.

Those who were critical of *Filartiga* saw it as "*a legal oddity, not a landmark case with far-reaching implications for the development of international law*" by an

[38] Burke et al. (1983), p. 321.

[39] Holt (1990), p. 547. See generally Schneebaum (1983).

[40] International Law and Human Rights—Alien Tort Claims under 28 U.S.C. § 1350, Case Comment, Minnesota Law Review Vol. 66, 1982. Johnson (1921), p. 337.

[41] United States Memorandum Submitted to the Court of Appeals of the Second Circuit in *Filartiga v. Pena-Irala*, 19 I.L.M. p. 604, 1980.

[42] Kaufman (1980), p. 44.

[43] Blum and Steinhardt (1981), p. 113.

[44] Holt (1990), p. 549.

[45] Bazyler (1985), p. 724.

[46] Blum and Steinhardt (1981), p. 113.

[47] Rosenbaum (1989), p. 124.

[48] Blum and Steinhardt (1981), p. 113.

[49] Blum and Steinhardt (1981), p. 113.

activist court.[50] Some commentators focused on the reliance on policy rather than practice and the non-binding status of the declarations cited to dismiss *Filartiga* without reaching the jurisdictional question.[51] The fact that torture exists in any country "*discredits the nation that torture has become a violation of international law because of the usage and practice of nations*."[52]

The usage of non-binding treaties and declarations as authoritative statements was a common basis for criticism.[53] If one considers a provision of human rights law to be law in a domestic court, then it must be shown that this was indeed the effect intended by the national lawmaker.[54] The Judges were accused of going further than they had needed to, applying "*a consuetudinarian law of human rights that in world terms may not be so assured*."[55] It was contended that not only should the court have considered whether it had authority to hear the case but also how this authority could impact the international community.[56] The critics alleged that *Filartiga* was "*manifestly contrary to the trend of the philosophy of international protection of human rights*"[57] and that there was clear disagreement over whether an individual should and does have the right to seek redress for human rights violations or whether this was an undesirable extension of existing law.[58]

Despite the criticism, *Filartiga* articulated a new role for the domestic courts of the United States when applying international law.[59] There was some surprise about a United States court trying a case that arose entirely in a foreign state. That any such case could proceed at all is a victory for human rights.[60] A main factor for caution must nonetheless remain the decision as to when to grant ATS jurisdiction, especially to avoid harassment suits, and statutes of limitations potentially applicable.[61]

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[50] Rusk (1981), p. 311.

[51] Holt (1990), p. 550.

[52] "Torture is a Tort in Violation of the Law of Nations, Giving Rise to Federal Jurisdiction Pursuant to 28 U.S.C. § 1350 Whenever an Alleged Torturer, Regardless of Nationality, is served with Process by an Alien within the Border of the United States." Case Comment Filartiga v. Pena-Irala (1980) University of Cincinnati Law Review Vol. 49, p. 890.

[53] 28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay? Case Comment, Georgetown Law Journal Vol. 69, 1881, p. 845.

[54] Symposium on International Human Rights Law in State Courts (1984) Comment, International Law Vol. 18. See also Holt (1990), p. 550.

[55] Oliver (1982), p. 152.

[56] Enforcement of International Human Rights in the Federal Courts after Filartiga v. Pena-Irala (1981), Virginia Law Review Vol. 67, p. 1380.

[57] Hassan (1983), p. 256.

[58] Hassan (1982), p. 137.

[59] Blum and Steinhardt (1981), p. 112.

[60] Blum and Steinhardt (1981), p. 112.

[61] Blum and Steinhardt (1981), p. 112.

3.1.2 *Sosa v. Alvarez-Machain*

Sosa v. Alvarez-Machain came before the United States Supreme Court in 2004.[62] Humberto Alvarez-Machain sued Jose Francisco Sosa for his involvement in Alvarez-Machain's abduction from Mexico and his subsequent extradition to the USA. Alvarez-Machain was suspected to be involved in the torture and killing of US DEA agent Enrique Camarena-Salazar by prolonging the agents' life in order to extend his interrogation and torture.[63] In 1990, a grand jury indicted Alvarez-Machain for the torture and killing of Camarena and the United States District Court for the District of California issued his arrest warrant. Negotiations between the USA and Mexico as to the extradition of Alvarez-Machain were fruitless and thus the DEA approved a plan to hire Mexican nationals to kidnap Alvarez and bring him across the border into the United States.[64]

After Alvarez-Machain had been acquitted in 1993, he filed a civil action against Francisco Sosa for violation of the law of nations under the ATS.[65] The District Courts awarded Alvarez-Machain 25,000 USD in damages under the ATS.[66] The Ninth Circuit Court affirmed the ATS judgment.[67] The Supreme Court of the United States reversed the judgment in 2004, finding that the alleged violations did not constitute a sufficiently established violation of the law of nations to create ATS jurisdiction.

3.1.2.1 Nature of the Alien Tort Statute

The ATS is to be considered a "*legal Lohengrin*".[68] When it was enacted it have courts cognizance of certain causes of action, not the power to mold substantive law, making its nature purely jurisdictional.[69]

The plaintiff, Sosa, contented that the ATS, as a jurisdictional statute, did not confer upon the courts the right to recognize any right of action without further congressional action.[70] The Supreme Court, although agreeing with the assessment of the jurisdictional nature of the statute, rejected the reading that the jurisdictional aspect did not confer upon the court a right to hear cases pertaining to the law of nations.[71] According to the Court, when enacted in 1789, the ATS gave the district

[62] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Feldberg (2008), p. 93.
[63] 542 U.S. 692 at 697.
[64] 542 U.S. 692 at 698.
[65] 542 U.S. 692 at 698.
[66] 542 U.S. 692 at 699.
[67] *Alvarez-Machain v. United States of America,* 266 F. 3d 1045 (2001).
[68] *ITT v. Vencap Ltd.*, 51 2 F. 2d 1001(1975) at 1005.
[69] 542 U.S. 692 at 713. Feldberg (2008), p. 90.
[70] 542 U.S. 692 at 712.
[71] 542 U.S. 692 at 712.

courts "*cognizance*" of certain causes of action, a grant of jurisdiction, and not the power to adapt the law.[72] The fact that the ATS was included in the Judiciary Act, an Act concerned exclusively with federal court jurisdiction, supports the strictly jurisdictional nature of the statute.[73] The ATS was to address the power of courts to entertain cases concerning a certain, specific subject.[74] "*Section 1350 clearly does not create a statutory cause of action and the contrary suggestion is simply frivolous*."[75]

The members of the First Congress did not provide for a statutory cause of action for alien tort claims because they did not believe a statutory cause necessary, as the necessity for a cause of action only entered American law in 1848.[76] Edmund Randolph recommended that the States needed to provide an expeditious, exemplary and adequate punishment for violations of the law of nations and treaties to which the USA were a party.[77] The goal of the ATS was therefore to give aliens access to federal courts if they so desired.[78] As a result, the First Congress meant to grant the district courts original jurisdiction over all causes where an alien sues for a tort in violation of the law of nations and not just those where the defendant was a U.S. citizen or the violations accepted in 1789.[79]

3.1.2.2 Interaction Between the Alien Tort Statute and the Law of Nations

Although Sosa contends that the ATS was "*stillborn*"[80] because there could be no claim for relief without further statutory action, the Court disagreed. Torts relating to the law of the nation were already recognized in the common law of time the ATS was enacted, and as such, jurisdiction for a violation of the law of nation can be recognized.[81]

When the United States declared their independence from the United Kingdom, they received the law of nations in their modern state.[82] At the time it consisted of two main aspects: the general norms governing the behavior of states with each other and a body of judge-made law regulating the conduct of individuals situated

[72] *Sosa v. Alvarez-Machain,* 542 U.S. 692 at 713.
[73] 542 U.S. 692 at 713.
[74] 542 U.S. 692 at 714.
[75] Casto (1986), p. 467.
[76] Dodge (2001–2002), p. 690.
[77] Journals of the Continental Congress 1774–1789, Volume 21 at 1136.
[78] Dodge (2001–2002), p. 696.
[79] Dodge (2001–2002), p. 701.
[80] 542 U.S. 692 at 714.
[81] 542 U.S. 692 at 714.
[82] 542 U.S. 692 at 714.

outside domestic boundaries and consequently carrying an international savor.[83] This conduct included three specific violations: violation of safe conduct, infringements of the right of ambassadors and piracy.[84] This narrow set of violations of the law of nations admitting a judicial remedy and threatening serious consequences in international affairs was on the minds of the men who drafted the ATS serves as guidance for the Supreme Court in its evaluation.[85]

Already before the enactment of the ATS, the United States were concerned about the vindication of rights under the law of nations.[86] In 1781, Congress called upon the state legislature to provide expeditious and adequate punishment for violation of safe passage, hostility, infractions of the immunities of ambassadors and infractions of treaties and conventions to which the United States are a party.[87] When this proved to be difficult, the framers of the Judiciary Act vested the Supreme Court with original jurisdiction over all cases affecting ambassadors and other public ministers and consuls.[88] The provision was later extended to include the ATS.[89] Based on these historical evaluations, the Supreme Court makes two assumptions: (1) There is reason to suppose that the First Congress did not intend to create the ATS as a jurisdictional convenience to be placed on a shelf until a later congress can create causes of actions for foreigners.[90] It would have been odd for Congress to create a jurisdictional statute entertaining civil cases brought by aliens for the violation of the law of nations without effect until a later Congress has taken further action.[91] (2) Congress intended for the ATS to have limited jurisdiction for the specific set of violations of the law of nations.[92]

Although the ATS is a jurisdictional statute creating no new causes of action, history strongly suggests that the statute was intended to have practical effect. The jurisdictional grant of the ATS was enacted on the understanding that common law would provide a cause of action for the limited number violations of the law of nations with a potential for personal liability at the time.[93] With regard to the violations of the law of nations, the Supreme Court finds that courts should require any claim based on a violation of the law of nations to rest on a norm of international character accepted by the civilized world and define with sufficient clarity and specificity comparable to the features of the eighteenth Century paradigms of safe passage, infringements of the rights of ambassadors and piracy. This consideration is terminal to the defendants' claim under the ATS.

[83] *Sosa v. Alvarez-Machain,* 542 U.S. 692 at 715.
[84] 542 U.S. 692 at 715.
[85] 542 U.S. 692 at 715.
[86] 542 U.S. 692 at 716.
[87] 542 U.S. 692 at 716.
[88] 542 U.S. 692 at 717.
[89] 542 U.S. 692 at 718.
[90] 542 U.S. 692 at 719.
[91] 542 U.S. 692 at 719.
[92] 542 U.S. 692 at 720.
[93] 542 U.S. 692 at 724.

3.1.2.3 The Need for Judicial Caution When Considering Individual ATS Claims

There are several reasons why judicial restraint must be exercised when adjudicating ATS claims. The primary concern is that "*a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision*."[94] Since the prevailing conception of common law has changed since 1789, as it is no longer being discovered but rather created and developed, restraint must be practiced when applying new, internationally generated norms.[95]

The second problem is the conceptual development in understanding common law that has entailed a significant rethinking of the role of federal courts.[96] The general practice has been to look for legislative guidance before exercising any authority over substantive law. Thus, it would take a much more aggressive role of the federal courts in exercising a jurisdiction which has remained largely obscure for almost 200 years.[97] Proactive courts are deemed to be a danger to the state compared to more conservative ones.

Third, a decision creating new private rights of action is better left to the legislator than to the judiciary. The creation of this type of rights of action raises issues far beyond the consideration of whether the primary underlying conduct should be allowed or not, thus entailing a decision to permit enforcement without the check of prosecutorial discretion.[98] The possible collateral damages of making international law privately actionable calls for judicial caution.[99]

The fourth contemplation pertains to the possible collateral damages which are in themselves reason enough to exercise caution when admitting new private causes of caution for a violation of the law of nations.[100] The foreign law implications for the United States when allowing comparable causes should make courts vigilant of imposing on the discretion of the legislature and the executive in managing foreign affairs.[101]

It is one thing if an American court imposes constitutional limits on its own states or the federal government, yet it remains another to allow suits claiming a limit on the powers of foreign governments over their citizens or to hold that foreign governments or their agents have disobeyed those limits.[102] As many remedies for the violation of the law of nations would consist in federal courts creating them themselves, this could create risks for foreign policy.[103]

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[94] *Sosa v. Alvarez-Machain,* 542 U.S. 692 at 726.

[95] 542 U.S. 692 at 725.

[96] 542 U.S. 692 at 726.

[97] 542 U.S. 692 at 726.

[98] 542 U.S. 692 at 727.

[99] 542 U.S. 692 at 727.

[100] 542 U.S. 392 at 727.

[101] 542 U.S. 692 at 727.

[102] 542 U.S. 692 at 727.

[103] 542 U.S. 692 at 728. See *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (1984) at 813.

The final reason for exercising restraint when it comes to adjudicating new claims under the ATS lies in the fact that the Supreme Court of the United States has no Congressional mandate to seek out and define new violations of the law of nations and the Congressional understanding of the judicial role has not demonstrated that greater judicial creativity is necessary or needed.[104] Even though it has been remarked that § 1350 should remain available for suits based on other norms that already exist or may ripen into rules of customary international law in the future, Congress has never promoted these suits and the Senate has expressly declined to give federal courts the task of interpreting and applying international human rights law.[105]

Great caution must henceforth be exercised when adjusting the law of nations to private rights and claims. Jurisdiction under the ATS was originally understood to provide relief for a small number of international norms that federal courts recognized without further statutory authority.[106] Congress has never shut the door in international law and it has not, to date, modified judicial decisions pertaining to the recognition of an international norm.[107] Until Congress acts further, therefore, ATS jurisdiction should be exercised with the understanding that the "*door remains ajar, subject to vigilant door keeping*" to a narrow class of international norms.[108]

3.1.2.4 Sufficiency of Alvarez Claims for the Supreme Court Standard

Having clarified how the ATS should be understood with regard to international law claims, the Court elaborated whether the alleged violations were sufficiently accepted in the civilized world to grant Alvarez ATS jurisdiction. Federal courts must not recognize claims under the statute if they do not have a definite content and are not generally accepted among civilized nations.[109] The determination whether a norm is sufficiently definite to support a cause of action should involve a decision about the practical consequences of making that cause available for litigation in the future.[110]

As a result of the reading by the Court, Alvarez-Machain's claims had to be weighed against the current state of international law on the subject.[111] Alvarez-Machain argues that his abduction by Sosa amounted to arbitrary arrest within the meaning of the Universal Declaration of Human Rights and Art. 9 of the ICCPR.[112]

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[104] *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 728.

[105] 542 U.S. 692 at 728. See also H. R. Rep. No. 102–367, pt. 1, p. 3 and 138 Cong. Rec. 8071 (1992).

[106] 542 U.S. 692 at 729.

[107] 542 U.S. 692 at 731.

[108] 542 U.S. 692 at 731.

[109] 542 U.S. 692 at 732. Known as the *Sosa Standard*.

[110] 542 U.S. 692 at 733.

[111] 542 U.S. 692 at 733.

[112] 542 U.S. 692 at 734.

The Universal Declaration however does not, on its own, impose obligations on the United States. Additionally, although the United States are bound by the ICCPR as a matter of law, they ratified the Covenant with the express understanding that it was not self-executing and did not create obligations enforceable in federal courts.[113] As a result, they cannot be used to extrapolate a binding obligation on US courts.

Because the ICCPR and the Universal Declaration do not, in themselves, establish a relevant, distinct norm, Alvarez-Machain contends that the prohibition of arbitrary arrest has reached the level of binding customary law.[114] Alvarez invokes the general prohibition of arbitrary arrest and detention because no applicable law authorized his arrest by Sosa.[115] The general prohibition of arbitrary detention, according to the plaintiff, is defined as officially sanctioned actions exceeding positive authorization to detain under domestic law of some government, regardless of the circumstances.[116] This understanding of the prohibition of arbitrary detention and arrest however would have far reaching consequences and little authority to support it.[117] This interpretation would lead to a cause of action in cases where federal officers simply exceed their authority and for the violation of any limit that the law might place on the authority of its own officers.[118]

Any credible invocation of the prohibition of arbitrary arrest and detention requires a factual basis beyond relatively brief detention in excess of positive authority. In the plaintiff's case where he was being held for less than a day, followed by a transfer to the custody of the lawful authorities and a prompt arraignment does not bring him within the realm of a violation of customary international law so well defined as to support the creation of a federal remedy.[119] Alvarez, by advocating such a broad principle, expresses an aspiration which exceeds any binding customary international rule of the specificity required by the Supreme Court. Creating a private cause of action for his claim would go beyond the common law discretion appropriate in ATS cases.[120] The Supreme Court rejected the holding of the lower courts for failure to prove a violation of the law of nations sufficiently established by international law.

[113] *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 734.
[114] 542 U.S. 692 at 735.
[115] 542 U.S. 692 at 736.
[116] 542 U.S. 692 at 736.
[117] 542 U.S. 692 at 736.
[118] 542 U.S. 692 at 737.
[119] 542 U.S. 692 at 738.
[120] 542 U.S. 692 at 737.

3.1.2.5 Concurring Opinion of Justice Scalia

Although Justice Scalia concurred with the holding and most of the reasoning, he took issue with the discretionary power of the federal judiciary to create causes of action for the enforcement of international-law-based norms.[121]

The Justice agreed that the ATS was a purely jurisdictional statute creating no new causes of action.[122] To Scalia, this conclusion alone was sufficient to dispose of the case in favor of Sosa.[123] A federal court must first create the underlying federal command in order to allow for ATS claims; but the fact that a rule has been recognized as customary international law by itself is not an adequate basis for viewing that rule as part of federal common law.[124] Using Jeremy Bentham's infamous terminology, Scalia dismisses the creation of a federal command out of international norms and the construction of a cause of action to enforce that command through the purely jurisdictional grant of the ATS as "*nonsense upon stilts*."[125]

Scalia rejected the court's finding that there were good reasons for a restrained discretion in considering new causes under the ATS because, by framing the issue as one of discretion, the Court neglected the lesson learnt in *Erie* where grants of jurisdiction are not themselves grants of law-making authority.[126] The question in Scalia's opinion is not what case or congressional actions prevented federal courts from applying the law of nations as part of the general common law; rather, it is what authorizes a departure from *Erie*'s fundamental holding that general common law does not exist.[127] The creation of post-*Erie* federal common law is rooted in a positivist mind-set that is foreign to the American common law tradition as it is far removed from the traditional common law adjudication.[128] Today's federal common law is not the Framer's common law; the question is no longer whether to extend old-school general common law but rather, whether to create new federal common law.[129]

According to Scalia, the Court attempted to mask its novel approach by suggesting that Scalia, and those concurring with him, closed the door on further judicial recognition of actionable international norms, yet in reality, this door was

[121] *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 739.

[122] 542 U.S. 692 at 742.

[123] 542 U.S. 692 at 743.

[124] 542 U.S. 692 at 743. See also Meltzer (2002), p. 519.

[125] 542 U.S. 692 at 743.

[126] *Erie R. Co v. Tompkins*, 304 U.S. 64 (1938). The Supreme Court held that held that federal courts did not have the judicial power to create general federal common law when hearing state law claims under diversity jurisdiction.

[127] 542 U.S. 692 at 744.

[128] 542 U.S. 692 at 745.

[129] 542 U.S. 692 at 746.

already closed by the Supreme Courts in *Erie*.[130] Rather the Court, Scalia argues, has created and opened a new door.[131] In keeping open the possibility that judges may create rights where Congress has not explicitly authorized them to do so, the Court allowed for judicial occupation of a sphere that belongs to the Representatives of the people.[132] This, Scalia argued, would go far beyond the court's powers and contravene its decision in *Erie*.

3.1.2.6 Reception of Sosa

While the reactions surrounding *Filartiga* focused more on whether the judgment was *good* or *bad*, the critical reception of *Sosa* addressed the major concern of the future implications of the so-called *Sosa Standard*. *Sosa v. Alvarez-Machain* was the first ATS case that the Supreme Court considered, establishing general guidelines the federal courts had to consider when evaluating whether a specific international law norm could lead to a recognizable cause of action for an ATS Suit.[133]

The *Sosa Standard* required a "*specific, universal and obligatory*"[134] international law norm for any ATS litigation.[135] In order to fulfil this requirement, the current state of international law must be assessed and the practical consequences of making the proposed cause available for litigation considered.[136] What worries judicial conservatives, much like Justice Scalia, is the elastic definition of possible causes of action susceptible to ATS claims under the Sosa Standard.[137] The possibility of accommodating an ever-growing array of subject matter jurisdiction, coupled with the difficulty of establishing elements and evidence for liability seemed to be the most troubling aspect of the *Sosa* holding for conservatives.[138]

Some maintain that the *Sosa* Court lacks any comprehensive theory of how and why international law should even be applied by federal courts.[139] The *Sosa* decision is a pragmatic yet incoherent ratification of existing ATS case law based on no particular theory of incorporation.[140] *Sosa* is a *no decision* in the sense that it misinterprets the proper domestic status of international law in the United States.[141]

[130] *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 746.
[131] 542 U.S. 692 at 746.
[132] 542 U.S. 692 at 747.
[133] Goodwin and Rosencranz (2007–2008), p. 702.
[134] 542 U.S. 692 at 725.
[135] Goodwin and Rosencranz (2007–2008), p. 708.
[136] Goodwin and Rosencranz (2007–2008), p. 709.
[137] Hufbauer (2004–2005), p. 78.
[138] Hufbauer (2004–2005), p. 79. Feldberg (2008), p. 96.
[139] Ku (2007), p. 267. Compare Steinhardt (2013), pp. 273 et seq.
[140] Ku (2007), p. 267.
[141] Ku (2007), p. 268.

The decision places the burden on the lower courts to justify why international law is now federal law even though the *Erie* decision held that it was not.[142]

Even though the Supreme Court decision does not lead to a bad result *per se*, there remain two fundamental questions which *Sosa* did not answer: (1) Has international law become law that pre-empts state courts interpretation of it? Are state courts bound by all the rules relating to the interpretation of international law? (2) Is the President of the United States bound by international law because it is a special form of federal common law?[143]

Others are far less critical of the implications of *Sosa* because they reason that the court upheld human rights litigation under the ATS in a "*clear and qualified*" manner.[144] Any judicial recognition of modern causes of action for human rights violations must be comparable to those recognized in the eighteenth century, thus exercising the necessary judicial caution required.[145] Even though *Sosa* was a clear victory for human rights advocates there are nonetheless several issues in need of clarification: (1) What will the clear definition rule mean in practice? (2) How will this affect the flow of ATS litigation in the future? and (3) How will international law be incorporated into domestic law and how will this affect state and federal laws?[146]

The concern was that a prominent role of international law in domestic law could ultimately affect the governance of a state as it removes the pure separation of power between the executive and the judiciary.[147] The *Sosa* court took this concern into consideration when it pointed out that even though there remains the competence to make judicial rules of importance to foreign policy, general practice requires a court to look for legislative guidance before exercising any innovative authority.[148]

From a pragmatic standpoint, the practical implications of ATS suits limit the problems *Sosa* has raised.[149] Most ATS cases have been dismissed over the years, while only two-dozen have actually led to a final judgment and of those, only one has resulted in significant damage payments.[150] Additionally, neither *Erie* nor any subsequent lawsuits have deprived courts of their power to recognize common law claims under international law.[151] Even though the Supreme Court emphasized the discretionary power of the lower court to recognize causes of action based on international law violations, it also repeatedly pointed out that any such recognition

[142] Ku (2007), p. 268.
[143] Ku (2007), p. 269.
[144] Flaherty (2007), p. 262.
[145] Flaherty (2007), p. 263. Feldberg (2008), p. 98.
[146] Flaherty (2007), p. 264.
[147] Moore (2007), p. 265.
[148] Moore (2007), p. 265. See also *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 726.
[149] Stephens (2004–2005), p. 534.
[150] Stephens (2004–2005), p. 534.
[151] Stephens (2004–2005), p. 548.

must be exercised with caution and restrained conception.[152] This cautionary approach is a mirror image of the already existing method employed by the lower courts in ATS cases, illustrating the understanding of the courts that a far reaching incorporation of international law into domestic law will lead to adverse consequences.[153]

Any court hearing ATS claims pertaining to international law must take into consideration the practical consequences of making a particular cause of action available. Additionally, they must consider whether international law even extends the scope of liability to the specific violation, as well as whether the national remedies have been fully exhausted or whether the case should be deferred to the political branches.[154] The Supreme Court, in its first ATS decision, validated a cautious approach to international law in *Sosa*, preserving a measured mechanism for human rights accountability, underlining the significant, even if narrow, role of the U.S. courts in providing redress for the victims of human rights violations.[155]

3.2 Corporate ATS Suits Prior to *Kiobel* Involving Oil Companies

The corporate community and the U.S. government have long been opposed to using the ATS in corporate human rights cases, as they argue that human rights law falls under the responsibility of governments and not private judicial entities.[156] Corporations argue that ATS litigation undermines corporate efforts to track their human rights records through their enactment of corporate codes, while governmental agencies have contended that corporate ATS litigation adversely affects U.S. commerce.[157]

Despite opposition, the ATS became a frequently used tool to bring corporations to justice for their roles in human rights violations after *Filartiga* and *Sosa*. Corporate ATS cases, until *Kiobel*, never questioned whether corporations were bound by international human rights law; rather they assumed that those norms binding private individuals also applied to corporate entities.[158] Understanding the arguments in preceding oil cases will underline why the *Kiobel* judgement is fundamentally flawed.

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[152] Stephens (2004–2005), p. 550.

[153] Stephens (2004–2005), p. 551.

[154] Gomez (2005–2006), p. 489.

[155] Stephens (2004–2005), p. 567.

[156] Amao (2011), p. 257.

[157] Kurlantzick (2002), pp. 60 et seq. For a discussion of the adverse effects of ATS litigation on commerce, see Sect. 4.3.3 of this research.

[158] Köster (2010), p. 52. See also *Doe I v. Unocal Corp*., 395 F3d 932, 945 (2002). Lincoln (2010), p. 605.

3.2.1 *Presbyterian Church of Sudan v. Talisman Energy Inc.*

Between 1998 and 2003, Talisman energy conducted oil development activities in Sudan as part of a consortium. Part of this development strategy was the removal of all inhabitants from the drilling areas, a task that was often undertaken with excessive force by the army, who was providing the consortium with the necessary security staff.[159] The plaintiffs sued the Sudanese army and Talisman Energy for genocide, crimes against humanity and other violations of international law. Talisman sought to dismiss the ATS suit on the basis of lack of subject matter jurisdiction, *forum non conveniens,*[160] act of state doctrine[161] and equity considerations.[162] The district court dismissed the claims by Talisman in 2003, stating that corporations could be held liable under international law for violations of *ius cogens* and that international law permitted the secondary liability claims for aiding and abetting.[163]

Following the decision of the District Court, the U.S. Government submitted a Statement of Interest, expressing concerns that the case could potentially negatively affect foreign relations of the USA with the Sudan.[164] On the basis of this statement, Talisman filed a new motion for summary judgment regarding the plaintiffs ATS claim, requesting the court to find that the doctrine of international comity and the concern of undue interference with the political branches warranted dismissal of the case.[165] The court denied the motion. In 2006, Talisman filed a motion for summary judgment, stating that the plaintiffs' allegation could not be proven as the evidence was either insufficient or inadmissible.[166] The motion was ultimately granted because the court held that the evidence necessary to support the plaintiffs' claims was either non-existent or inadmissible.[167]

[159] Lincoln (2010), p. 609. Goodwin and Rosencranz (2007–2008), p. 712.

[160] The doctrine of *forum non conveniens* applies in cases where courts refuse to take jurisdiction over matters when there is a more appropriate forum available to the parties.

[161] The act of state doctrine states that the courts will not sit in judgment of another government's acts done within its own territory.

[162] Equity is the set of maxims that reign over all the law and from which flow all civil laws. Goodwin and Rosencranz (2007–2008), p. 713. Feldberg, pp. 51 et seq.

[163] *Presbyterian Church of Sudan v. Talisman Energy Inc*., 453 F. Supp. 2d at 638 (2006).

[164] Goodwin and Rosencranz (2007–2008), p. 716.

[165] Goodwin and Rosencranz (2007–2008), p. 716.

[166] Goodwin and Rosencranz (2007–2008), p. 716.

[167] 453 F. Supp. 2d at 654 (2006).

3.2.2 *Doe v. Exxon Mobil Corp.*

The plaintiffs sued Exxon in 2005 for its extraction and processing activities in Indonesia during the ongoing warfare between the Indonesian Government and the Achenese rebels.[168] Due to the continuing violence, Exxon hired a unit of the Indonesian military for security purposes, giving them logistical support and providing training instructors and campsites.[169] The defendants argued that Exxon was liable for aiding and abetting the Indonesian army for the violations of international law it committed during its security engagement, including genocide, crimes against humanity and torture.[170] The defendants filed a motion to dismiss and the United States Department of State filed a Statement of Interest, expressing its concern that the resolution of the complaint may interfere with the foreign policy of the United States, especially with regard to terrorism.[171] The District Court considered the case in light of the outcome of *Sosa* and the State Departments Statement of Intent.

First, the District Court dismissed the plaintiffs' claim for aiding and abetting the alleged violations of international law, finding that this theory was not actionable under the ATS.[172] Second, the court terminated the claims of sexual violence, finding that this prohibition had not yet reached the required status of customary international law.[173] Last, the court considered whether the plaintiffs were required to exhaust domestic remedies before filing an ATS claim in the USA even though the *Sosa* court had declined to impose such a requirement. The district court found that an exhaustion of domestic remedies was not required, noting additionally that it was doubtful that the plaintiffs could have achieved justice in the Indonesian courts in the first place.[174]

After these initial considerations, the court turned to the claims of genocide and crimes against humanity, finding that these were sufficiently accepted amongst civilized nations to be actionable under the ATS.[175] At the same time, however, adjudicating these claims would result in judging the policies of the Indonesian military policies, which would be an impermissible intrusion in Indonesia's affairs.[176] Thus, the genocide and crimes against humanity claims were dismissed based on the consequences of assessing the policies and practices of Indonesian military.[177]

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[168] *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (2005).

[169] 393 F. Supp. 2d at 22.

[170] Goodwin and Rosencranz (2007–2008), p. 723.

[171] Goodwin and Rosencranz (2007–2008), p. 724.

[172] Goodwin and Rosencranz (2007–2008), p. 725.

[173] 393 F Supp. 2d at 24.

[174] 393 F Supp. 2d at 25.

[175] 393 F Supp. 2d at 25.

[176] 393 F Supp. 2d at 25.

[177] 393 F Supp. 2d at 25.

Next, the court considered the remaining claims pertaining to torture, arbitrary detention and extrajudicial killings. These claims did not encounter the same problems as the genocide claims as they constituted targeted actions by individuals rather than being general domestic policies of a foreign sovereign.[178] The issue with the plaintiffs' residual claims against Exxon was that, in the past, liability for these offenses had been extended only to nation-state defendants and not to private entities, although some courts had extended liability based on the color of law analysis.[179]

Ultimately, the district court in *Exxon* refused to extend liability to private actors since it found that allowing color of the law claims to go forward would result in a vast expansion in types of claims actionable under the ATS—an issue *Sosa* had expressly wanted to prevent.[180] Furthermore, any such claims could interfere with the domestic policies of Indonesia, potentially causing foreign policy problems for the USA.[181] Lastly, the court interpreted *Sosa* in such a way as to allow international law liability for states only, and not for corporations or other private actors.[182] As a final result, the court granted the defendants' motion to dismiss with respect to all of the plaintiffs' claims under the ATS.[183]

3.2.3 *Bowoto v. Chevron Corp.*

The *Bowoto* case arose out of the oil development activities Chevron was conducting in Nigeria, where it hired Nigerian government security forces to protect its drilling sites, much like Shell.[184] The plaintiffs alleged that following a protest against the Parabe Platform, where Nigerian citizens took control of the Platform for two days, Chevron enlisted Nigerian government forces to regain

[178] *Doe v. Exxon Mobil Corp.,* 393 F Supp. 2d at 25.

[179] 393 F Supp. 2d at 26. Section 242, Title 18 US Constitution: "For the purpose of Section 242, acts under 'color of law' include acts not only done by federal, state, or local officials within the their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers, prisons guards and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim." United States Department of Justice, http://www.justice.gov/crt/about/crm/242fin.php.

[180] 393 F Supp. 2d at 26. Van der Heijden (2012), p. 72.

[181] 393 F Supp. 2d at 26.

[182] 393 F Supp. 2d at 26, citing Sosa: "A related consideration is whether international law extends the scope of liability of a given norm to the perpetrator being sued, if the defendant is a private actor, such as a corporation or individual", 542 U.S. at 732, footnote 20.

[183] 393 F Supp. 2d at 30.

[184] Goodwin and Rosencranz (2007–2008), p. 733. Feldberg (2008), pp. 58 et seq.

control.[185] Chevron helicopters transported the security forces to the platform, where they fired at the protestors, killing two and harming a number of others.[186] Subsequently, the security forced quickly regained control of the platform, arresting the protestors; allegations of torture in custody followed.[187] In another instance, Nigerian security attacked two villages, damaging property and killing four individuals, using transportation and equipment issued by Chevron.[188]

The plaintiffs sued Chevron for violation of international law, namely execution, crimes against humanity and torture.[189] Chevron filed a motion to dismiss, claiming that the alleged violations applied to states only. The district court dismissed Chevrons motion on the basis that although the alleged crimes were primarily attributable to states, the plaintiffs had adequately alleged that Chevron had acted under the color of the law.[190] After the outcome of *Sosa*, Chevron challenged the original District Court holding, claiming that their interpretation of the color of law would not withstand the guidelines of the *Sosa* majority.[191]

The District Court reviewed its judgment post-*Sosa* and came to the conclusion that even though customary international used to apply solely to states, courts have recently begun to hold private parties liable for serious violations of fundamental international law norms such as slave trade, war crimes and genocide.[192] The plaintiffs alleged that Chevron had aided and abetted the Nigerian government security forces in their commission of the crimes, while Chevron argued that customary international law did not allow for aiding and abetting liability.[193] The court rejected Chevrons take on aiding abetting, finding that a number of courts recognized aiding and abetting liability since *Sosa* had been decided; thus, the plaintiffs were allowed to proceed with their ATS claims pertaining to the aiding and abetting of Chevron for the commission of crimes against humanity.[194]

The remaining claims of international law violations by the plaintiffs had previously been recognized as applying to the state only, yet it was argued that based on color of law, Chevron should be held responsible.[195] The court rejected this interpretation based on its inconsistency with the guidelines articulated in *Sosa*.[196] Traditionally, certain norms were only binding on specific entities, and it would have been inconsistent to also incorporate corporations.[197] The court

[185] Goodwin and Rosencranz (2007–2008), p. 733.
[186] Goodwin and Rosencranz (2007–2008), p. 733.
[187] Goodwin and Rosencranz (2007–2008), p. 733.
[188] Goodwin and Rosencranz (2007–2008), p. 733.
[189] Goodwin and Rosencranz (2007–2008), p. 733. Van der Heijden (2012), p. 70.
[190] Goodwin and Rosencranz (2007–2008), p. 733.
[191] Goodwin and Rosencranz (2007–2008), p. 733.
[192] *Bowoto I*, WL 2455752 at 2.
[193] WL 2455752 at 3.
[194] WL 2455752 at 3.
[195] WL 2455752 at 5.
[196] WL 2455752 at 5.
[197] WL 2455752 at 8.

rejected any further aiding and abetting claims of the plaintiffs, because extending the theory to other violations than crimes against humanity would be inconsistent with basic law principles.[198] Even though international law generally recognized aiding and abetting liability, *in casu* it would result in corporations being held liable for violations only be attributable to state officials.[199] According to the court, it would be illogical to hold a party liable for aiding and abetting the commission of crime when that same party could not be the prime perpetrator of a crime.[200]

Subsequently, Chevron filed a motion for summary judgment for the plaintiff's crimes against humanity claim, stating that the alleged facts were insufficient to support the claim at trial.[201] The district court considered Chevron's motion on two points: (1) Crimes against humanity consist of the so-called *chapeau*, which requires a systematic or widespread attack directed against any civilian population, and (2) the underlying conduct, usually murder, extermination or torture.[202] The plaintiff must establish that both parts of the claim are fulfilled and that there exists a nexus between the acts of the defendant and the *chapeau*.[203] The plaintiffs had presented sufficient evidence to raise a genuine issue of fact as to whether the security forced engaged in a pattern of violent repression of the civilian protests.[204] In the course of its analysis, nonetheless, the court found that the facts alleged by the plaintiffs did not fulfil the requirement of a widespread or systematic attack aimed at any civilian population as required by the *chapeau*.[205] As a result, Chevron's motion for summary judgment was granted.[206]

Subsequently, the plaintiffs filed a motion for reconsideration of the holding, arguing that the district court had employed faulty logic when coming to its conclusion.[207] During its reconsideration of the issue, the district court found its conclusion was inconsistent with prevailing legal authority.[208] The court furthermore noted that various policy considerations support finding that liability should extend to private parties that aid and abet the commission of crimes against fundamental international norms even if they apply only to state conduct.[209] The court therefore granted the plaintiffs' motion to reconsider and permitted them to proceed under the ATS with all of their claims.[210] In 2008, a San Francisco Court

[198] *Bowoto I,* WL 2455752 at 8.
[199] WL 2455752 at 8.
[200] WL 2455752 at 9.
[201] *Bowoto II*, No. C 99–02506 SI, 2007 WL 2349343 at 1.
[202] WL 2349343 at 3.
[203] WL 2349343 at 3.
[204] WL 2349343 at 9.
[205] WL 2349343 at 9–10.
[206] WL 2349343 at 11.
[207] *Bowoto III*, No. C 99–02506 SI, 2007 WL 2349341 at 2.
[208] *Bowoto III* WL 2349341 at 2, citing *Bowoto I* at 8.
[209] WL 2349341 at 4.
[210] WL 2349341 at 7.

cleared Chevron of all charges and in 2009 a motion for a new trial by the plaintiffs was denied.

3.3 Kiobel v. Royal Dutch Petroleum

Kiobel v. Royal Dutch Petroleum is a historic case as it considerably altered the way US courts will adjudicate ATS cases in future. *Kiobel* is significant in that it not only departs from the path previously taken by other courts on similar matters but also because it fails to provide an adequate answer as to how to deal with TNC cases in the future. Understanding the issues facing the courts as well as their way of solving them will aid in appreciating the importance of *Kiobel* for the future of the human rights debate.

Following the violence in the Ogoni region Dr. Barinem Kiobel's widow, Esther Kiobel, fled Nigeria and came to the United States of America, where she filed for political asylum and now resides as a permanent resident.[211] She subsequently filed a class action suit against Royal Dutch Petroleum in 2002 in the United States District Court for the Southern District of New York, alleging jurisdiction under the Alien Tort Statute requesting relief under international law for violation of their basic rights in Nigeria.[212] Royal Dutch Petroleum moved for dismissal of the case.[213]

3.3.1 Submission to the United States District Court for the Southern District of New York

The District Court dismissed the plaintiffs' claims for aiding and abetting property destruction, forced exile, extrajudicial killing and violations of the rights to life, liberty, security, and association.[214] The district court allowed the plaintiffs' claim for relief for crimes against humanity, torture and arbitrary arrest and detention. Due to the fact that the *Kiobel* case involved several controlling questions of law, the court certified the case order for interlocutory appeal to the Second Circuit Court pursuant to 28 U.S.C. § 1292.[215]

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[211] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._10-1491 2013, p. 2.

[212] *Kiobel v. Royal Dutch Petroleum*, 02 Civ. 7618. See also Karp (2014), p. 18.

[213] Centre For Justice and Accountability Background Paper, *Kiobel v. Shell*: *Light Dims on Human Rights Claims in the U.S.*, http://cja.org/section.php?id=510.

[214] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, p. 124.

[215] 02 Civ. 7618, p. 28.

3.3.1.1 Secondary Liability Claims

Before the court assessed the validity of the claims made by Kiobel and her fellow petitioners, it analyzed whether these secondary liability claims may even be adjudicated under the ATS.[216] Kiobel et al. do not assert that Royal Dutch Petroleum directly committed any of the offences but they argue that the company "*facilitated, conspired with and cooperated with government actors or government activity in violation of international law*."[217]

The precedent of *Sosa* did not expressly address secondary liability claims, yet its dictum implied that courts ought to consider them on a case-by-case basis only, taking into account the primary violation rather than secondary violations *per se*.[218] Nonetheless, considering that secondary liability was only mentioned in a footnote in *Sosa*, the Circuit Court followed its own approach on the topic as established in *Presbyterian Church of Sudan v. Talisman Energy Inc*.[219] The court thus concluded that where a cause of action for a violation of an international norm is viable under the ATS, so are secondary liability claims.

3.3.1.2 The Alleged Violations

The plaintiffs alleged that Royal Dutch Petroleum aided and abetted the Nigerian government in wanton destruction of property, forced exile, extrajudicial killings, torture, cruel and degrading treatment, arbitrary arrest and detention as well as crimes against humanity and the violation of the right to life, liberty and security.[220]

With regard to property destruction, forced exile, extrajudicial killings and violation of the right to life, liberty and security, the court found that there was insufficient evidence to prove that these abuses were well-defined international law violations that overcome the *Sosa* requirement of universal, specific and obligatory.[221] Concerning the accusations of crimes against humanity, torture and arbitrary arrest and detention, the court found that each of these allegations were sufficient to state a claim under the ATS.[222]

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[216] *Kiobel v. Royal Dutch Petroleum*, 02 Civ. 7618, p. 11.

[217] 02 Civ. 7618, p. 11.

[218] *Sosa v. Alvarez-Machain*, 542 U.S. at 733.

[219] *Presbyterian Church of Sudan v. Talisman Energy Inc*., 244 F. Supp. 2d (2006). For case details, see Sect. 3.2.1.

[220] 02 Civ. 7618, pp. 11–21.

[221] 02 Civ. 7618, pp. 11–21.

[222] 02 Civ. 7618, pp. 11–21.

3.3.1.3 The Interlocutory Appeal 28 U.S.C. § 1292

A court may certify an issue for interlocutory appeal if the court is of the opinion that the case involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal of the case may materially advance the termination of litigation.[223] *Kiobel* addressed several controlling questions of law which in themselves provided substantial ground for difference of opinion: judges may differ on the issue as to whether the alleged secondary violations are sufficiently accepted norms of international law to be actionable under the ATS.[224] Furthermore, an immediate appeal to the Second Circuit Court would, in all likeliness, advance the termination of the lawsuit pending for over 4 years already and where discovery has been expensive and time consuming, making it potentially even lengthier and expensive should it go ahead in US courts.[225] This effort and the ensuing cost would be futile if the Court were incorrect in asserting the viability of the plaintiffs' claims.[226]

3.3.2 The Appeal to the United States Court of Appeals for the Second Circuit

After granting the interlocutory appeal, the Court of Appeals for the Second Circuit held that Royal Dutch Petroleum could not be held responsible for the alleged conduct in Nigeria because they were not subject to human rights liability under customary international law:

> Our recognition of a norm of liability as a matter of domestic law, therefore, cannot create a norm of customary international law. In other words, the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS). Moreover, the fact that a legal norm is found in most or even all "civilized nations" does not make that norm a part of customary international law. (. . .)We must conclude, therefore, that insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATS.[227]

True to precedent, the Court of Appeals held that the scope of ATS liability is determined by customary international law.[228] Customary international law consists of those rules that are specific, universal and obligatory and no corporation has been subjected to any form of liability under international human rights law.[229]

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[223] *Consol. Edison, Inc. v. N.E. Utils*, 318 F. Supp. 2d 181 at 195.

[224] *Kiobel v. Royal Dutch Petroleum*, 02 Civ. 7618, p. 22.

[225] 02 Civ. 7618, p. 22.

[226] 02 Civ. 7618, p. 23.

[227] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 at 119.

[228] 621 F.3d at 126.

[229] *Kiobel v. Royal Dutch Petroleum*, 06-4800-cv, p. 2.

Accordingly, corporate liability for human rights violations is not a discernable or universally accepted rule of international law and thus the case must be dismissed for lack of subject matter jurisdiction.[230]

3.3.2.1 Precedence of International Law Over Domestic Law

The Alien Tort Statute as such does not provide a cause of action in itself; rather it relies on international law to provide one.[231] As the US Supreme Court noted in *Sosa*[232]:

> Federal courts may recognize claims based on the present-day law of nations provided that the claims rest on norms of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms the Court had recognized.[233]

A fundamental consideration must thus always be the stance customary international law takes on an issue and whether this, in turn, extends jurisdiction to the perpetrator the plaintiff is trying to sue.[234] Consequently, any action under the ATS must be possible because there has been a violation of a principle of international law by a universally accepted perpetrator.[235]

> We emphasize that the question before us is not whether corporations are "immune" from suit under the ATS: That formulation improperly assumes that there is a norm imposing liability in the first place. Rather, the question before us, as the Supreme Court has explained, "Is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[236]

3.3.2.2 Implications of Applying International Law to the Case

Even if domestic law would, in theory, provide a cause of action in a certain case, should international law not allow for this cause of action, then ATS jurisdiction is denied. This means that any case brought under the ATS must withstand the *law of nations* test. In accordance with this requirement, any violation of the law of nations is a violation of a norm accepted by the civilized world and defined with specificity sufficient to provide a basis for jurisdiction under the ATS.[237] If no norm exists with

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[230] *Kiobel v. Royal Dutch Petroleum,* 06-4800-cv, p. 2.

[231] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d at 125.

[232] *Sosa v. Alvarez-Machain*, 542 U.S. 692.

[233] 621 F.3d at 126.

[234] 621 F.3d at 126.

[235] 542 U.S. at 760, Breyer, J., concurring.

[236] 621 F.3d at 127. Citing *Sosa v. Alvarez-Machain* at 732 Footnote 20.

[237] 621 F.3d at 130.

regard to corporate liability for human rights violations that is sufficiently accepted and defined, the ATS cannot provide a cause of action for a violation of the law of nations:

> Together, those authorities demonstrate that imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se. Because corporate liability is not recognized as a "specific, universal, and obligatory" norm, see Sosa, 542 U.S. at 732 (internal quotation marks omitted), it is not a rule of customary international law that we may apply under the ATS. Accordingly, insofar as plaintiffs in this action seek to hold only corporations liable for their conduct in Nigeria (as opposed to individuals within those corporations), and only under the ATS, their claims must be dismissed for lack of subject matter jurisdiction.[238]

3.3.2.2.1 The Nuremberg Legacy 1945–1946

Considering the Nuremberg Trials is mandatory as they explicitly and unambiguously established, for the first time, the human rights norms that had before been implicit in international law.[239] The principles established by the Nuremberg Trials and the London Charter with regard to responsibility for human rights violations are still considered to be founding principles when asserting liability today. Jurisdiction was granted to natural persons only, while judicial entities could not be prosecuted. Although institutions such as the SS and the GeStaPo were declared criminal organizations, these declarations had no impact on their status as an entity—their individual members were prosecuted, not the entity itself.[240] This approach is illustrated in the case against I. G. Farben:

> The corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings (. . .) we have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt (. . .) the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.[241]

The arguments in Farben can be summed up simply: "*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.*"[242]

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[238] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d at 132.

[239] 621 F.3d at 133.

[240] 621 F.3d at 134.

[241] 621 F.3d at 135.

[242] 621 F.3d at 135.

Even though the Nuremberg Trials explicitly rejected the concept of corporate liability for human rights violations, it remains important to point out that the Nuremberg Trials were criminal proceedings and did not address civil liability. Additionally, although the tribunal rejected the criminal liability of corporate entities for human rights violations, it did indeed qualify the Totenkopf Division of the Waffen SS as a criminal entity.[243] Thus, although the Nuremberg trials can provide guidance into the criminal liability of corporate entities, its holdings should not be used exclusively to deny its existence in civil liability suits.

3.3.2.2.2 The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

Since the Nuremberg Trials, other tribunals have also rejected to include corporations in their lists of possible defendants, albeit for different reasons: both the ICTY and the ICTR extend jurisdiction only to natural persons and not to judicial ones.[244] The report of the UN Secretary General on the ICTY also addressed the corporate question:

> The question arises whether a juridical person, such as an association or organization may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary–General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons.[245]

In the context of the ICTY it is important to note that there was no corporate involvement in the atrocities committed in the former Yugoslavia. In Rwanda, on the other hand, the court did investigate allegations that various media outlets, including "Kangura -Wake Others Up!" and "Radio Télévision Libre des Milles Collines" (KTLM), incited the Rwandan genocide:

> From October 1993 to late 1994, RTLM was used by Hutu leaders to advance an extremist Hutu message and anti-Tutsi disinformation, spreading fear of a Tutsi genocide against Hutu, identifying specific Tutsi targets or areas where they could be found, and encouraging the progress of the genocide. In April 1994, Radio Rwanda began to advance a similar message, speaking for the national authorities, issuing directives on how and where to kill Tutsis, and congratulating those who had already taken part.[246]

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[243] Der Prozeß gegen die Hauptkriegsverbrecher vor dem Internationalen Gerichtshof Nürnberg. Nürnberg 1947, Bd. 1, S. 303–307, http://www.zeno.org/nid/20002756412.

[244] International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (1993). Statute of the International Tribunal for Rwanda, Art. 5, S.C. Res. 955, U.N. Doc. S/RES/955 (1994).

[245] 621 F.3d at 135.

[246] Montreal Institute for Genocide and Human Rights Studies, Rwandan Radio Transcripts, http://migs.concordia.ca/links/RwandaRadioTranscripts.htm.

However, none of the radio stations themselves were convicted by the ICTY, which preferred to sanction the individuals behind the microphone with up to 35 years imprisonment.[247] Nonetheless, much like the Nuremberg Trials, using the lack of corporate convictions as evidence of its denial by international tribunals would mean considerably misinterpreting case law of both the ICTY and ICTR.[248] While the radio incited people yet offering no factual physical support to the crimes committed, Shell supplied the armed forces with transportation and food supply. Furthermore, Shell considerably benefitted from the quelling of Ogoni protests, as this allowed them to resume their oil exploitation activities until the situation completely deteriorated. The circumstances in Rwanda were thus considerably different to those in Nigeria.

3.3.2.2.3 The Rome Statute

The Court of Appeals for the Second Circuit then turns to the Rome Statute of the International Criminal Court (ICC) to further its argument:

> When reading paragraphs (1), (2), and (3) of Article 25 of the ICC Statute together, there can be no doubt that by limiting criminal responsibility to individual natural persons, the Rome Statute implicitly negates—at least or its own jurisdiction—the punishability of corporations and other legal entities.[249]

Although there was an attempt by a delegation to have corporations included in the Rome Statute, it was futile because of increasing opposition.[250] The concept of corporate liability was considered too alien for some jurisdictions and including it in the ICC statute would have led to problems with regard to the ICC's principle of complementarity.[251]

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[247] In 1997, the United Nations International Criminal Tribunal for Rwanda (ICTR) indicted three Rwandans for "incitement to genocide": Hassan Ngeze who founded, published, and edited Kangura (Wake Others Up!), a Hutu-owned tabloid that in the months preceding the genocide published vitriolic articles dehumanizing the Tutsi as inyenzi (cockroaches) though never called directly for killing them; and Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders of a radio station called Radio Télévision Libre des Milles Collines (RTLM) that indirectly and directly called for murder, even at times to the point of providing the names and locations of people to be killed. In the days leading to and during the massacres, RTLM received help from Radio Rwanda, the government-owned station, and programs were relayed to villages and towns throughout the country by a network of transmitters operated by Radio Rwanda. United States Holocaust Memorial Museum, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007839.

[248] Case law of the ICTY available at http://www.icty.org/action/cases/4. Case law of the ICTR available at http://www.unictr.org/en/cases.

[249] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d at 137.

[250] Amann (2001), p. 334. Ratner (2015), p. 494.

[251] Art. 17 Rome Statute. The reasons for having the complementarity requirement of the ICC is that many states were afraid that the Court could become too powerful, essentially transforming itself into a supranational organization, meaning loss of control for national courts.

It can be argued that not including corporate liability in the Rome statute was less a decision on content but more a consideration of policy: jurisdiction of the ICC is often debated and contested and if it would have accepted to include a relatively new concept of corporate liability into its statute, protest would have been even greater. Thus, the ICC chose to protect the acceptance that is has among states rather than to risk causing commotion by including corporate responsibility in its Statute.

3.3.2.2.4 Absence of Concrete Legal Obligations

"*Provisions imposing corporate liability in some recent specialized treaties have not established corporate liability as a norm of customary international law*."[252] One cannot discern, neither from tribunals nor from treaty sources, that there exists a compelling international norm that would place upon corporations the duty to respect human rights. As a consequence, corporate liability for human rights violations is a public opinion and desire but has not yet evolved into a legal concept firm enough to withstand the requirements Sosa, namely being specific, universal and obligatory.[253]

It is important to note that although corporate liability for human rights violations is not an accepted legal concept yet does not equate to impunity of corporations for the court. Rather, the court finds:

> Acknowledging the absence of corporate liability under customary international law is not a matter of conferring "immunity" on corporations. It is, instead, a recognition that the States of the world, in their relations with one another, see IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir.1975) (Friendly, J.), (...) have determined that moral and legal responsibility for heinous crimes should rest on the individual whose conduct makes him or her "'hostis humani generis, an enemy of all mankind.'[254]

3.3.2.3 Judge Leval's Concurring Opinion

Judge Leval argues that *Kiobel* must be dismissed because the plaintiffs fail to state a correct legal claim for aiding and abetting liability.[255]

The rule created by the majority deals a substantial blow to international law as it allows those who profit from exploitation or abuses impunity so long as they operate in corporate form.[256] The justice contends that the position of international law on whether to impose civil liability for violations of international law is left up

[252] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d at 139.

[253] 621 F.3d at 140.

[254] *Kiobel v. Royal Dutch Petroleum*, 621 F. 3d at 149.

[255] 621 F. 3d at 158.

[256] *Kiobel v. Royal Dutch Petroleum*, 06-4800-cv, Judge Leval concurring, p. 1.

to the states; once having established prohibited conduct, international law says little about how these norms should be enforced.[257] Thus, the majority approach of denying corporate responsibility for human rights violations because it is not sufficiently established in international law is unwarranted. The case must be dismissed for failure to state correct claim of entitlement to relief for aiding and abetting because the quality of an aider and abettor is only given if there is proof of intent to facilitate or bring about a human rights violation.[258]

3.3.2.3.1 The Aim of International Law

> The rules of international law have been created by a collective human agency representing the nations of the world with a purpose to serve desired objectives. Those rules express the consensus of nations on goals that are shared with virtual unanimity throughout the world (. . .) The law of nations thus came to focus on humanitarian, moral concerns, addressing a small category of particularly "heinous actions— each of which violates definable, universal and obligatory norms"—conduct so heinous that he who commits it is rendered hostis humani generis, an enemy of all mankind.[259]

International law serves the purpose of giving full effect to the common goals of all nations: peace and prosperity. Consequently, international law must be understood as an enforcement tool for these common aims of nations. As a result, allowing corporations to act with impunity would defeat this general aim and purpose of international law.

If a corporation receives no adequate protection from the local government and police, said corporation will engage its own private forces to protect its production facilities, giving rise to concerns under international law with regard to genocide, torture and extra-judicial killings, as demonstrated by the Blackwater Scandal.[260] As established in *Khulumani v. Barclay National Bank Ltd.*[261] a corporation can only be held liable for aiding and abetting when the aiding and abetting was done with the purpose to further the actual violation: "*standards of international law admit of aiding and abetting liability only when the accused aider acts with a purpose to bring about the violations of international law*."[262] Any corporate

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[257] *Kiobel v. Royal Dutch Petroleum*, 06-4800-cv, Judge Leval concurring, p. 6.

[258] 06-4800-cv, Judge Leval concurring, p. 9.

[259] *Kiobel v. Royal Dutch Petroleum*, 621 F. 3d at 154.

[260] Blackwater USA is a private military company and security firm founded in 1997 by Erik Prince and Al Clark. It is based in the U.S. state of North Carolina, where it operates a tactical training facility that it claims is the world's largest. The company markets itself as being "*The most comprehensive professional military, law enforcement, security, peacekeeping, and stability operations company in the world*". At least 90 % of its revenue comes from government contracts, two-thirds of which are no-bid contracts. Following 9/11, Blackwater famously stated: "*After 9/11, the gloves come off*". Corpwatch, http://corpwatch.org/section.php?id=210.

For a full discussion of Blackwater, see Scahill (2007).

[261] *Khulumani v. Barclay National Bank Ltd.,* 504 F.3d 254 2d Cir. (2007).

[262] 621 F. 3d at 158.

behavior that leads to an aiding and abetting liability needs to be behavior that purposefully furthered international law violations.

3.3.2.3.2 No Aiding and Abetting Liability

Kiobel must be dismissed not because Shell Royal Dutch Petroleum is not liable for human rights violations by virtue of being a corporation but rather because the plaintiffs failed to state a correct claim for aiding and abetting liability. While their account does show that Royal Dutch Petroleum knew or should have known of the ongoing violations,[263] they fail to show that Royal Dutch Petroleum acted with the purpose to further the violations the Ogoni people suffered: "*For a complaint to properly allege a defendant's complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses*."[264]

Even though Shell provided the Nigerian military forces with tools and money, this premise alone cannot be utilized to infer intent to actively further any violations and thus, an aiding and abetting liability cannot be construed. As *Talisman*[265] has clearly established, only when a defendant provides practical assistance that has a substantial effect on the perpetration of a crime with the full intent and purpose of facilitating the commission of said crime can he be held liable for aiding and abetting.[266] In the case of Shell in Nigeria, this intent to substantially further the attempts by the Nigerian military to suppress the Ogoni uprising cannot be proven. Although the plaintiff's do infer this intent throughout their pleadings, they cannot factually prove it. Thus, according to the concurring opinion, the case must be dismissed because the plaintiffs fail to prove that Royal Dutch Petroleum substantially aided and abetted the Nigerian government and not because the company cannot be subject to liability under the law of nations.[267]

3.3.3 The Appeal to the Supreme Court of the United States

Following the Second Circuit Courts rejection of the case, Esther Kiobel appealed the decision to the Supreme Court of the United States. In October 2011, the Supreme Court heard a first round of arguments. After this first round, however,

[263] See Chap. 2.

[264] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d at 188.

[265] See Sect. 3.2.1.

[266] *Presbyterian Church of Sudan v. Talisman Energy,* 582 F. 3d 244 2nd Cir. (2009) at 258.

[267] In light of the considerations of Sect. 2.2., this seems debateable.

the Supreme Court ordered a re-draft of the original submissions,[268] asking the parties to answer "*Whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States*", drastically narrowing the thrust of the issue at hand.[269]

In April 2013, after additional briefs had been filed and oral arguments heard, the Supreme Court of the United States affirmed the judgment of the Second Circuit Court, stating that the underlying ideas of the general assumption against extra-territoriality applied to the ATS since there is nothing in the provision to rebut such an assumption.

To the Court, the question was not whether the applicants had stated a correct claim but rather, whether the ATS should even apply to cases having no connection to the United States. As a result, the Supreme Court did not address the issue of corporate liability for human rights violations as such, but rather, the applicability of the ATS for cases without nexus to the USA.

Essentially, the Supreme Court used *Kiobel* not to clarify the issue of corporate liability for human rights violations but to take a policy stand on the Alien Tort Statute and cases concerning events abroad, effectively limiting and almost reversing their original holding in *Sosa*.

3.3.3.1 The Presumption Against Extraterritorial Application

The presumption against extraterritorial application states that where a statute gives no clear indication of an extraterritorial application, it has none.[270] It is intended to demonstrate that the laws of the United States are envisioned with domestic concerns in mind only and to ensure that the laws of the USA do not clash with laws of other nations abroad:

> The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U. S. law that carries foreign policy consequences not clearly intended by the political branches.[271]

The problem with applying this presumption to the ATS, however, is that the ATS is a jurisdictional statute because it does not directly regulate any conduct or afford relief to parties.[272] As the presumption against extraterritorial application is typically applied to Acts of Congress to determine whether or not they were intended to have effect beyond the borders of the United States, the application of

[268] Kiobel to be expanded and reargued, SCOTUS Blog, http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/.

[269] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._10-1491 2013, p. 3.

[270] *Morrison v. National Australia Bank Ltd.*, 561 U. S. 247 (2010). Furthermore Cleveland (2013), p. 11.

[271] *Benz v. Compania Naviera Hidalgo*, S. A., 353 U. S. 138 (1957).

[272] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._ 10-1491 2013, p. 5.

the presumption to a judicial statute departs from the classical understanding of how it is to be used.[273] As a matter of fact, the presumption as it is articulated by the Supreme Court is less the classic presumption against extraterritoriality but more an ATS/*Kiobel* presumption preserving the transformational vision of the ATS.[274] As such, the court argues that it is, in fact, not applying the presumption against extraterritoriality itself but rather its underlying principles.[275]

The major issue concerning the ATS is that it allows courts to recognize certain causes of action based on universal norms of international law[276]:

> The danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in Sosa repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns.[277]

The ATS, in itself, offers no cause of action, rather it is the courts who may find the cause of action. This, in turn, can lead to adverse effects on the foreign policy of the USA because courts get involved with issues that have no connection to the USA.[278] Thus, courts could interfere with the foreign policy of the USA when finding causes of action under the ATS.[279]

The Court rebuts the claims by the petitioners that the history and purpose of the ATS clearly shows its intent to apply beyond the borders of the USA. In the view of the Court, the ATS would need to give a clear indication of extraterritoriality if it were to apply as such.[280] Nothing in the text of the statute indicates the intention of it applying anywhere else than the United States territory:

> The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "any civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.[281]

The fundamental question is ultimately whether the US judicial system should have the power to hear cases and enforce a cause of action under US law in order to enforce international law.[282] What is problematic about the application of the

[273] Steinhardt (2013), p. 842.

[274] Cleveland (2013), p. 9.

[275] Cleveland (2013), p. 11. *Kiobel v. Royal Dutch Petroleum*, 569 U. S._ 10-1291 2014, p. 5. This is particularly relevant when considering that applying the presumption against extraterritoriality to the ATS would result in "*drastically expanding the canon into uncharted waters*." Cleveland (2013), p. 12.

[276] 569 U. S._ 10-1491 2013, p. 5.

[277] 569 U. S._ 10-1491 2013, p. 5.

[278] Bradley (2001), pp. 460 et seq.

[279] Ramsey (2013), p. 70.

[280] *Morrison v. National Australia Bank Ltd.*, 561 U. S. 247.

[281] 569 U. S._ 10-1491 2013, p. 7.

[282] 569 U. S._ 10-1491 2013, p. 8.

presumption to cases like *Kiobel* is the facility with which it may be overcome by a sufficient nexus to the United States.[283] This leads to a case-by-case analysis of whether the presumption can be overcome, effectively dismissing the classic statute by statute analysis.[284]

3.3.3.1.1 Intent of the ATS

When the ATS was enacted in 1786, it targeted three principal offences: violations of safe conduct, infringements on the rights of ambassadors and piracy.[285] Neither the violation of safe conduct nor the infringements on the rights of ambassadors had a necessary extraterritorial application—they were enacted following the assault on Francis Barbe Marbois, Secretary of the French Legion in Philadelphia and the entering of the Dutch Ambassadors house by a constable in New York.[286] In the eyes of the Court, these two examples give no indications of any attempt by the Congress to give the ATS extraterritorial reach.

The only offence having some sort of extraterritorial reach is piracy, since it usually occurs in the high seas, beyond the influence of any one sovereign.[287] The Supreme Court generally treated the high seas as foreign soil for the purpose of the presumption against extraterritorial application of a statute. In the present case, nonetheless, the Court argues that applying the ATS to piracy has less foreign policy implications because pirates, wherever they were found, were "*fair game*".[288] Applying the statute to pirates, thus, does not mean applying the will of the sovereign USA onto another sovereign nation because pirates are generally found in international waters, thus incurring little if any foreign policy problems. Additionally, at the time, piracy was condemned by most nations, thus any one state attempting to capture them was applauded rather than scolded. It is the conviction of the court that pirates and piracy offer no indication of an extraterritorial application of the ATS because they must be considered as "*a category unto themselves*".[289]

3.3.3.1.2 Unique Hospitable Forum

"*There is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.*"[290] With

[283] Steinhardt (2013), p. 842.
[284] Steinhardt (2013), p. 842.
[285] Blackstone, Commentaries on the Laws of England 68 (1769).
[286] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._ 10-1491 2013, p. 9.
[287] 569 U. S._ 10-1491 2013, p. 10.
[288] 569 U. S._ 10-1491 2013, p. 10.
[289] 569 U. S._ 10-1491 2013, p. 11.
[290] 569 U. S._ 10-1491 2013, p. 12.

regard to the history of the United States it appears implausible why the founding fathers of an insecure, struggling republic would want their nation to be the "*policeman of the world*".[291] With the attacks on the Ambassadors mentioned above, however, the United States were obliged to address the violation of the rights of foreign officials injured in the USA by enacting the ATS. Nonetheless, nothing in this history suggests that: "*Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign*."[292] It is the view of the Supreme Court that allowing the ATS to apply in the territory of another sovereign would have created problems rather than solving them.

Furthermore, if the USA were to become a forum for international claims, nothing could stop other nations from hearing cases against American citizens for any alleged violation in the USA or abroad. Any judgment made by a nation as prominent as the USA will inevitably have consequences outside its borders and in order to protect not only its citizens but also the foreign policy considerations of the nation in cases such as *Kiobel*, the possible consequences must be taken into account. It is difficult to fathom that any nation would want to take on the responsibility to be the world's judicial police force in a world that is increasingly unstable.

The Supreme Court argues that all of the alleged conduct in *Kiobel* occurred in Nigeria and the only link with the USA is the corporate headquarters of Shell in New York. This, on its own, would support the view of the Supreme Court that the USA should not step in to rule on the issue. Nonetheless, one could argue against the Court's finding that corporate decision-making in the headquarters in New York also amounts to corporate conduct because of the effects the decisions in New York had on the conduct of Shell officials in Nigeria. In "*Defining the Scope of Business Responsibility for Human Rights Abroad*", the Danish Human Rights and Business Project uses this principle to create and condemn the indirect complicity of corporations for human rights violations:[293]

> In the modern world, the decisions taken by a business can have major implications for lives and communities geographically and culturally remote, so businesses do have to be discerning in identifying their indirect connection to violations (. . .) Businesses must, therefore, be alert to the extent to which they can be indirectly complicit in human rights violations.[294]

Corporations must bear some responsibility for human rights violations committed *on their watch* even if they are not directly involved, because their power, position and influence oblige them to act in a moral fashion that will not cause harm to those around them. This includes namely the individuals in the state they do

[291] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._ 10-1491 2013, p. 12.

[292] 569 U. S._ 10-1491 2013, p. 13.

[293] Clapham and Jerbi (2001), p. 346.

[294] Defining the Scope of Business Responsibility for Human Rights Abroad, http://www.humanrights.dk/humanrightsbusiness/index.html.

business in as well as their customers abroad. Thus, the decisions taken in New York would have had a direct effect on the decisions taken by Shell employees in Nigeria, as it has been indicated in previous chapters.[295] Furthermore, keeping in mind the human rights tradition of the USA liberating themselves form the oppression of the British and bringing democracy to oppressed nations worldwide, it seems odd for the Court to veer away from this understanding now towards a policy non-intervention.

The Court ultimately concludes that the presumption against extraterritoriality applies to the ATS and affirms the Court of Appeals judgment:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. (. . .) Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required. (. . .) The judgment of the Court of Appeals is affirmed.[296]

The sole explanation for the reticence to justify not ruling on corporate liability is political policy. Corporate liability does not yet have the same stigma as international terrorism or torture. The issue, in itself, is not attractive or generally accepted enough to raise the need to rule on it. Although the number of cases is increasing, the issue has not yet become so large that it cannot be ignored, thus not demanding to be dealt with immediately. At the time the Supreme Court ruled on *Kiobel*, it also had to rule on issues regarding terrorism, same-sex marriage and healthcare, issues that appeared to be in a more urgent need for resolution than an obscure human rights case from Africa.

3.3.3.2 Concurring Opinion of Justices Breyer, Ginsburg, Sotomayor and Kagan

In their concurring opinion authored by Justice Breyer, the Justices find that rather than solving the problem of the ATS via the presumption against extraterritoriality, they would find jurisdiction under the statute in cases where:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) 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.[297]

[295] See Sects. 2.1 and 2.2.

[296] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._ 10-1491 2013, p. 14.

[297] 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 2.

When considering to what extent the door remains open to ATS litigation for activities having taken place abroad, the approach taken by the majority is rejected. According to the concurring opinion, the presumption against territoriality rests on the assumption that Congress regulates with domestic concerns in mind; with regard to the ATS however, this approach is flawed since it was enacted precisely with those extraterritorial concerns in mind. The language used in the statute, such as *alien*, *treaties* or *law of nations* clearly indicates the cross-border intent of the statute[298]:

> The statute's purpose was to address violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.[299]

Rather than trying to limit the application of the ATS by applying the presumption against extraterritoriality, the opinion establishes a list of instances where the ATS would apply, clarifying rather than limiting the ATS. If an alleged tort occurs on American soil, if the perpetrator is an American citizen or if the conduct of the defendant has such a detrimental effect on American interests, such as the interested of the USA of not becoming a safe haven for the enemy of mankind, then the ATS must apply, regardless where the conduct alleged occurred in the first place. In other words, the tort must be sufficiently *American*.

Although the formula significantly reduces the scope of the ATS with regard to the prior case law, by allowing the ATS to apply in cases where the interests USA are at stake, such as the risk of becoming a safe haven for enemies of human kind, it does leave the door open for instances where human rights violations have been grave, with a sufficient US nexus and where no proper remedy could be granted. The majority ruling thus establishes that unless Congress explicitly decides that the USA shall become a universal policeman for all international crimes committed, cases not affecting American interests should no longer be adjudicated under the ATS.[300] The concurring opinion thus should be viewed as an extension of the *Sosa* holding, albeit with significant limitations.

3.3.3.2.1 The Underlying Substantive Grasp

Cases "*occurring within the territory of another sovereign, I would assume that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp*".[301]

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[298] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 3.

[299] 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 4. See also Sect. 3.1.2.1.

[300] One could consider terrorism, where the USA explicitly declared that all terrorist offenses anywhere in the world would be considered an attack on democracy and the USA and would be punished by them.

[301] 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 6.

The purpose of the statute is to provide compensation for victims of the modern day equivalents of the original ATS torts in cases where such compensation avoids serious interference with foreign policy of the USA.[302] According to the Restatement of Foreign Relations Law § 402, a nation may apply its laws to cases where conduct takes place within its own territory, to the activities and interests of its nationals outside as well as inside its territory, to conduct outside its territory which has or was intended to have effect within its territory and last to conduct which has occurred outside its territory but which is directed at the security of the state.[303]

Keeping in mind the purpose and grasp of the ATS as well as the Restatement § 402, Justice Breyer and his fellow Justices develop their principles for applying the ATS[304]: "*Adjudicating any such claim must, in my view, also be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement*".[305]

The statute should thus only apply to cases where distinctive American concerns are at stake because, if the statute applies only to concerns that are distinctly American, foreign policy concerns cannot arise. Foreign policy keeps in mind the distinct American concerns and aims to protect them by engaging in policies that minimize international friction.[306]

Despite his attempt at limiting the application of the ATS to those cases having a direct effect on distinctly American issues, Justice Breyer nonetheless draws attention to something fundamental:

> As I have indicated, we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction- related interest justifying application of the ATS in light of the statute's basic purposes—in particular that of compensating those who have suffered harm at the hands of, e.g., torturers or other modern pirates. Nothing in the statute or its history suggests that our courts should turn a blind eye to the plight of victims in that handful of heinous actions.[307]

The ATS should be considered a weapon against the modern day pirates attempting to violate fundamental norms of international law. Moreover, international law has long obliged states to persecute those who violate fundamental legal norms, thus obliging them to refrain from becoming a safe haven for the enemy of mankind. The cases of *Filartiga*, *Sosa* and *Marcos* exemplify this commitment.[308]

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[302] *Kiobel v. Royal Dutch Petroleum*, 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 6.

[303] Bradley (2001), p. 467.

[304] See Sect. 3.3.3.2.

[305] 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 3.

[306] "No nation has ever yet pretended to be the custos morum of the whole world." Justice Story, *United States v. The La Jeune Eugenie*, 26 F. Cas. 832. Ramsey (2013), p. 365.

[307] 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 7.

[308] *In re Estate of Marcos*, Human Rights Litigation, 25 F. 3d 1467, 1469, 1475 (CA9 1994), *Sosa v. Alvarez-Machain*, 542 U.S. 2004, *Filártiga v. Peña-Irala*, 630 F.2d 876 2d Cir.1980.

3.3.3.2.2 Applying the New Model to Kiobel

If the theories developed are consequently applied to *Kiobel*, the following result ensues: the only presence of the corporation in the USA is their offices, as well as their shares, which are traded at the New York Stock Exchange.[309] The plaintiffs are not American nationals, but nationals of Nigeria and the conduct which they allege is aiding and abetting those who engaged in torture and killing in Nigeria. Consequently, none of the alleged conduct took place in the USA nor are the defendants the actual perpetrators of said offences—they are being prosecuted for having helped the perpetrators by supplying food, money and means of transport. In the view of the Justices, there mere corporate presence of Royal Dutch Petroleum in New York does not suffice to bring them within the realm of the 4th requirement of their theory, namely, not providing a safe haven for enemies of mankind:

> It would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an enemy of all mankind. Thus I agree with the Court that here it would reach too far to say that such mere corporate presence suffices.[310]

3.3.4 Evaluation

Kiobel v. Royal Dutch Petroleum is an example of judicial decisions influenced, in part, by the views and considerations of the executive.[311] The Supreme Court took great care in evaluating how the outcome of the case could potentially affect the interest of the United States in future. It stressed that the political branches and not the courts should be making foreign policy decisions—how far this statement pertained to the executive branches' amicus briefs as well as to Congress' and its legislative power is unclear.[312] Although there is good reason to argue that the executive branch is better placed than the court to rule on how a matter will affect foreign policy, obliging courts to defer to the opinion of the executive would lead to an inconsistent and unaccountable judiciary, creating a doctrinal disorder.[313]

Kiobel aims at being as efficient as possible by preventing a further flow of corporate human rights cases, which could potentially discredit the economic business possibilities of corporations in the USA. As a result, the reception of the judgment was varied.

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[309] *Kiobel v. Royal Dutch Petroleum*, 569 U. S_ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 14.

[310] 569 U. S._ 10-1491 2013, Justices Breyer, Sotomayor, Ginsburg and Kagan, concurring, p. 15.

[311] Wuerth (2013), p. 612.

[312] Wuerth (2013), p. 612.

[313] Wuerth (2013), p. 615.

3.3.4.1 Negative Response

Considering the historical background of the ATS and its litigation, it is unsurprising that considerations of separations of power took center stage.[314] Federal courts applying a broad understanding of universal jurisdiction, as was the case in past ATS cases, would eventually raise international concerns and lead to friction, as *Sosa* already recognized.[315]

The Supreme Court seized upon a judicially invented presumption which was born 20 years after the ATS, gave it novel application to a jurisdictional statute and projected it backwards.[316] The ATS expressly refers to the law of the nations, and thus extraterritorial application, making the Supreme Court decision "*wrong*".[317]

According to Human Rights First, an independent non-profit organization aimed at protecting human rights based in New York and Washington, the holding of *Kiobel* undermines the US leadership on human rights issues:

> This decision so severely limited a law that has for decades been a beacon of hope for victims of gross human rights violations. The United States has been a leader in the fight against impunity, but this decision cuts a hole into the web of accountability. Human rights abusers may be rejoicing today, but this is a major setback for their victims, who often look to the United States for justice when all else fails. Now what will they do?[318]

This disillusionment has been echoed by most in the human rights movement, clearly indicating that people had hoped for a better outcome than they got. The Centre for Constitutional Rights qualifies the Supreme Court decision as "*disappointing*", and Charles Wiwa, one of the plaintiffs, contended that "*The Supreme Court's decision further exposes how human rights abuses are given a low priority in US courts*".[319]

Others highlight an unexpected problem brought about by *Kiobel*: its disfavors American companies.[320] Contrary to common belief, *Kiobel* did not end ATS litigation against corporate defendants; rather, it led to the "*death of U.S. human rights litigation against foreign companies*".[321] As the decision requires a sufficient nexus for the ATS to apply, American companies, as their headquarters and crucial employees are more likely to be domiciled in the USA, are far more likely to satisfy this requirement.[322]

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[314] Ku (2013), p. 840.

[315] Ku (2013), p. 840.

[316] Colangelo (2013), p. 1329.

[317] Colangelo (2013), p. 1331.

[318] Human Rights First Kiobel Ruling.

[319] Centre For Constitutional Rights, *Kiobel v. Shell*: *Supreme Court Limits Courts' Ability to Hear Claims of Human Rights Abuses Committed Abroad*, http://ccrjustice.org/newsroom/press-releases/kiobel-v.-shell%3A-supreme-court-limits-courts'-ability-hear-claims-of-human-rights-abuses-committed-a.

[320] Chander (2013), p. 829.

[321] Chander (2013), p. 829.

[322] Chander (2013), p. 830.

The negative reactions to *Kiobel* by the human rights community were to be expected. Many had hoped that the US Supreme Court would take a clear stand on the issue and so highlight the way for other democracies in creating litigation targeting human rights obligations of corporations. The stand taken by the Court in this case, favoring foreign policy over human rights legacy disappoints many.

3.3.4.2 Positive Reception

There are those who see their vision of the ATS confirmed by the holding of the Supreme Court. The decision by the Supreme Court was the right one, as the USA should not become to forum for "*hauling overseas damage claims into American courts*".[323] There is only one true sense to what American courts can and should do: do justice in the United States. As a result, this ruling is the only sensible way of interpreting the ATS, as the USA should not have to play policeman to the world.[324]

Although it may seem attractive to bring a suit in US courts based on the possibility of *wining big*, it is of utmost importance that courts rule only on matters which concern them and the sovereign nation they are bound by. If any and every court could rule on conduct that occurred anywhere in the world, what would be the point of having sovereign nations with functioning judiciaries? What would be the interest of having an International Criminal Court? Of course it brings a great amount of publicity for any case if it is brought within the US judicial system yet do media coverage and world-wide interest really make up for the fact that one brings a case in a country which has no nexus to the alleged conduct? Being one of the leading nations of the world should not mean that the USA has to hear cases having no connection to it.

3.3.4.3 Mixed Review

Lastly, there are those who view the Supreme Court decision as a "*mixed bag*".[325] The opinions in Kiobel underline that several important issues remain to be litigated because "*what is law in Kiobel isn't clear and what is clear in Kiobel isn't law*."[326]

Although Katie Redford, co-founder and US Office Director of EarthRights International, which filed two amicus briefs in support of the petitioners in this case, deems the decision to be a "*shame*", she believes that the door does remain open for future human rights claims.[327] In her opinion, it is important to distinguish

[323] SCOTUS Blog.
[324] SCOTUS Blog.
[325] SCOTUS Blog.
[326] Steinhardt (2013), p. 841.
[327] SCOTUS Blog.

the holding into what "*it did and didn't do*".[328] The Supreme Court did not completely annihilate the ATS nor did it give transnational corporations carte blanche with regard to human rights; rather it has narrowed down the possibility of bringing an ATS case, despite this being out of line with its previous decisions:

> The majority opinion (. . .) holds that the presumption against extraterritoriality applies to the Alien Tort Statute (. . .) naturally, we believe the majority's opinion is legally flawed. This may be the first time that the Court has applied the presumption against extraterritoriality to a jurisdictional statute, and in a way that essentially requires a case-by-case analysis (. . .) In the face of a very short statute and little legislative history, the majority essentially allows its own policy views to decide the meaning of the ATS. It speculates that using the ATS in foreign cases may cause friction with foreign states, ignoring the glaring fact that the ATS applies only specific and universal norms of human rights law.[329]

Considering that the language of the decision is so vague and providing such little concrete foothold, the holding of *Kiobel v. Royal Dutch Petroleum* will essentially lead only to one thing: "*The Supreme Court has provided fodder for another decade or more of litigation and created more business for litigators*".[330] As Jazrawi notes: "*(. . .) whilst Kiobel has been a setback for those seeking stronger accountability of multinationals operating abroad, the decision does not mean that corporations are immune from liability, and ways will continue to be sought to that end*".[331]

Although the *Kiobel* opinions are not an example of clarity, they do indicate, much like *Sosa*, that the door remains ajar for some extraterritorial claims even if the broad Universalist application of the ATS has been rejected.[332] Future courts should thus read *Kiobel* and the ATS in such a way that preserves the ability to continue advancing *Filartiga's* promise of a borderless regime of accountability as a last resort for egregious human rights violations.[333] Although pure universal jurisdiction has become nearly impossible to argue since *Kiobel*, other principles of extraterritorial jurisdiction in international law can be used to construe the statute under the law of nations it invokes.[334]

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[328] SCOTUS Blog.

[329] SCOTUS Blog.

[330] SCOTUS Blog.

[331] Kiobel v. Shell: US Supreme Court on corporate accountability for foreign human rights abuses, UK Human Rights Blog, http://ukhumanrightsblog.com/2013/04/18/kiobel-v-shell-us-supreme-court-on-corporate-accountability-for-foreign-human-rights-abuses/.

[332] Cleveland (2013), p. 27.

[333] Cleveland (2013), p. 27.

[334] Colangelo (2013), p. 1346. Colangelo cites objective territoriality, active personality and protective principle as examples of bases of extraterritorial jurisdiction.

3.3.4.4 The Great Flaw That Is Kiobel

The Supreme Court decision in *Kiobel* is inconsistent and wrong, not because the outcome is far from desirable from a human rights perspective, but rather because the interpretation of the Court rests on false premises.

The Supreme Court has a history of ruling in one of two fashions: Either by paying close attention to the text and the intent of the drafters of the constitution or statute, thus following the text and tradition approach, or considering the constitution and the statutes as living instruments that change and adapt to the needs of society. Neither approach, as will be demonstrated, lends itself to construing a rejection of the application of the ATS based on the presumption against extraterritoriality. What is questionable about the court's holding in *Kiobel*, thus, is its underlying justification.

3.3.4.4.1 The Text and Tradition Approach

The conservative text and tradition approach, propagated especially by Justice Scalia, finds that primacy must be given to the text, structure and history of the document or statute and that the job of the judge is to apply either the clear language of the statute or the critical structural principle implicit in the text.[335] If a text should be ambiguous, the judge should turn to the specific legal tradition flowing from that text and what it meant to the society that adopted it.[336] By specific legal tradition, Scalia understands the "*most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified*."[337] A judge, therefore, is to be governed only by the text and tradition of the Constitution and not by their intellectual, moral and personal perceptions because "*When judges test their individual notions of fairness against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges*."[338]

Reliance on text and tradition means constraining judicial discretion.[339] The danger that the text and tradition school of thought sees in the exercise of judicial discretion is that "*the judges will mistake their own predilections for the law*"[340] Adherence to the text or to the traditional understanding of those who originally adopted it, however, reduces the danger of judges substituting their personal beliefs for those of society.[341] The rule of law, in the view of Scalia, is a "*law of rules*" and

[335] Scalia (1983), p. 881. Rossum (2006), p. 27.
[336] Rossum (2006), p. 27.
[337] *Michael H v. Gerald D*, 491 U.S. 110 at 127.
[338] *Schad v. Arizona*, 501 U.S. 624 at 650.
[339] Rossum (2006), p. 27.
[340] Friedman Friedman (1991), pp. 194–195.
[341] Rossum (2006), p. 27.

when text embodies a rule, the judges are to apply this rule as law.[342] When text and tradition fail to supply a rule, there is no rule for the judge to apply and thus, any action by the judge will contradict actions of the popular branches.[343] Scalia's reason for rejecting judicial policymaking is simple: "*it is a trend in government that has developed in recent centuries, called democracy*."[344] It is not compatible with democracy and democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that meaning is.[345] This interpretation accords primacy to the text and tradition of the documents and regards it as the duty of the judge to apply the textual language of the Constitution or statute when it is clear, and to the traditional understanding of the society who adopted it, when it is not.[346] By staying faithful to the text, one reduces the risk of judges substituting their view for those of society and it preserves the values of society by preventing backsliding on the restrictions the Constitution originally imposed on the government.[347]

Called "*wooden*", "*unimaginative*" or "*pedestrian*", Scalia contends that textualism is not constructionism but rather the belief that judges have no authority to pursue broader purposes or rewrite laws.[348] A text should be construed neither strictly nor leniently; it should be interpreted reasonably, allowing it to contain all that it reasonably contains.[349] Words have a limited range of meaning and any interpretation going beyond that limited range is not permissible.[350] When confronted with the criticism that textualism is too formalistic, Scalia responds that this is exactly what textualism is about: form.[351] The rule of law is about form and it is what makes laws and *not rules of men*.[352]

Before examining the actual ATS provision and its applicability to the *Kiobel* case from a textualist perspective, one must first consider the possible application of a doctrine of non-justiciability. The Supreme Court relied on the presumption against extraterritoriality to refuse to adjudicate *Kiobel*, yet it will be shown that neither this presumption nor the act of state doctrine, a more plausible approach, lend themselves to rejecting to adjudicate the issue.

The presumption against extraterritoriality states that "*when a statute gives no clear indication of an extraterritorial application, it has none*," and reflects the understanding that "*United States law governs domestically but does not rule the*

[342] Scalia (1989), p. 1175.
[343] Rossum (2006), p. 33.
[344] Scalia (1997), p. 9.
[345] Rossum (2006), p. 33. See also Scalia (1997), p. 22.
[346] Rossum (2006), p. 51.
[347] Rossum (2006), p. 51.
[348] Scalia (1997), p. 23.
[349] Scalia (1997), p. 23.
[350] Scalia (1997), p. 23.
[351] Scalia (1997), p. 25.
[352] Scalia (1997), p. 25.

world"[353] and is intended to "*protect against unintended clashes between our laws and those of other nations which could result in international discord*."[354] In *Morrison v. National Australia Bank*, a Scalia-authored decision of 2009, the Supreme Court demonstrated its modern understanding of the presumption against extraterritoriality: According to *Morrison*, it is a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.[355] The assumption rests on the presumption that Congress ordinarily legislates with respect to domestic and not foreign matters.[356] Therefore, unless it is the affirmative intent of Congress to give extraterritorial effect to a statute, the court must presume that Congress was primarily concerned with domestic conditions.[357]

The presumption is to be applied to all cases in which the preserving of a stable background is necessary against which Congress can legislate with predictable effect.[358] The claim of the majority opinion that the ATS was never intended to be applied beyond the borders of the USA is simply not accurate: the language of the statute does not suggest domestic use only, since it refers to international treaties and the law of the nations. If the ATS were to apply only within the United States, what would be the interest in referencing international legal instruments? Had Congress intended for the ATS to apply within the USA only, they would have made reference to American legal instruments and not international ones. Furthermore, the Supreme Court had the chance to apply the presumption against extraterritoriality to the ATS in 2004 when deciding the case of *Sosa*, where the alleged conduct took place in Mexico. It is rather far-fetched to suddenly apply a canon of construction to a statute when the case law suggests a completely different approach.

As Justice Breyer correctly notes, the ATS was intended to provide victims of violations of the law of nations with a remedy, consequently forcing it under the presumption against extraterritoriality is erroneous. The ATS was intended specifically to apply to cases such as piracy, violation of safe conduct and the infringements of the rights of ambassadors, all cases having an extraterritorial reach. The Congress who had enacted the ATS at the time, wanted to prevent the newly independent United States from encountering foreign policy issues with its neighbors because it provided a safe-haven for those who violated fundamental laws. Applying the presumption against extraterritoriality to a statute such as the ATS thus defies not only the intent of Congress but also purpose of the statute itself.

If the Supreme Court had wanted to apply any doctrine of restraint to prevent *Kiobel* from being adjudicated, it should have applied the act of state doctrine rather

[353] *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 at 6.
[354] *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 at 454.
[355] 561 U.S. 247 at 5.
[356] 561 U.S. 247 at 6.
[357] 561 U.S. 247 at 6.
[358] 561 U.S. 247 at 12.

than the presumption against extraterritoriality, which is usually not applied to jurisdictional statues.[359] The act of state doctrine lends itself much more to the considerations of the majority, as its intent is to protect the court from deciding matters that would have negative foreign policy effects if adjudicated.[360] According to the act of state doctrine, derived from the constitutional separation of powers, a court can abstain from adjudicating claims when it is required to evaluate acts of foreign sovereign governments made within their own sovereign territory.[361] In *Banco Nacional de Cuba v. Sabbatino*, the U. S. Supreme Court elaborated the concept based expropriation acts by the Cuban government under Fidel Castro.[362] The Court held that the act of state doctrine proscribed judicial review of the validity of the Cuban expropriation degree because the greater the degree of codification concerning a particular area of international law is, the more appropriate it will be to render a decision regarding it.[363] In addition, the less important the implications on an issue are for the foreign relations of the USA, the weaker the justification will be for exclusivity in the political branches.[364] Lastly, the balance of consideration may also be tipped in cases where the government who perpetrated the challenged acts is no longer in power or existence.[365] This last consideration means, notably, that in the case of Nigeria and thus *Kiobel*, where the new government distanced itself from the acts of the former military dictatorship, the application of the act of state doctrine would be preempted based on this change in government, ultimately allowing adjudication of the issue in the USA.[366]

Consequently, from a textualist perspective, *Kiobel* should not have been dismissed on considerations of non-justiciability. Rather, the court could have successfully refused parts of the case while allowing parts to go ahead because not all of Shells' alleged aiding and abetting conduct in Nigeria satisfies the requirements of *Sosa* for specific, universal and obligatory violation. In the present case the alleged violations were undertaken by state officials, accepted subjects of international law, with the substantial aid of a corporate entity, Shell. According to the *Talisman* precedent, if a primary perpetrator can be sued for a violation, so can the aider and abettor.[367] The violation of the law of nations, as defined by *Sosa* and *Filartiga*, must have "*definite content and acceptance among civilized nations*."[368] For *Kiobel*, this means that the allegations of torture, extra-judicial killing and

[359] Feldberg (2008), pp. 253 et seq.

[360] Hailer (2006), p. 132.

[361] O'Donnell (2004), p. 229. See also Koebele (2009), p. 348. Ramsey (2013), p. 364.

[362] Koebele (2009), p. 348. Feldberg (2008), p. 255.

[363] Feldberg (2008), p. 255. Koebele (2009), p. 348. See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) at 428.

[364] Koebele (2009), p. 348. See also 376 U.S. 398 at 428.

[365] 376 U.S. 398 at 428.

[366] Koebele (2009), p. 349.

[367] *Presbyterian Church of Sudan v. Talisman Energy Inc*., 453 F. Supp. 2d at 638.

[368] *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 699.

crimes against humanity should have been considered by the Supreme Court as aiding and abetting violations sufficiently established for the *Sosa Standard* while the allegations of destruction of property and housing rights should have been denied for failure to reach the *Sosa* standard. Denying parts of *Kiobel* due to the nature of the violation not satisfying the requirements of the ATS rather than trying to disallow it under the presumption against extraterritoriality, which is clearly unfit for the purpose, would have been a legally sounder approach by the conservatives.

3.3.4.4.2 The Constitution as a Living Instrument

The liberal wing of the United States Supreme Court believes in reading the Constitution and its provisions as if it were a living instrument, much like the European Court of Human Rights.[369] The argument behind this approach is that an evolutionary approach to the Constitution is necessary in order to provide it with the flexibility to tend to the evolving societal needs.[370] Moreover, the Constitution would become irrelevant if it were not allowed to grow along with the society it governs.[371] As Justice Holmes notes in *Missouri v. Holland*:

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.[372]

The framers of the Constitution used broad language and left the application of said language to those generations living in ever-changing environment in which they lived.[373] Just because an activity did not exist when the Constitution was framed cannot mean that the Constitution may not be applied to such an activity[374]:

> Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.[375]

However, any interpretation of the Constitution as a living instrument that has boundaries:

> An individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would

[369] See, for example, *Tyrer v. United Kingdom* and *Marckx v. Belgium.*

[370] Scalia (1997), p. 41.

[371] Scalia (1997), p. 41.

[372] *Missouri v. Holland*, 252 U.S. 416 (1920) at 433.

[373] Rehnquist (2006), p. 402.

[374] Rehnquist (2006), p. 402.

[375] Rehnquist (2006), p. 402.

> not have enacted and the voters have not and would not have embodied in the Constitution (. . .) is genuinely corrosive of the fundamental values of our democratic society.[376]

Thus, even though the broad constitutional language is intended to provide future generations with the ability to rule on issues that may have not been foreseen by the original drafters of the Constitution, this ability to interpret the constitution finds its boundaries in the will of the people. As a result, even if the interpretative attitude of those embracing the "constitution as a living instrument" approach is broader than the textualist approach, it does not aim to go further than the will and need of the American people. As Supreme Court Justice Ruth Bader Ginsburg puts it, the Constitution:

> Is intended to be looked at in the context of contemporary events, in the context of history, in the context of past precedent, and the intent of the framers. Put all those things together and hopefully what you get is the right answer to some perplexing issue that the court is confronting.[377]

If the understanding of a modern, developing Constitution is applied to *Kiobel*, the case should have gone ahead in the Supreme Court. According to established ATS jurisprudence, the intent of the ATS is to provide relief for those who suffered grave breaches of their basic rights.[378] If the Supreme Court would continue to hold that foreign human rights violations cannot be adjudicated in the United States under a statute whose exact purpose it is to enable such suits, it could run danger of becoming a safe haven for violators of international law. As already argued in *Filartiga*, it is not illegitimate for a court to rule on events outside of territorial jurisdiction if there exists legitimate interest in finding a solution for a dispute within its jurisdiction.[379] Additionally, this approach would weaken the stance of the United States a prime protector of human rights and democratic value. "*. . .the United States is subject to the scrutiny of a candid world . . . what the United States does, for good or for ill, continues to be watched by the international community, in particular by organizations concerned with the advancement of the rule of law and respect for human dignity*."[380]

The ATS was to ensure that the USA as a newly established nation could provide effective remedies for international law violations. Torture, extra-judicial killing and rape are all universally accepted violations of human rights.[381] Although corporations have not traditionally been seen as violators of human rights, the changes in international organization and policy have resulted in violations being increasingly committed or supported by corporations, whether directly or indirectly. It is irrelevant whether torture or killings are committed on the order of a

[376] Rehnquist (2006), p. 415.

[377] The Constitution: Living Document or Original Intent?, http://www.cbn.com/cbnnews/news/050801a.aspx.

[378] Stephens (2000–2001), p. 405.

[379] *Filartiga v. Pena-Irala*, 630 F. 2d 876 at 885.

[380] Supreme Court Justice Ruth Bader Ginsburg.

[381] Stephens (2000–2001), p. 406. Compare *In re Estate of Marcos*, 25 F. 3d 1467.

state official or by order of a CEO—torture remains torture regardless of the position of the initiator.[382] If there is a sufficient nexus to the USA, be it a US company, US headquarters or American interests, the USA should adjudicate foreign corporate ATS claims because it has been a prime defendant and enforcer of human rights since its independence in 1776.

The remaining problem is why the USA should take it upon them to hear foreign cases. As it stands in 2015, there is no international treaty or binding document which would allow victims of corporate human rights abuses to have their cases be heard, despite the existence of a multitude of non-binding initiatives. Thus, as the minority opinion has suggested, if there exists a sufficient nexus to the United States, thus pre-empting sovereignty issues, the USA should hear corporate ATS cases because this would be true to precedent and intent. ATS jurisprudence is well established and could contribute to the formulation of an international treaty or grievance mechanism. Furthermore, considering the prominence of the USA, the adjudication of corporate claims could motivate other nations to develop similar tools, leading to the creation of an international consensus on corporate human rights violations.

Based on these considerations, from a *living instrument* perspective, the Supreme Court should have allowed all claims in *Kiobel* to be heard. *Kiobel* is the modern day equivalent to *Filartiga* and *Sosa* and had the unique potential to clarify the reach of the ATS and establish zero tolerance for corporate backed human rights violations. Considering that Shell has headquarters in New York, that they trade at the NYSE and that many of its decisions are taken in the boardrooms in New York, a sufficient nexus to the USA can be proven. Furthermore, it ought to be a distinct American interest that modern day human rights violations under the watchful eye of the Statue of Liberty are prevented.

3.3.4.4.3 Final Remarks

The issue of *Kiobel* is not only that it breaks with precedent—*Kiobel* fails as precedent: it is unclear, offers little to no guidance for the lower courts on how they are to implement it and which forms of conduct overcome the new presumption.[383]

Had the United States Supreme Court ruled according to the established case law and less with foreign policy considerations in mind, the *Kiobel* judgment would not have contravened and overthrown 20 years of established, good law. Even though the Supreme Court is not bound by precedent, it has been known to be notoriously conservative when overthrowing previous legal decisions.[384] This is partly because

[382] Stephens (2000–2001), p. 407.

[383] Steinhardt (2013), p. 842.

[384] For a detailed analysis of the Supreme Court tendency to be conservative, see Whittington (2014), pp. 2219 et seq. Bradley (2001), p. 472.

of the *stare decisis* doctrine, which argues that what has been decided must be maintained.[385] The Supreme Court tends not to overturn decisions unless they are harmful or because they have become outdated in light in changing circumstances.[386] Moreover, judges are advised not to overrule decisions unless they have considered the issues of stability and stare decisis, especially in light of unanimity and uniformity.[387] Reluctance in overturning cases, so Supreme Court Justice Breyer argues, maintains a courts' institutional strength and a practicable system of decision-making.[388]

Kiobel, nevertheless, is a case which is not only outdated in light of current circumstances, *Kiobel* is simply wrong. In the end, *Kiobel v. Royal Dutch Petroleum* is to the corporate human rights responsibility debate what *Bowers v. Hardwick* was to the gay rights debate: incorrect.[389] As the Supreme Court conceded in its 2003 *Lawrence v. Texas* decision:

> Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.[390]

Until the corporate human rights equivalent of *Lawrence v. Texas* will be decided by the Supreme Court, the ATS presents significant hurdles for those hoping to rectify corporate human rights abuses. Scenarios that could result in the overturning of *Kiobel* include human rights violations abroad by an American corporation or corporate funding of human rights violations by ISIS, Al Qaida or another terrorist organization. The question then becomes: did the actions by the Nigerian military dictatorship backed by Shell not constitute some form of terror? Torture of individuals opposing oil extraction, killing of demonstrators or the rape of women to quell protests by the husbands for the sake of allowing the oil business to continue peacefully is eerily comparable to the actions by ISIS or the Paris attacks on Charlie Hebdo. It would appear that the US Supreme Court does not view terror by a state to carry the same stigma as terror by declared terrorist organizations even if the effects of their actions are sadly similar.

In a perfect world, the US Supreme Court would have held that the ATS applies to *Kiobel* and that consequently, corporations can be sued in the USA for their conduct abroad. However, there is no such thing as a perfect judicial decision and anyone who had hoped for a clear signal from the Supreme Court with regard to corporate liability was most likely waiting for Godot.[391] Yet, not all is lost: "*But the*

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[385] Breyer (2010), p. 149.

[386] Breyer (2010), p. 150. Key example here is the overturning of *Plessy v. Ferguson* in *Brown v. Board of Education*, lifting the segregation principle of "*seperate but equal*". See *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[387] Breyer (2010), p. 155.

[388] Breyer (2010), p. 156.

[389] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[390] *Lawrence v. Texas*, 539 U.S. 558 (2003), Syllabus, p. 3.

[391] Beckett (1949).

greatest dissents do become court opinions and gradually over time their views become the dominant view."[392] Until the Supreme Court of the United States becomes brave enough to give full effect to the original intent of the ATS and its quest to right the fundamental wrongs of society, human rights violations by corporations will need to be rectified through other channels.[393]

The ATS can no longer be used by foreigners to gain justice for human rights violations by corporate entities unless they can prove that a distinct American interest is at stake. When this will be the case remains unclear, especially considering the broad meaning of the term "*distinct American interest*." Although American citizens may still use the Torture Victims Protection Act (TVPA), this tool seems ill fit to address corporate human rights problems. Effectively, foreign individuals who were not granted relief in their home states due to inefficient judicial systems, corruptions or lack of funds now stand alone. Other states, such as Switzerland, have provided for corporate liability under Art. 102 StGB, yet as the most recently introduced case against Nestlé shows, such provisions still remain largely unused.[394]

Thus, rather than hoping for a national solution to the problem, other methods must be investigated to bring corporate conduct in line with human rights. Three main questions now need to be answered:

Whether and how there exists a corporate responsibility for human rights violations.[395]
How international frameworks currently target corporate human rights conduct.[396]
Why and how human rights policies are best implemented by corporations.[397]

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[392] Supreme Court Justice Ruth Bader Ginsburg.

[393] Kiobel's holding was confirmed by the United States Supreme Court in *Daimler AG v. Baumann* in 2013. See *Daimler AG v. Bauman et al*. 571 U.S._ 11–965.

[394] Criminal Complaint against Nestlé Switzerland concerning murder of Colombian trade unionist Luciano Romero, European Centre for Constitutional and Human Rights, http://www.ecchr.de/nestle-518.html.

[395] Chapter 4.

[396] Chapters 5 and 6.

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Chapter 4
Corporations and Human Rights

Abstract In order to legally bind corporations to international human rights law, it must first be shown that human rights can indeed be extended to these actors (Ratner, Yale Law J 111:449, 2001–2002). The philosophical origins of human rights will be discussed briefly to gain a better appreciation of their purpose. Arguments advanced against human rights obligations for corporations will be compared and contrasted to arguments in favor of such an extension. Ultimately, it will be shown that human rights can certainly be extended to corporate entities.

Keywords Human rights • Philosophy • Corporations • Complicity

4.1 The Philosophical Roots of Human Rights

Most associate *justice* with *rights*.[1] The concept of justice as a right is a notion of entitlement: justice is a personal prerogative, a moral objective that is to be enforced.[2] Rights are legal boundaries. From a philosophical standpoint, ones wellbeing is no more important than the happiness of another just because it is one's own wellbeing. The secular philosophical tradition also speaks of inalienable rights and inalienable dignity.[3] Neither intelligence nor reasonableness can provide a basis for evaluating wellbeing differently from one person to another.[4]

Critics have argued that the wellbeing of a child or of a loved one can, however, have more value to an individual than the well-being of a complete stranger.[5] Yet this claim can be refuted: "*We almost all accept (. . .) that human life is scared. (. . .) For some of us, the sacredness of human life is a matter of religious faith; for others, of secular but deep philosophical belief.*"[6] The sacredness of human life and human dignity is rooted in the fact that the human being is the highest product of natural selection. Furthermore, the human being is the product of the "*deliberative*

[1] Humbach (2001), p. 41.
[2] Humbach (2001), p. 41.
[3] Perry (2006), p. 17.
[4] Finnis (2011).
[5] Perry (2006), p. 19.
[6] Perry (2006), p. 20. See also Dworkin (1993), p. 36.

J.R.-M. Wetzel, *Human Rights in Transnational Business*,
DOI 10.1007/978-3-319-31325-2_4

human creative force, which we honor."[7] Every human being has inherent dignity, even if the universe has no ultimate meaning, because it's a creative masterpiece of natural and human creation.[8] The fundamental wrong of a human rights violation is therefore that the order of the normative world is transgressed.[9]

Human rights are to be understood as those moral rights every human has simply because he is human, without necessarily being in some sort of relationship to others.[10] The human quality of an individual cannot be denied to him, even with good reasons.[11] Accepting the individual as an autonomous member of the human community is the first principle and basis for the derivation of a whole catalogue of specific human rights.[12] These rights are considered to be individual entitlements for the protection against a standard set of threats.[13] They would not exist if one were not to understand human beings, as bearers of these rights, to have the right to demand justification for their limitation.[14] They are objectively a precautionary measure of protection against violence in human coexistence and a measure of conflict prevention.[15] The idea of the existence of human rights is the moral insight into the equal worth and equal importance of all human beings.[16] This understanding can then be used to maintain, protect and increase human interests.[17] This is why it is of fundamental importance to understand the content of these rights and their enforcement mechanisms to raise the moral consciousness of society.[18]

Tugendhat understood human rights as moral rights, based on the universal and equal respect of all.[19] Habermas, on the other hand, argues that law and morality should remain separate because their character is strictly judicial.[20] Lohmann, however, argues that both these approaches are incomplete: If one were to follow the first definition, it would result in an individual having human rights only in those cases where he is the object of moral duties, which is too narrow a definition.[21] On the other hand, if one were to ground human rights solely on their judicial character, this would result in human rights only being attributed to those individuals under

[7] Perry (2006), p. 20. Dworkin (1993), p. 83.
[8] Perry (2006), p. 21.
[9] Perry (2006), p. 27.
[10] Gosepath (1999), pp. 90–109.
[11] Kirchschläger (2012), p. 211.
[12] Gosepath (1999), p. 149. Arendt (1949), p. 614.
[13] Ratner (2001–2002), p. 74.
[14] Lohmann (2000), pp. 9–10.
[15] Kirchschläger (2012), p. 210.
[16] Campbell (2001), p. 175.
[17] Campbell (2001), p. 175.
[18] Campbell (2001), p. 175.
[19] Lohmann (2010), p. 68.
[20] Lohmann (2010), p. 71.
[21] Lohmann (2010), p. 81.

democratic rule and jurisdiction, which would lead to impossible results.[22] Human rights cannot be justified solely by judicial or moral philosophical considerations—they need both aspects.[23] Human rights are based on the moral obligation to recognize that all subjects have equal rights; this is their moral origin.[24] This moral origin is then translated into positive legal obligations, because only if their morality is established in writing can they demonstrably exist.[25] Conclusively, human rights do not exist solely based on morality or legal texts; rather, they are a result of the manifestation of moral obligations in legal scriptures.[26]

4.2 The Legal Perception of Human Rights

From a legal perspective, human rights are inherent to every human being based on the fact that they were born human. An individual is the beneficiary of human rights regardless of skin color, sexual orientation or religion.[27] All human rights are universal, indivisible, interdependent and interrelated.[28] Human rights have become the *raison d'etre* of the state system.[29] The essential purpose of human rights is, therefore, to promote and protect vital human interests.[30]

Human rights law can positively be derived from a vast array of theories regarding the human nature and the notion of a transcendental standard of justice by which particular acts of the state can be judged.[31] International human rights law is therefore essentially rooted in the liberal commitment to the equal moral worth of each individual, regardless of their utility[32] and human rights themselves embody the minimum standards of treatment necessary in view of this moral worth.[33] The Human Rights Model of human nature and human dignity is preoccupied with ends, with the status of the human person as an end in and as themselves.[34] What is important about a human being is their dignity, not as a matter of personal preference or utility, but rather as a matter of moral duty and principle.[35]

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[22] Lohmann (2010), p. 78.
[23] Lohmann (2010), p. 83.
[24] Lohmann (2010), p. 89.
[25] Lohmann (2010), p. 91.
[26] Lohmann (2010), p. 95.
[27] What are Human Rights?, United Nations Human Rights, Office of the High Commissioner for Human Rights, http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx.
[28] Maier (2015), p. 11.
[29] Douzinas (2000), p. 374.
[30] Dickinson (2012), p. 178.
[31] Garcia (1999), p. 70.
[32] Donelly (1989), p. 66.
[33] Garcia (1999), p. 70.
[34] Garcia (1999), p. 71.
[35] Garcia (1999), p. 71.

Human rights are also rights of defense against the state: the state is to respect the sphere of human rights. The state cannot do as it pleases; rather it must abide by the substantial realm of freedom enshrined in human rights law, which can be restricted only under certain, clearly defined circumstances.[36] Essentially, traditional human rights law means rights for the individual, abstinence for the state.[37]

Deontological moral reasoning determines the rightness or wrongness of an act by the nature of the act itself, specifically whether it is in accord with certain moral principles, and regardless of the personally favorable consequences of the act itself.[38] Rights are things that are valued in themselves and not for their consequences. To cite an example, the international prohibition against torture is justified on the basis that torture is wrong because it is a direct violation of human dignity, despite the fact that it might lead to information of value to the state and despite the fact that it may deter conduct that threatens the state.[39] This is in direct contrast to the more consequential form of moral reasoning, which predominates in trade and in economics and which, in theory, could determine torture, slavery and other human rights violations to be economically advantageous or justifiable, and hence appropriate.[40] As a result, human rights abuse claims should take precedent over others, i.e. economic claims, because the inherent value of human dignity trumps all other claims.[41] Human rights exist because the law exists.[42]

The Asian human rights understanding[43] differs from the western interpretation, as it criticizes the *western* approach for allowing individuals to misbehave in society while at the same time still granting them rights:

> In the East, the main object is to have a well-ordered society so that everybody can have maximum enjoyment of their freedoms. This freedom only exists in an ordered state and not in a natural state of contention.[44]

However, it is exactly this cultural difference enabling the human rights dialogue: human rights are rights accorded to humans and raised as a protective shield. Human rights exist because they enable the human being to be human no matter what culture they are form.[45] The state's duty, in turn, is to ensure that these rights are granted and enforced.[46] Cultural difference is not a challenge to the

[36] Maier (2015), p. 11.
[37] Maier (2015), p. 11.
[38] On deontological moral reasoning, see Gaus (2000), pp. 179 et seq.
[39] Garcia (1999), p. 72.
[40] Garcia (1999), p. 72.
[41] Garcia (1999), pp. 71–72.
[42] Mégret (2011), p. 201.
[43] The issue is known as the Asian Values Debate. Critical: Kaufmann 2007, p. 78.
[44] Zakaria (1994), p. 111.
[45] Höffe (2010), pp. 29–47.
[46] Kirchschläger (2012), p. 219.

understanding of human rights; rather it is a possibility and a necessity for the moral justification for human rights:

> The realization and implementation of a better human rights protection is closely linked to the development of human society. You cannot separate the two, for you risk failing to recognize the problem in its true magnitude. Those who consider human rights in an isolated fashion have already failed because you cannot abstract human rights from the other great problems of our time like war and poverty, and the overwhelming power of the minority and the boundless powerlessness of the majority of the population. It is only in the awareness of this interconnectedness that one can realistically approach the idea of human rights.[47]

4.2.1 Modern Legal Interpretation

The modern foundation of human rights law is seen as a variety of different layers: metaphysical and positivist. Rights are not a random phenomenon; they may not physically manifest themselves but their existence can be justified.[48] In order to determine what human rights entail, one must look at the individual these rights aim to protect: its desires, its aims, its needs and its social nature. The problem here is that no human beings are alike; their desires and aspirations vary greatly. Consequently, the danger of returning to the Kantian ideal of human rights, based on the idea of how humans should treat each other, is imminent.[49] The challenge for modern human rights law is not to focus on whether human rights exist but rather to understand their fully constructed character and the ongoing battle between faith and politics.[50] So rather than trying to find some sort of intellectual way of justification for the existence of human rights, one should hold them to be self-evident.

The open market economy and the thus resulting competition have led to considerable economic and social inequalities with regard to human rights.[51] Rather than reflecting the economic status of a society, human rights should compensate for any differences for human rights do not depend on economic prosperity. Nowadays, poverty and inequality in the social sector seem to discredit the idea of universal human rights.[52] Those who suffer from poverty see their rights limited or completely ignored whereas those who live in prosperity enjoy human rights extensively. It appears that monetary wealth has become linked to the full enjoyment of human rights. The rise of capitalism helped to establish human rights and their universality as one of the founding pillars of the contemporary legal system.[53]

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[47] Bobbio (1998), p. 33.
[48] Mégret (2011), p. 201.
[49] Mégret (2011), p. 201.
[50] Mégret (2011), p. 202.
[51] Stoilov (2001), p. 93.
[52] Stoilov (2001), p. 97.
[53] Stoilov (2001), p. 97.

Yet, based on precisely the progressive nature of capitalism, this universal understanding can no longer be ensured.

There arises the question as to how unrepresented collectives of people, such as minorities, can have human rights as a collective and how these are logically related to individual human rights. [54] Individual and collective rights have the same theoretical foundations: individuals and collectives have been oppressed throughout history. [55] Communities have collective interests, which is why they are granted collective rights in addition to the individual rights every human being has. [56] Compared to individual rights, where any violation is excluded, with regard to collective rights, the bigger picture is relevant.[57] Collective rights are violated when the rights of the group as a whole and not just of certain members have been unjustifiably limited.[58]

The document that expressly regulates collective rights, although in an informal manner, is the UN Declaration on the Rights of Indigenous Peoples, which entered into force in 2007. The enforceable counterpart of the Declaration is found in Art. 27 ICCPR, which grants minorities the right to enjoy their own culture. Other collective human rights include the right to self-determination and the right to use natural resources. It remains important to remember, however, that collective human rights exist not only in terms of minorities but generally in terms of ethic, linguistic or religious groups which are all encompassed in collective rights protection without automatically being a minority.[59]

Doctrines only recognizing individual rights as opposed to collective rights misunderstand the relevant contemporary issues of human rights law because many societies today are so heterogenic that they only function on the basis of collective rights.[60] Collective human rights are necessary to protect individual rights too, as in cases of freedom of religion where worship sometimes depends on the erection of temples or the availability of dietary options.[61] Since the Second World War, the main victims of human rights violations have been groups or collectives of people.[62] The violations are conceived and perceived as group violations because they target the collective.[63] As these constitute attacks against

[54] See generally Jovanovic (2012), p. 115. Compare to Miller (2006), pp. 183 et seq.

[55] Freeman (1995), p. 27.

[56] Freeman (1995), p. 28.

[57] Dinstein (1976), p. 103.

[58] Dinstein (1976), p. 103.

[59] Dinstein (1976), p. 112. Key example is the black population of South Africa during Apartheid, who made up the majority of the country's population but whose rights were still severely restricted by the white Buuren/Afrikaaner minority. See also Ratner (2001–2002), p. 448.

[60] Van Dyke (1976–1977), pp. 355 et seq.

[61] Dinstein (1976), p. 103.

[62] Gurr (1989), pp. 375 et seq.

[63] The Genocides in Rwanda and Srebrenica are examples of violations with a collective aim and effect.

a group, the solutions automatically also need to target the group as a whole and not just its members individually.[64] Collective human rights are therefore rights which are borne by collectives and which are consistent with individual human rights and which have as their basis the same justification as individual human rights.[65]

Parallels can be drawn to corporate rights: some collective rights can only be exercised through a representative body or agent, much like corporations exercise their rights.[66] This understanding can help justify why corporations, like collectives, have rights and obligations. The corporation, like the collective, is granted rights based on the union of individuals for a common purpose or cause. As soon as a corporation is recognized as a legal person, they have rights and privileges in domestic law.[67] As rights do not exist in a vacuum, because they come with duties, as the nexus of rights and duties is unchallengeable.[68]

4.2.2 The Corporate Debate

The claim that human rights violations are committed by men not judicial entities has become eroded over the last few years.[69] As corporations act through their organs, they must be held accountable for the decisions these organs take. Despite not being an entirely new debate in international law and international relations, the nexus between human rights and non-state actors, in particular multinational corporations, has only recently become a highly relevant topic of international concern and scholarly research.[70] Today it has become common to examine the weakening of the existing classical state-centered approach in international law and thus the move away from the traditional view that under human rights law, the individuals hold the rights while only states bear the obligations.[71] The debate of what the role of TNCs is or ought to be has been ongoing, even before *Kiobel*, yet with its outcome the need to solve the issue has become more urgent than ever.

In the 1930's a debate erupted between Adolf Berle and E. Merrick Dodd around the question of stockholders and shareholders. Berle was of the opinion that the powers that were granted to a corporation are exercisable only for the benefit of their shareholders, as their interest appears to be.[72] Dodd, on the other hand, argued

[64] Freeman (1995), pp. 32–33.
[65] Freeman (1995), p. 38.
[66] Jovanovic (2012), p. 115.
[67] Pinto and Evans (2013), p. 179.
[68] Pinto and Evans (2013), p. 179. Addo (1999), p. 187.
[69] See Sect. 3.3.2.2.1.
[70] De Brabandere (2010), p. 66.
[71] De Brabandere (2010), p. 66.
[72] Deva (2012), p. 120.

that by virtue of law and public opinion, directors should serve not only their shareholders but the general public as well.[73]

4.3 The Absence of Corporate Responsibility for Human Rights

Corporations are not fit to take on human rights responsibilities as they have been largely reserved for states. Corporations, as abstract judicial entities, lack the ability to commit human rights violations. More fundamentally perhaps, they have no obligation to respect human rights as customary international law does not extend to them and their sole purpose is the generation and maximization of wealth for their shareholders. If one were to extend human rights obligations to corporations, this would considerably harm foreign investment of developed nations because the danger of costly litigation would prevent companies from investing abroad unless they absolutely have to. In turn, this would lead to a slowing of growth of the developing world, increasing the danger of human rights abuses. Another factor of concern for those who oppose a human rights scheme for corporate actors is the danger of framing corporations for acts they were not involved in or could not prevent. Corporations are often obliged to operate in environments with weak governance structures, making them the victims of political unrest and turmoil.

4.3.1 Milton Friedman and the Corporation

In his book, *Capitalism and Freedom,* Milton Friedman dealt with the question of corporate responsibility in depth.[74] With regard to the opinion that TNCs have a social responsibility, Friedman argued:

> This view shows a fundamental misconception of the character and nature of a free market economy. In such an economy, there is one and only one social responsibility of business-to use its resources and engage in activities designed to increase its profit so long as it stays within the rules of the game, which is to say, engage in open and free competition without deception or fraud. (. . .) Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than making as much money for their stockholders as possible. This is a fundamentally subversive doctrine. If businessmen do have a social responsibility, how are they to decide what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest?[75]

[73] Deva (2012), p. 120.

[74] Compare Deva (2012), p. 121. Wettstein (2009), pp. 292 et seq.

[75] Friedman (2002) Capitalism and Freedom, University of Chicago Press, pp. 133 et seq.

Friedman rejects the concept of corporate social responsibility because it undermines the free market, because shareholders own the corporation and because CSR would be too big a burden for corporate actors.

First, corporate social responsibility undermines the free market economy because social responsibility was a socialist Marxist concept, both of which were contradictory to the idea of a free market economy.[76] "*The doctrine of social responsibility involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternate uses*."[77] Considering that Friedman was writing at the time of the Cold War between the USA and the USSR, anything remotely socialist was to be considered as offensive and dangerous.

Second, Friedman was of the conviction that the shareholders owned the corporation. Executives are acting as agents of the shareholders of the corporation and as such agents, their sole duty was to ensure that the primary interests of the shareholders were met.[78] The main interest of any shareholder, should one follow Friedman's argumentation, is the most profit possible, regardless of the circumstances that brought about this gain. Consequently, as the corporate executives act solely as agents for the shareholders, they cannot have any other purpose than to fulfill these aspirations.

Third, Friedman believed that corporations could not accept any sort of social responsibility because the burden would be too much to bear. If TNCs were to act according to social rules, this would turn them from corporations into civil servants, a purpose they are not conceived for.[79] As corporate executives are not experts in the social domain, it is difficult for them to discern what consequences their social engagements may have in the future.[80] Consequently, they should not be forced to make decisions pertaining to the social sector since the outcomes of these decisions could negatively affect profit and thus their shareholders in the future.

4.3.2 No Rule of Law Under Customary International Law

> The liability of private corporations is not well-established in customary international law and is, at best, the subject of theoretical discussion and speculation in academic literature.[81]

[76] Deva (2012), p. 122.

[77] Friedman (1970), p. 74.

[78] Deva (2012), p. 125.

[79] Deva 2012, p. 125.

[80] Friedman (1970), p. 74.

[81] Brief for Professors of international law, foreign relations law and federal jurisdiction as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S.10-1491 (2013), p. 25.

Although the dialogue with regard to liability may exist, this is insufficient as to providing an actual binding obligation for corporations in human rights. Considering the failure to convict I.G. Farben at the Nuremberg Trials, some parties rely on the claim that "*Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced*."[82] Crimes against humanity have always been committed by states or individuals and extending the liability to non-state actors would be contrary to historical case law.[83]

Art. 38 of the ICJ statute defines customary international law as international custom, as evidence of a general state practice accepted as law. Because the concept of custom was lacking clarity, the 1920 Preparatory Committee clarified that for a customary rule of law to be established, concordant practice by several states with reference to a type of situation falling under international relations, continuation or repetition over a considerable period of time, the understanding that the practice is required by law or at least consistent with it and the general acquiescence in the practice by other states are required.[84] In its North Sea Continental Shelf decision of 1969, the ICJ confirms:

> An indispensable requirement would be that... State practice, including that of the States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such way as to show a general recognition that a rule of law or legal obligation is involved.[85]

Thus, any conduct that is contrary to said principle should be treated as a breach of customary international law and not as a development thereof.[86]

4.3.2.1 General State Practice

State practice is to be understood as "*what states do in their relations with one another*."[87] State practice, therefore, is any act or behavior of a state as long as the behavior in question discloses the state's conscious attitude with respect to its recognition of a customary rule.[88] This includes actions such as treaties, decisions,

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[82] Brief for Professors of international law, foreign relations law and federal jurisdiction as amici curiae in support of respondents *Kiobel v. Royal Dutch Petroleum*, p. 28. Amann (2001), p. 336. Pegg (2003), p. 7.

[83] Ratner (2001–2002), p. 466, is of a different opinion when he cites the obligations of rebel groups under international humanitarian law to respect certain fundamental rights.

[84] Yearbook of the International Law Commission 1950 II 26, para. 11.

[85] North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*) (1969), p. 43, para. 74. Kamminga (2009), p. 7.

[86] *Nicaragua v. United States* (1986). Kamminga (2009), p. 8.

[87] Brierly (1963), p. 59.

[88] Ferrari-Bravo (1985), p. 261.

legislation, diplomatic correspondence or the position taken by governments before international legal bodies.[89] With regard to the position taken by states, it is important to note that not every abstract statement of a state with regard to a legal rule is evidence of state practice; rather, the statements must always be linked to a specific or potential dispute.[90]

The term *general* signifies the number of states that contribute to the customary rule and is thus a quantitative aspect of customary international law.[91] The number of states engaging in a specific practice should be representative, albeit not universal.[92] As established in the *North Sea Cases*, customary rules and obligations must have equal force for all members of the international community.[93] Additionally, the general conduct of states must be uniform and consistent, meaning that state practice needs to refer to the same customary rule, where substantial, virtual uniformity or consistency of practice suffices.[94]

4.3.2.2 Opinion Iuris

The creation of customary international law not only depends on general state practice but also on the acceptance of said practice as law.[95] The ICJ held that "*the acts concerned must be such or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it*."[96] The states must thus act in the belief that they are following a legal rule and failure to comply with this rule will lead to sanctions. The basis of the binding character of customary international law is thus the consensus of states that a rule has passed into the general corpus of law[97] and that *consuetudo, sicut jus accepta, est servanda*.[98]

4.3.2.3 Sufficiency of Corporate Human Rights Liability for Customary International Law

It has been well documented and established that the focus of customary international law has been the responsibility of states and individuals following the

[89] Villiger (1997), p. 17.
[90] Thirlway (1972), p. 57.
[91] Villiger (1997), p. 29.
[92] ICJ Reports (1969), p. 43, para. 74.
[93] ICJ Reports (1969), p. 43, para. 75.
[94] Villiger (1997), p. 43.
[95] Art. 38 subpara. 1(b) ICJ Statute.
[96] ICJ Repots (1969), p. 44, para. 77.
[97] ICJ Repots (1969), p. 41, para. 71.
[98] Villiger (1997), p. 49.

atrocities of World War Two.[99] There is no international consensus on holding corporations liable for human rights violations—neither in criminal nor in human rights law. None of the specialized criminal tribunals have recognized corporate liability, and the ICJ has outright rejected to include corporations in its statute.[100]

Equally, none of the major human rights treaties have recognized corporations as having any direct liability for human rights violations. It is the understanding of both the United Kingdom and the Netherlands that any court ruling finding corporate liability for human rights violations to exist would be an erroneous interpretation of international law.[101]

Furthermore, the entire concept of corporate liability in human rights cases is simply alien to many legal systems.[102] International human rights law imposes duties only on states, not on non-state actors. In their preamble, the UN treaties state that each state party is required to "*respect and to ensure to all individuals within its territory, and subject to its jurisdiction the rights set out in that treaty*."[103] They make no mention of private entities. Additionally, the enforcement mechanisms of most human rights treaties are aimed at states and not non-state actors, underlining the inapplicability of human rights law to corporations, in the eyes of the United Kingdom and the Netherlands:

> Ultimately, international human rights law as it currently stands is clearly intended to apply to the vertical relationship between the State and the individual, in which the State bears sole legal responsibility to respect individual rights, even though some cases may include a positive obligation to penalize the behavior of non-State actors.[104]

There is little to no evidence to suggest that there is emerging, uniform state practice aiming to create a legal obligation for corporations to adhere to human rights standards. The Council of Europe has even expressly rejected this idea.[105] Although initiatives targeting corporate conduct with regard to human rights have increasingly begun to be drafted, all of these frameworks remain voluntary and thus cannot, by themselves, aid in creating a customary law obligation for corporations to adhere to human rights.[106]

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[99] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. 10-1491, (2013), p. 13.

[100] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as amici curiae in support of respondents, p. 14. See also Sect. 3.3.2.2.2.

[101] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as amici curiae in support of respondents, p. 14.

[102] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as amici curiae in support of respondents, p. 19.

[103] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as amici curiae in support of respondents, p. 20.

[104] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as amici curiae in support of respondents, p. 23.

[105] See Sect. 5.3.1.

[106] For a detailed discussion of the various initiatives, see Chaps. 5 and 6 of this research.

Another group of *amici* adds that legal entities such as corporations cannot think or act like human beings and thus "*a corporation, even if treated in some areas of the law as having certain rights and obligations, lacks the qualities of a moral agent, e.g., it has no moral conscience*."[107] Since corporations lack this quality of moral agent, they cannot be punished for their actions, since punishment passes judgment or condemnation onto a person and thus cannot apply to abstract entities devoid of any such human quality.[108] Due to the way corporations are structured, the financial penalties are paid for by its shareholders and are indirectly imposed on entire economies through loss of jobs and revenue—as opposed to imposing it on the individuals who actually committed the morally condemned act.[109]

4.3.3 Harm to Foreign Investment

The Chamber of Commerce of the United States argues that imposing liability on corporations would inevitably lead to damaging developing countries because such liability would harm foreign investment.[110] By imposing liability on corporations, they become exposed to high costs and risks—regardless of whether they truly are guilty or not. In turn, this cost/risk factor will influence their future foreign investment. Consequently, growth in developing countries will be slowed considerably, undercutting the aim of the industrial nations to help in their development.[111]

In the past, 125 cases have been filed against corporations in the USA alone, amounting to a total of 400 billion dollars in damages.[112] When such cases are filed, regardless of the outcome, share value and debt rating may be adversely affected. The negative publicity surrounding any suit filed against a corporation can be enough to irreparably damage any corporate reputation.[113] In the view of the Product Liability Advisory Council "*the impact of such publicity undermines the ability of a corporation to function normally and provide goods and services to the public*."[114] The Chamber of Commerce uses the Coca-Cola lawsuit to exemplify

[107] Brief for Professors of International Law in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 15.

[108] Brief for Professors of International Law in support of respondents, p. 15.

[109] Brief for Professors of International Law in support of respondents, p. 16.

[110] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 14.

[111] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, p. 14.

[112] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 15.

[113] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, p. 16. See Sect. 7.2.

[114] Brief for Product Liability Advisory Council as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 23.

the problem: following the allegation that Coca-Cola had aided in torture and murder in Colombia, shareholders were quick to sell their shares, forcing their price and company value to drop considerably.[115]

Furthermore, as the Association of the German Chambers of Industry and Commerce, the Federation of Industries, the Conference of Swedish Enterprises, Economiesuisse and the International Chamber of Commerce remark, making corporations liable will lead to vast costs relating to the discovery of facts, since most of the conduct alleged will have taken place abroad[116]:

> Disproving an alleged link between claims of human-rights abuses and a corporation's operations abroad often demands substantial overseas discovery—including efforts to seek documents and information from uncooperative states and their regimes.[117]

As a result, transnational corporations will refrain from investing abroad because the secondary costs connected with such an investment will turn out to be too high:

> The depiction of corporate defendants as the "I.G. Farbens of today" is inconsistent with the commitments by many companies to corporate social responsibility and to standards based on international human rights and labor rights norms.[118]

Although some corporations have a hesitant relationship with human rights, there are many who engage in various humanitarian projects in the country that they invest in. Accordingly, imposing human rights obligations on all corporations would lead to the strange situation where those who obey human rights would be subjected to the same scrutiny as those who do not. For these reasons, the Chambers of Commerce of Germany, Sweden and Switzerland as well as the Product Liability Advisory Council are concerned that imposing liability on corporations will deter companies from investing abroad.

Developing countries supply a vast amount of the raw material and are an important export partner for the developed world. Without this revenue from raw material, jobs will fall away and business costs will increase considerably.[119] Furthermore, the withdrawal of corporations from the developing world will harm the countries themselves: developing countries depend on the foreign investment of transnational corporations. The income provided by such foreign

[115] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, p. 16.

[116] Sykes (2012), pp. 2162 et seq.

[117] Brief for Association of the German Chambers of Industry and Commerce, Federation of Industries, Conference of Swedish Enterprises, Economiesuisse and the International Chamber of Commerce as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 18.

[118] Brief for Product Liability Advisory Council as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 24.

[119] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 23.

investment ensures stability to develop democratic institutions and allows for economic self-sufficiency.[120]

Corporations are obliged to invest in developing countries because they are the only ones with sufficient resources, yet if the risk of being subjected to litigation considerably rises every time, foreign investment in developing countries could be slowed or halted altogether. As the Solicitor General remarked, holding corporations liable for human rights violations may "*have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur*."[121]

Additionally, if a corporation ceases to invest in a developing country, the human rights situation in said country is not likely to improve. With the loss of monetary funds, social inequality will rise, and human rights will fall to the bottom of the political agenda. Thus, holding corporations liable for human rights violation will not serve any purpose other than deterring foreign investment in developing countries. This will create further problems, as exemplified by the Talisman Group and its investment in Sudan:

> The vacuum produced by Talisman's departure has been filled by Chinese companies that take an official policy of "non-interference in domestic affairs"—a polite way of saying China will not interfere with local regimes' oppression of their populations.[122]

Even if corporations were to stop investing in a certain region, this is no guarantee that an improvement of the human rights situation will take place, as this will simply create a vacuum for other parties to fill.

4.3.4 Framing the Corporation

Transnational corporations are often implicated in conflicts over human rights issues in the place where they do business.[123] Given the lack of resources the local activists often turn toward the consumer to make their voices heard, sometimes framing the corporation when, in reality, its influence was limited.[124]

Corporate policies often affect human rights indirectly: corporations do not torture or kill individuals directly, yet they may lend financial support to those who do. At the same time however, public discourse, or "*discursive political consumerism*", can make it appear as though the corporation is directly

[120] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, p. 23.

[121] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, p. 24.

[122] Brief for Chamber of Commerce of the United States as amici curiae in support of respondents, *Kiobel v. Royal Dutch Petroleum*, 569 U. S. _10-1491 (2013), p. 27.

[123] Holzer (2007), p. 281.

[124] Holzer (2007), p. 281.

responsible.[125] Discursive political consumerism is a form of political consumerism that is not primarily concerned with the decision to buy or not to buy but with "*the expression of opinions about corporate policy and practice in communicative efforts directed at business, the public at large, family and friends, and various political institutions*."[126]

Political consumerism attempts to improve the products available as well as the conditions in which they are manufactured.[127] Together with *cholère publique*, it combines morality and market economy in order to influence the shopping behavior of individuals.[128] Essentially, political consumerism challenges the traditional thinking about politics and political participation.[129] This requires the changing of corporate policies by boycotting a certain product or company or by buying the same product from another company with a better record in environmental or human rights policies.[130] The threat of boycott campaigns is real and Coca-Cola, Nike and Shell have been victims of them.[131]

A major part of framing corporations through discourse is persuading consumers on behalf of others to change their consumption behavior, such as persuading customers to buy from other brands than Nike on behalf of the sweatshop workers who suffer for profit or to boycott Shell Gas stations on behalf of the Ogoni people in Nigeria suffering from oil exploitation activities.[132]

The problem with targeting non-state actors such as corporations with discourse is that while national governments can hardly deny responsibility for human rights problems within their territory, corporations are regularly part of problematic constellations without being the sole perpetrator.[133] Although corporations often can take advantage of weak human rights regimes, they are usually not the ones who created the underlying socio-political conditions in the first place.[134]

Shell in Nigeria is an excellent example of political consumerism. Shell attempted to improve its problematic position in Nigeria after 1993 by running a wide advert campaign in British and German newspapers in order to sway public opinion.[135] Shell's initial attempt to stick to the business side of its Nigerian operations and not react to public criticism failed because consumers could no longer be convinced that the corporation was not responsible for the local political

[125] Holzer (2007), p. 282.

[126] Micheletti and Stolle (2005), p. 259.

[127] Holzer (2007), p. 283. See also Micheletti (2003), p. 3.

[128] Holzer (2007), p. 283.

[129] Micheletti (2003), p. 3.

[130] Holzer (2007), p. 283. Pegg (2003), p. 1.

[131] Boycott Nike, http://www.saigon.com/nike/. Killer Coke, http://killercoke.org. Boycott Shell, http://www.essentialaction.org/shell/.

[132] Holzer (2007), p. 283. Micheletti (2003), p. 12.

[133] Holzer (2007), p. 285.

[134] Holzer (2007), p. 285.

[135] Holzer (2007), p. 289.

situation because the company had remained silent for so long. Once there was but a hint of a connection with the Ogoni trials, the already tarnished reputation of Royal Dutch Petroleum provided campaigners with an open target for their claims.[136] At the core of the moral war against Shell was the strategy to hold the company responsible for its involvement in the human rights violations in Nigeria.[137] This particularly stressed Shell's responsibility and thereby provided the necessary arguments to expect changes in Shell's corporate policies to make a difference.[138]

The contrast between a wealthy company such as Royal Dutch Petroleum exploiting the region's resources and the impoverished people of the Niger Delta made Shell's stance look increasingly formalistic.[139] This contrast still poses problems for many TNCs, especially in the oil and mining industry.

The public debate about Shell's role in Nigeria turned the corporation into the symbol of the dubious alliances between weak, corrupt military regimes and large corporations.[140] It also showed that consumer opinion can be infused with global politics: Shell served as a "*surrogate for the Nigerian government: The only thing on which outraged world opinion can get a purchase*."[141] Shell was faced with moral accusations concerning its responsibility for nature and people, its support for an unfair regime and its involvement in political decisions that could not be refuted on the grounds of economic reasoning. True as the statement "*we are only here to do business*" may be, it proved to be a rather weak argument in the face of public outrage about the responsibility for the consequences of doing business.[142]

The general climate of distrust in Nigerian politics before the transition to democratic rule made it difficult for Shell to establish contact and dialogue with local communities. This highlights a paradox concerning corporate responsibility in developing countries and the effectiveness of political consumerism as a tool for human rights: the actual capacities to control their surroundings often stand in sharp contrast to the perception that TNCs are wealthy and powerful compared with governments.[143] Although corporations may have only limited influence on domestic politics, consumers and activists may nonetheless regard it as a public institution similar to governments.[144]

[136] Holzer (2007), p. 289. Boycott Shell Campaign, http://www.essentialaction.org/shell/.
[137] Holzer (2007), p. 289.
[138] Holzer (2007), p. 290.
[139] Holzer (2007), p. 292.
[140] Holzer (2007), p. 294.
[141] A word in your Shell-like, The Observer, 10. December 1995.
[142] Holzer (2007), p. 294.
[143] Holzer (2007), p. 296.
[144] Vogel (1975), p. 5.

4.4 The Existence of Corporate Human Rights Responsibility

Transnational corporations have become important players on the international economic stage. They have grown into enterprises of considerable magnitude and their economic dimensions are comparable to those of national states.[145] Achieving adequate control over such multinationals and imposing accountability upon them should be a major objective.[146]

The Universal Declaration on Human Rights mentions the responsibility of "*every organ of society*"[147] while the CCPR states that "*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein*."[148] Additionally, international humanitarian law obliges rebel groups to respect certain fundamental rights of those within their control.[149]

Accordingly, human rights treaties provide for indirect human rights responsibilities of businesses, even if no permanently binding legal instrument has yet been implemented.[150] As a result, there exists particular concern about the conduct of transnational corporations and their accountability. If one were to use a broader interpretation of human rights, this would make them more relevant and truer to the international reality.[151] As a matter of fact, corporate responsibility for human rights violations represents a global and coherent response to the new challenges to human dignity.[152]

By adopting the broader understanding of human rights as an expression of human dignity, one can also infer obligations of corporations to respect human rights.[153] Human dignity binds all international actors, regardless of treaties or customs.[154] From the traditional human rights perspective, human rights were intended to protect the individual from the overwhelming power of the state.[155] They were envisioned to allow individuals to enjoy their various freedoms without unjustified intervention from the state. The state, on the other hand, had the power to limit human rights based on virtue or contract.[156] Consequently, if human rights

[145] Blumberg (2001), p. 297.
[146] Blumberg (2001), p. 297. Ratner (2001–2002), pp. 461 et seq.
[147] Universal Declaration of Human Rights, U.N. Doc A/810 (1948).
[148] International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966).
[149] Ratner (2001–2002), p. 466.
[150] Weissbrodt (2006), p. 62. Protocol Additional II to the Geneva Conventions.
[151] Jochnick (1999), p. 56.
[152] Ratner (2001–2002), p. 545.
[153] Jochnick (1999), p. 61. Compare Clapham (2004), p. 137.
[154] Jochnick (1999), p. 61. See also Sect. 4.1.
[155] Reinisch (2005), p. 37.
[156] Deva (2012), p. 149.

are the expression of the protection of human dignity, then the law must respond to violations not directly attributable to the state.[157]

> When the United Nations system was created, nation-states, some of them imperial powers, were dominant. Faith in the ability of governments to protect citizens and improve their lives was strong ... Moreover, the state had few rivals. The world economy was not as closely integrated as it is today. The vast array of global firms and corporate alliances that has emerged was just beginning to develop. The huge global capital market, which today dwarfs even the largest national capital markets, was not foreseen.[158]

States were the primary targets of human rights rules and regulations because it was believed that they alone were capable of violating them.[159] The traditional role of the state, as primary violator and promoter of human rights, has been challenged in the last few years when the rise of big corporations saw them take on similar functions as the state.[160] With this newfound power balance in international law comes a new understanding of duties and responsibilities: rights of individuals give rise to a variety of duties as well as to a variety of dutyholders.[161] There is no closed list of duties corresponding to a right; a change of circumstances can lead to the creation of new duties under the same right.[162]

With the outsourcing of state power and state function, coupled with the free market economy, corporations have become the new key players on the international stage. If one were to extend human rights obligations only to states and not to the corporations that they employ, states can bypass their obligations by privatization and outsourcing.[163] It must be clarified here that states and corporations cannot have the same duties with regard to human rights because their essential roles are very different; this, however, does not mean that corporations should have no obligations. Corporate obligations must be tailored to fit their unique position in society, as will be demonstrated below.

4.4.1 Criticism of Friedman[164]

Although Milton Friedman was an expert with regard to the free market economy, his claims with regard to the social responsibility of TNCs cannot be upheld. With the development of society since 1970, the roles of states and TNCs have changed

[157] Ratner (2001–2002), p. 472.

[158] Commission on Global Governance, Our Global Neighborhood 3 (1995).

[159] Jochnick (1999), p. 59.

[160] Reinisch (2005), p. 74.

[161] Ratner (2001–2002), p. 468.

[162] Raz (1989), p. 171.

[163] Deva (2012), p. 149.

[164] For a detailed Analysis of Friedman's view on the corporate role, see Sect. 4.3.1. of this paper. Furthermore Wetzel (2014), pp. 93 et seq.

drastically. Today, corporations perform many public functions as they have begun to assume public roles. With the assumption of public roles, in turn, comes the responsibility to assume certain social responsibilities.[165]

4.4.1.1 Social Responsibility Undermines the Free Market

By obliging corporations to act in a socially responsible manner they are in no way obliged to fulfil the social objectives of a government.[166] Corporations have become part of the social culture of today and as such, must do their part with regard to society. The theory of the free market does not mean to absence of any rules and regulations; quite the contrary.[167] For the free market to function, specific rules and regulations are required[168]:

> Corporations are best thought of as entities permitted to exist by the state because they serve a public good, not because individuals have the right to enrich themselves through them.[169]

Corporations can no longer be considered as simple enrichment tools but, due to their size and influence, must also bear some responsibility for their actions. The free market concept is no longer an ideal that must be protected at the cost of humanity.[170]

4.4.1.2 Shareholder Ownership Of TNCs

Friedman erroneously viewed corporate executives as the agents of their shareholders.[171] Shareholders are truly not the owners of a corporation: they are last in the receiving line for the economic benefits the corporation has amassed.[172] Corporations are designed in such a way that they represent a separate legal entity from their shareholders, so that in case of liability, only the corporation will be liable and not the shareholders. If one were now to assume that the shareholders own the corporations, this separate legal status becomes obsolete. Shareholders have an interest in the company and want their input maximized, which is a legitimate aim. It is illegitimate, however, to claim that any possible profit needs to be maximized at all costs.[173] With growing awareness and ethical sensitivity, it is not hard to

[165] Deva (2012), p. 129.
[166] Deva (2012), p. 123.
[167] Wettstein (2009), p. 295.
[168] See, for example, the Competition Law of the European Union.
[169] Orlando (2013), p. 31.
[170] Deva (2012), p. 124.
[171] Dine (2005), p. 263.
[172] Wettstein (2009), p. 298.
[173] Deva (2012), p. 126.

conceive that shareholders have an interest in seeing their corporation act as responsibly as possible, as this can positively affect image and profit.

4.4.1.3 TNCs Cannot Assume Social Responsibility

TNCs are said to be ill equipped to assume social responsibility because business executives cannot foresee the impact of their social actions. This claim can be refuted: the world is one of specialists. Every second university graduate has some sort of special focus making him a high-quality candidate in a specific field. Corporations spend millions of dollars each year on analysts, finance officers and recruitment specialists thus they could effortlessly hire a social operations specialist.[174] As a matter of fact, compliance departments are among the most steadily growing corporate departments.

The claim about foreseeability can be made with regard to any business transaction. One cannot foresee how an investment will develop, how the markets will change because there will always be a risk. Risk-calculation, speculation and uncertainty will always be present in any business venture; social or not.[175] The idea that social responsibility will create so much uncertainty and insecurity that it can have a detriment effect on the corporation is not defensible. Human rights can be incorporated into corporate risk management procedures, creating foreseeability and stability. A good corporate risk assessment procedure will be so thorough that a great number of risks can be pre-empted. The remaining risks for business ventures are part of the unforeseeable "natural phenomena" category, which is neither heightened nor intensified through human rights responsibilities.

Again, corporations are not required to take on the responsibilities of a government; rather, corporate processes must become more transparent and accountable.[176] Friedman considers TNCs to be abstract entities that are incapable of having any sort of responsibility whatsoever, yet he claims at the same time that TNCs enjoy and exercise certain freedoms.[177] In legal theory, it is widely accepted that whoever has rights will also have corresponding duties. Rights and duties are irrevocable interlinked and cannot be separated. It is thus difficult to argue that although corporations have rights and freedoms in the legal sphere, they would not have any duties in return. The nexus between rights and duties is permanent. Within this certain amount of freedom, TNCs should also be able to hold some sort of responsibility for their actions. Friedman's views of TNCs being free agents without any responsibility towards anyone but their shareholders cannot be defended in a society where awareness and ethical conduct have gained considerable momentum. If a corporation wants to offer its shareholders the greatest

[174] Wettstein (2009), p. 296. Deva (2012), p. 128.
[175] Deva (2012), p. 128.
[176] Deva (2012), p. 128.
[177] Friedman (1970), p. 74.

possible profit, it must do so in a way that shows socially responsible behavior and cultural awareness.[178]

4.4.2 Corporations as Organs of Society

Corporations are organs of society by any definition: "*They own property, pay taxes, consume raw materials, generate goods, services and waste and they play a central role in the lives of their workers and customers*."[179] Based on their common purpose, if corporations are social organs then they must have social obligations as well.[180]

> While companies may not be in the habit of referring to themselves as 'organs of society,' they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration. While a company is not legally obliged under international law to comply with these standards, those companies who have violated them have found, to their cost, that society at large will condemn them. A growing nucleus of transnational companies has incorporated an explicit commitment in their business principles and codes of conduct to uphold the rights enshrined in the UDHR.[181]

Multinationals are obliged to follow minimum moral rules of society otherwise this would lead to the unreasonable situation where a corporation does business with society while at the same time engaging in activities undermining that same society. Such a result is untenable.[182] The theory of profit maximization as the sole purpose of corporations must be abandoned in favor of a more balanced view of the role of business and human rights.[183] Corporations exercise considerable power over individuals, as in controlling their well-being.[184] This power and control needs to be channeled, for TNC's have largely escaped government control or have never even been subjected to it.[185] Corporations are in undeniable part of society with certain rights; hence they must also assume the corresponding duties.

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[178] Examples of Good Corporations include Google, Henkel and L'Oréal. Ethisphere, http://ethisphere.com/worlds-most-ethical/wme-honorees/.

[179] Bratspiess (2005), p. 15.

[180] Compare Wetzel (2014), pp. 93 et seq.

[181] Clapham and Jerbi (2001), p. 340.

[182] Bowie (1997), p. 249.

[183] Deva (2012), p. 151.

[184] Ratner (2001–2002), p. 462.

[185] Ratner (2001–2002), p. 463. Ratner cites instances where developing states depend on foreign investment and thus do not have the will or the resources to adequately control corporations.

4.5 Silent Complicity as a Moral and Legal Duty

Globalization has profoundly changed international power relations and authority.[186] A transition has taken place from a sphere where national governments played a dominating role to a sphere of institutional pluralism based on overlapping powers.[187] Prosperity of the national states is closely tied to their economic prosperity on the global marketplace controlled by the transnational corporations.[188] Their pronounced mobility equally threatens national states: a TNC can move from one country to another, causing considerable problems for any national economy as well as bringing about a shift in authority relations.[189] Today, governments no longer exclusively control corporate activity, rather corporations have begun controlling and dictating policy options of the national governments.[190] This trend is particularly obvious in states with weak governments and economies:

> While states certainly remain important (perhaps the most important) actors, the system is no longer state-centric: non-governmental organizations (NGOs), multinational corporations and international organizations such as the World Trade Organization (WTO) have emerged as significant transnational actors in world politics.[191]

Multinational corporations have become key players in shaping and directing this process because their influence as advisors, experts, and consultants for national governments and supranational bodies has become indispensable and has turned them into participants in the so-called public policy networks shaping the global public domain.[192] They have become key protagonists in writing and adopting the rulebooks for their own conduct through their involvement in formal regulatory processes and rulemaking or through self-regulation.[193] Thus, transnational corporations are involved in almost all stages of public policy- and economic rule-making today.

The new political role of multinational corporations has profound impacts on the way their moral responsibilities must be interpreted.[194] A large part of human rights violations are not committed directly by the TNC's but by a third party which relies on the direct or indirect aid of the corporations in their task. Corporations thus do not act as direct perpetrators but rather as accomplices to the crimes committed: "*Different forms of complicity can be specified along different kinds of support, participation, or assistance in the human rights violation*."[195] So rather than use the

[186] Wettstein (2010), p. 39.
[187] Kobrin (2009), p. 250.
[188] Wettstein (2010) , p. 39.
[189] Ratner (2001–2002), p. 463.
[190] Wettstein (2010), p. 39.
[191] Kobrin (2009), p. 250.
[192] Wettstein (2010), p. 39.
[193] Wettstein (2010), p. 39.
[194] Wettstein (2010), p. 40.
[195] Wettstein (2010), p. 34.

standard arguments for creating corporate human rights responsibility, one can morally expand this notion of complicity to encompass corporate human rights conduct:

> An ethical assessment of complicity reaches beyond the legal perspective; its implications are more demanding. A company may not be liable for certain actions from a legal point of view, but nevertheless be regarded an accomplice from an ethical perspective.[196]

With regard to TNCs then this refers to a situation where it "*'aids and abets' a host government in carrying out serious human rights abuses*."[197] The accomplice TNC must know, or should know, that its contribution can or will be used to further human rights violations; knowledge is power and with knowledge comes the ability to choose.[198] Only if even a reasonable assessment of the corporation's activities would not reveal their connection to the violation of human rights, could the corporation then justifiably claim not to bear any responsibility with regard to being complicit in the abuse.[199]

Corporations increasingly find themselves "*connected to harms and wrongs, albeit by relations that fall outside the paradigm of individual, intentional wrongdoing*."[200] The biggest problem, however, is that with the rise of corporations to considerable political power, combined with the increasing structural interconnectedness of the global economy, cases of "unintended" aiding and abetting seem to be getting ever more frequent and pervasive.[201]

An important element of this idea of corporate complicity is the substance of the aid and assistance provided by the corporations. In order for a corporation to be complicit in human rights violations, its aid must have been substantial albeit not indispensable: "*A corporation's actions might thus merely facilitate human rights violations rather than directly contribute to them*"[202] As a result, corporations can be complicit in human rights violations even if the violation would have taken place without its assistance. The element of substantiality therefore implies consequence-sensitivity, not consequentialism.[203] From a deontological point of view, any knowing contribution to human rights violations by corporations would *per se* have to be considered ethically problematic, whether it is direct, indirect, beneficial or silent complicity.[204]

The idea of silent complicity is not only conceptually different to other forms of complicity; it also has a different moral standpoint.[205] The general type of

[196] Wettstein (2010), p. 34.
[197] Ramasastry (2002), p. 95.
[198] Clapham and Jerbi (2001), p. 342.
[199] Wettstein (2010), p. 35.
[200] Kutz (2000), p. 1.
[201] Wettstein (2010), p. 35. Ratner (2001–2002), p. 474.
[202] Clapham (2004), p. 68.
[203] Wettstein (2010), p. 36.
[204] Wettstein (2010), p. 36.
[205] Wettstein (2013), p. 250.

complicity tends to focus on the actions taken by a corporation to facilitate a violation, while silent complicity focuses on the omission of a corporation to act.[206] According to Clapham and Jerbi, "*the notion of silent complicity reflects the expectation of companies that they raise systematic or continuous human rights abuses with the appropriate authorities*."[207]

This understanding is echoed in the UN Global Compact:

> Silent complicity describes the way human rights advocates see the failure by a company to raise the question of systematic or continuous human rights violations in its interactions with the appropriate authorities. For example, inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity.[208]

Consequently, silent complicity refers to any situation where a transnational corporation is witness to human rights abuses in the country they find themselves in yet fails to raise this point with the adequate authorities.[209] The TNC becomes complicit of the violation not by actively participating in it but because its silence allowed the violation to continue despite the influence the company may have had in the national state. As a result of this moral responsibility attached to silent complicity, it must be understood and evaluated differently to that of any other form of complicity.[210] In cases of direct complicity, it matters not who the perpetrator of a violation may be, yet in cases of silent complicity is does:

> It makes a difference whether those who are silent are vulnerable individuals who choose not to speak out because they fear to be turned into victims themselves, or whether it is a potent corporation operating in proximity to the abuse. The outcome of these two scenarios will likely differ; while it is unlikely that a rogue government would change its stance and policies based on the protest of its powerless victims, a corporation, depending on its status within the respective country and its economic importance for the government, might be more successful in exerting pressure.[211]

A powerful witness has a lot more influence on the competent authorities than a weak one and as such, silence from an influential party weighs all the more heavy. Silence in itself is not a sign of complicity *per se*; rather, silence becomes complicity only when it is to be interpreted as implicit moral acceptance of the violations:

> Silence only expresses moral approval if it is given by an agent or agency with sufficient influence on or over the perpetrator's behavior, that is, if breaking the silence could reasonably be expected to have an impact on the perpetrator.[212]

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[206] Wettstein (2013), p. 250.

[207] Clapham and Jerbi (2001), p. 347.

[208] UN Global Compact, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle2.html.

[209] Wettstein (2013), p. 251.

[210] Wettstein (2010), p. 37.

[211] Wettstein (2010), p. 37.

[212] Wettstein (2010), p. 37. Compare to Wettstein (2013), p. 251.

This is where silent complicity can be differentiated from all the other forms of complicity: it presupposes a position of authority of the accomplice. Only if the accomplice himself is in a powerful position with the actual perpetrator can one reasonably expect for him to stand up in the face of violations and make his voice be heard. When it fails to do so, the witness then turns into an accomplice.[213] This aspect of silent complicity gives it capital importance: The violations committed are not the result of an individual act that may be punished; rather, it is the structural and systematic toleration of human rights violation by a TNC. [214] Silent complicity means authoritative approval of human rights violations; the growing relevance of the concept for corporate conduct is thus a reflection and also a result of the fundamental reconfiguration of power in the political economy of the world today.

> TNCs have become actors with significant power and authority in the international political system: they can set standards, supply public goods and participate in negotiations; political authority should imply public responsibility.[215]

Symptomatic for this new role of transnational corporations are the expectations relative to silent complicity: Silent complicity expects the corporations to act based on the perception that not taking actions in the face of systematic human rights violations while being in a position to do is morally and legally wrong.[216]

> These companies are vital to the countries they serve. They help to sustain economically regimes of very varied complexions – from democracies to oppressive dictatorships. We ask them and see it as part of their agenda, to speak out in defense of human rights where they are violated in the countries in which they work. This is a wholly legitimate role. It is not interference in domestic politics, an argument that companies have used as an escape route in the past.[217]

As a result, if corporations do not wish to fall under the silent complicity construct, they must take a firm stand against human rights violations in areas under their influence.[218] Possible measures would include public statements of concern, dialogue with the leadership, imposing sanctions on suppliers or business partners who violate human rights[219] or discontinuance of partnership with entities that persistently violate fundamental international standards and standards enshrined in the corporate code of conduct. It cannot be expected that corporate entities interfere with the internal policies of host countries, yet often times a clear statement of discontent or a public expression of concern will be sufficiently explicit to halt violations, especially in cases where there is a close company host state partnership. In instances where such statements of concern prove to be

[213] Clapham and Jerbi (2001), pp. 347–348.

[214] Wettstein (2013), p. 251.

[215] Kobrin (2009), p. 350.

[216] Wettstein (2010), p. 41.

[217] Chandler (2000), p. 43.

[218] Wettstein (2013), p. 255.

[219] These types of sanctions can generally be foreseen in supplier or partnership contracts. See The Body Shop as an example, Sect. 7.4.3.3.

insufficient, the company needs to investigate other, more effective methods to make their concerns heard, such as halting operations or stopping monetary support until the violations cease.

It is important to point out that the moral responsibility attached to the authority of TNCs cannot be undone by abandoning the state they find themselves in. TNCs cannot be expected to become the moral arbiters of the world, yet they should remain responsive to the concerns of the global public.[220] Human rights advocacy by corporate institutions is legitimate based on the sufficient public condemnation of corporate human rights violations. Corporate human rights activism should thus be interpreted as a deliberate process for constituent democracy rather than corporate tyranny.[221]

The dominant position in today's debate on corporate responsibility for human rights violations seems to stall at the idea of corporations having only the duty to do no harm.[222] Although this is supported by the UN report of the Special Representative on Business and Human Rights, claiming that while all corporations undeniably have an obligation to respect human rights, any duty to protect and realize human rights ought to be ascribed to the state alone.[223] Nonetheless, it must be accepted that while there is an evident negative duty to stop harmful support of a primary perpetrator in those cases of complicity that derive from specific corporate activity, a wrongdoing that derives from omission should also call for some form of positive action.[224]

Given the underlying purpose of human rights law as a guarantee of certain inalienable rights for all people, logic requires that these principles apply to all international actors, extending beyond states.[225] Despite this clear intention of international human rights applying to all entities of society, the limited means of enforcement under international law have resulted in obligations securing the full enjoyment of human rights only being enforceable with regard to states and not to other entities.[226] This must change. The limited concern with national governments and state responsibility not only distorts the reality of the growing weakness of national-level authority but also protects other actors from greater responsibility.[227] Corporate liability for human rights violations should be read as a condition of reciprocity to the state responsibility to protect.[228]

[220] Chandler (2000), p. 5.
[221] Wettstein (2010), p. 43.
[222] Wettstein (2010), p. 41.
[223] Wettstein (2010), p. 41. See also Chap. 6.
[224] Wettstein (2013), pp. 253–254.
[225] McBeth (2010), p. 249.
[226] McBeth (2010), p. 249.
[227] McCorquodale (2009), p. 236.
[228] Dupuy (2009), p. 61.

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Chapter 5
Targeting Corporate Human Rights Conduct from a Multinational Perspective

Abstract Human rights obligations of corporations can be extrapolated from the established elements and understandings of international human rights law, yet the way in which these can be enforced is still lacking in the legal system of today (McBeth (2010) International economic actors and human rights. Routledge Research in International Law, p. 250). Thus, having established why corporations have obligations with regard to human rights, the next step must be discerning how these obligations can be translated into common law and legal obligations under international law.

Keywords Human rights • ILO • OECD • EU • Initiatives

There exist a multitude of actions targeting the human rights conduct of business entities. The OECD, the ILO and the EU have developed their principles to ensure that businesses adhere to basic standards of conduct. A multinational union of states and businesses has furthermore developed principles for the extractive sector and its business operations abroad. The content of these initiatives will be clarified and evaluated as to their accomplishment towards creating a successful strategy for corporate human rights compliance.

Among the first responders to create an international policy targeting TNC's human rights impacts were the OECD's Guidelines for Multinational Enterprises and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[1]

The origins of the modern codes of conducts and initiatives lie in the 1930s, where the International Chamber of Commerce developed model codes for publicity and marketing campaigns.[2] In the 1990s, following the increased outsourcing of corporate activities to developing countries with poor social, labor and ecological standards, a renewed debate on initiatives targeting corporate conduct took place.[3] The main focus of the original initiatives lay on sectors with long lines of

[1] Karp (2014), p. 30. See also De Schutter (2006), pp. 8–9. See generally Steinhardt (2005).

[2] Urminsky (2001), p. 13.

[3] Buntenbroich (2007), p. 19.

J.R.-M. Wetzel, *Human Rights in Transnational Business*,
DOI 10.1007/978-3-319-31325-2_5

subcontractors and suppliers as they were most prone to adverse human rights effects affecting their business.[4]

5.1 OECD Guidelines

The OECD Guidelines for Multinational Enterprises, originally created in 1976, are recommendations by governments to multinational enterprises (MNE) operating in or from adhering countries.[5] They are non-binding principles and standards for business operations that aim toward responsible business conduct consistent with the law and international standards.[6] The OECD Guidelines are the only multilateral code of conduct for business that governments have committed to promote.[7] These Principles are complimented by the National Contact Points (NCP), which promote and implement the principles.[8]

As international business and foreign investment have undergone extensive structural change, the OECD Guidelines were updated in 2011 to incorporate and account for this change.[9] Among these new updated principles, 42 countries have committed to higher standards for corporate actions. This was the first time that an inter-governmental agreement, albeit non-binding, has been reached regarding human rights abuses by corporations.[10] Through this update, the OECD has reaffirmed its commitment to addressing the challenges of tomorrow.[11] As an economic organization, the OECD is uniquely suited to tackle these issues, through its "*informal policy cross-checks, mechanisms to identify best practices and by providing avenues for governments to evaluate their own results*."[12]

The Guidelines are intended to express the shared values of the governments where a large share of international investment originates and which are home to an equally large number of MNEs.[13] They aim to promote the positive contributions by enterprises to economic, environmental and social progress worldwide.[14] Upon their re-edition in 2011, the Guidelines were completed with a human rights

[4] Justice (2002), p. 92.

[5] Buntenbroich (2007), p. 31. Vogelaar (1980), p. 130. OECD Guidelines (2011), p. 3. Kaufmann et al. (2013), p. 35. Karl (1999), p. 89.

[6] OECD Guidelines (2011), p. 3. Köster (2010), p. 91. Kaufmann (2007), p. 163.

[7] OECD Guidelines (2011), p. 3. Wieland and Schmiedeknecht (2010), p. 83. Federal Council Position Paper (2015), p. 20.

[8] OECD Guidelines (2011), p. 3. Kaufmann (2007), p. 166.

[9] Santner (2011), p. 375. Kaufmann (2007), p. 164. Van der Heijden (2012), p. 19.

[10] Santner (2011), p. 375.

[11] Buntenbroich (2007), p. 32. Santner (2011), p. 376.

[12] Etsy (2006), p. 1547.

[13] OECD Guidelines (2011), p. 3.

[14] Karl (1999), p. 91.

chapter, consistent with the UN Protect, Respect and Remedy Framework.[15] At their core, the Guidelines coordinate the laws of the national states with the social norm systems of the large corporations for the purpose of harmonizing behavioral standards at the international level.[16]

5.1.1 Chapter IV: Human Rights

The highlight of the newly updated Guidelines is the chapter on human rights.[17] It encourages corporations to respect human rights and recommends a risk-based due diligence approach to identify and prevent human rights violations.[18] According to Chapter IV of the OECD Guidelines, states have a primary duty to protect human rights, however companies should, regardless of their size or sector, respect human rights wherever they operate.[19] The terms used within the chapter are significant as they represent the first instance where human rights conduct and human rights are tied together with business conduct in an OECD document.[20] Respect for human rights is the expected conduct for enterprises independently of the host state's abilities and willingness to fulfil their inherent human rights duties.[21] Should a state fail to enforce the relevant domestic law with regard to human rights, this in no way diminishes the expectation that corporations are to respect human rights.[22]

The bare minimum expected of corporations is to refer to the internationally recognized human rights expressed in the Universal Declaration of Human Rights and the main instruments through which it has been codified.[23] Enterprises impact almost the entire spectrum of internationally recognized human rights, although in practice some rights are more at danger than others. Which rights are affected should be subject to consistent review in order to ensure that corporate action is adapted to the changing circumstances.[24] Special attention should be paid to vulnerable groups such as children, indigenous people, women, minorities or persons with disabilities; in cases of armed conflict, special consideration must also be paid to international humanitarian law.[25]

[15] OECD Guidelines (2011), p. 3. Köster (2010), p. 92. Kaufmann (2007), p. 163.
[16] Santner (2011), p. 381.
[17] For a general evaluation of the revised OECD guidelines, see Murray (2001).
[18] Santner (2011), p. 382. Koeltz (2010), p. 110.
[19] Buntenbroich (2007), p. 50.
[20] Santner (2011), p. 382.
[21] OECD Guidelines (2011), p. 32.
[22] See Buntenbroich (2007), p. 50. OECD Guidelines (2011), p. 32.
[23] OECD Guidelines (2011), p. 32, citing the ICCPR, ICESC, ILO Declarations.
[24] OECD Guidelines (2011), p. 32.
[25] OECD Guidelines (2011), p. 32.

5.1.1.1 Principle 1: Respect for Human Rights

Corporations should avoid infringing on the human rights of others. Adverse human rights impacts which they are involved in must be addressed.[26] Addressing actual and potential human rights violations consists of taking the adequate and necessary measures in identifying and preventing them.[27] Alleviation of potential human rights impacts and remediation of actual violations must take place as well as accounting for how the violations are addressed.[28] Infringement, in terms of the OECD Guidelines, refers to the adverse impacts, which corporate activities may have on the human rights of individuals in the zone of operation.[29]

5.1.1.2 Principle 2: Avoiding to Cause or to Contribute to Violations

Corporations should avoid causing or contributing to human rights violations in their sector of operations; when violations do occur, they must be addressed.[30] Activities causing human rights violations can include both action and omission and where an enterprise does cause adverse human rights impacts it should take the necessary steps to prevent these in future.[31] When a corporation contributes to human rights violations, it should take all necessary steps to cease its contribution and use its leverage to mitigate any impact to the largest extent possible.[32] Where corporations have the ability to create change in practices of an entity that causes human rights violations, they are considered to have leverage for change.[33]

5.1.1.3 Principle 3: Seeking Ways to Prevent Adverse Human Rights Impacts

Corporations should seek to prevent adverse human rights impacts that can be directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.[34] This Principle intends to address the complex issue where corporations have not contributed to human rights violations but the violation can nonetheless be directly linked to their

[26] OECD Guidelines (2011), p. 31.
[27] OECD Guidelines (2011), p. 33.
[28] OECD Guidelines (2011), p. 33.
[29] OECD Guidelines (2011), p. 33.
[30] OECD Guidelines (2011), p. 31.
[31] OECD Guidelines (2011), p. 33.
[32] OECD Guidelines (2011), p. 33.
[33] OECD Guidelines (2011), p. 33.
[34] OECD Guidelines (2011), p. 31.

business operations.[35] The expectation for principle 3 is that companies use their leverage to influence other entities to cease their human rights violations.[36] Any corporate business relationship includes business partners, entities in the supply chain and state or non-state entity directly linked to the business, its operations, services or products.[37] Entering into the determination on what the appropriate reactions are, consideration will be given to the leverage of the company over the entity concerned, the crucial nature of the relationship between the company and the entity, the severity of the violation and how the termination of the relationship between the corporations and the entity will affect human rights.[38]

5.1.1.4 Principle 4: Policy Commitment to Human Rights

Corporations should have a policy statement, outlining their commitment to human rights.[39] Any statement of policy should be approved by the highest level of the enterprise, must be informed by a relevant expertise pool, stipulate the company's human rights expectations of personnel, business partners and other parties linked to operations and be publicly available, communicated both internally and externally.[40] Lastly the policy must be reflected throughout operations and procedures so as to ensure that it is embedded throughout the company.[41]

5.1.1.5 Principle 5: Due Diligence

Corporations are recommended to carry out due diligence, assessing actual and potential human rights impacts of their operations and acting upon the findings by tracking human rights responses and addressing impacts.[42] Human rights can be included within the broader risk assessment policies of the company, provided that this risk assessment goes beyond simply identifying and managing material risks to the enterprise and its shareholders.[43] Any due diligence exercise must be considered an ongoing exercise, as human rights consideration change and evolve, just as the company's operating context will change.[44]

[35] OECD Guidelines (2011), p. 33.
[36] OECD Guidelines (2011), p. 33.
[37] OECD Guidelines (2011), p. 33.
[38] OECD Guidelines (2011), p. 33.
[39] OECD Guidelines (2011), p. 31.
[40] OECD Guidelines (2011), p. 34.
[41] OECD Guidelines (2011), p. 34.
[42] OECD Guidelines (2011), p. 34.
[43] OECD Guidelines (2011), p. 34.
[44] OECD Guidelines (2011), p. 34.

5.1.1.6 Principle 6: Enable Remediation

When a corporation has identified situations in which it has committed or contributed to human rights violations, the OECD Guidelines recommend that the corporation put in place a remediation mechanism.[45] Some situations may require the cooperation between state-based and non-state based grievance mechanisms whereas others may be addressed by operational-level solutions.[46] Any operational-level grievance mechanisms must satisfy the requirements of legitimacy, accessibility, predictability, equitability and transparency.[47] These mechanisms can be created by one enterprise alone or together with several others and should be a source of constant learning.[48] Any mechanisms addressing violations should, nonetheless, not preclude the use of or access to judicial or non-judicial mechanisms nor undermine the roles of trade unions.[49] The access to the OECD National Contact Points must also remain possible.[50]

5.1.2 Implementation of the OECD Guidelines

The OECD enhanced the Guidelines through the use of National Contact Points (NCPs) and the creation of an Investment Committee (IC).[51] The NCPs are set up by the adhering states to further the effectiveness of the Guidelines by promoting them, handling inquiries and contributing to the resolution of issues arising in relation to the Guidelines' implementation.[52] NCPs in different countries cooperate, if needed, on any matter related to the Guidelines. National states make human and financial resources available for their NCPs to ensure proper functioning. The IC periodically or upon request, reviews matters covered by the Guidelines and the experience gained through their application.[53] The IC meets regularly with business partners such as the OECD BIAC[54] or the OECD TUAC[55] as well as with other international partners in order to share views on matters covered by the Guidelines.[56] The IC is furthermore responsible for clarifying the Guidelines, exchanging

[45] OECD Guidelines (2011), p. 34.
[46] OECD Guidelines (2011), p. 34.
[47] OECD Guidelines (2011), p. 34.
[48] OECD Guidelines (2011), p. 34.
[49] OECD Guidelines (2011), p. 34.
[50] OECD Guidelines (2011), p. 34.
[51] OECD Guidelines (2011), Part II Implementation Procedures, p. 65. Köster (2010), p. 92.
[52] OECD Guidelines (2011), p. 68. Kaufmann (2007), p. 166. Schniederjahn (2013), p. 105.
[53] OECD Guidelines (2011), p. 68. Koeltz (2010), p. 112.
[54] OECD Business and Industry Advisory Committee.
[55] OECD Trade Union Advisory Committee.
[56] OECD Guidelines (2011), p. 68.

views with the NCPs and periodically reporting back to the OECD Council on matters covered by the Guidelines. Lastly, the IC and the NCPs actively promote the observance by the industry of the principles and standards contained in the Guidelines.[57]

5.1.2.1 The National Contact Points

The role of the NCPs is to further the effectiveness of the OECD Guidelines.[58] NCPs operate in accordance with the principles of visibility, accessibility, transparency and accountability in order to promote functional equivalence.[59] The role of the NCP is trifold: (1) They assess whether an issue merits further investigation and (2) respond to the parties involved accordingly. (3) If an issue warrants further investigation, the NCP will offer offices to help the parties resolve their issue by seeking advice from the relevant authorities, consulting other NCPs, seeking guidance from the OECD committee and offers to facilitate access to consensual and non-adversarial means of dispute resolution.[60]

The Guidelines are to be made known and available through the appropriate channels, raising awareness of the Guidelines and their implementations procedures as well as responding to inquiries from other NCPs, the business community and governments from adhering and non-adhering states.[61] With regard to the resolution of issues arising from the implementation of the Guidelines, the NCPs are expected to resolve these in an impartial, predictable and equitable fashion, compatible with the standards and principles of the Guidelines.[62] The NCP is a forum for discussion and assistance to the business community, worker organizations, NGOs and other interested parties in order to provide for a timely and efficient manner in dealing with matters arising from the implementation of the Guidelines.[63]

Although states have certain autonomy and flexibility when it comes to the organization of their NCPs, several values have been elaborated in the Guidelines. Primarily, NCPs must provide an effective, impartial and accountable basis for dealing with the issues covered by the Guidelines.[64] Different methods of organization can be used to meet these criteria, yet it remains important that relations with representatives of the business community and other interested parties are

[57] OECD Guidelines (2011), p. 68.
[58] Schniederjahn (2013), pp. 107 et seq. Kaufmann et al. (2013), p. 64.
[59] OECD Guidelines (2011), p. 71.
[60] OECD Guidelines (2011), p. 73.
[61] OECD Guidelines (2011), p. 72.
[62] OECD Guidelines (2011), p. 72.
[63] OECD Guidelines (2011), p. 72.
[64] OECD Guidelines (2011), p. 71.

developed and maintained in order to provide for an effective functioning of the Guidelines.[65]

At the conclusion of dispute procedures, the results of the procedures will be made available to the public through statements.[66] To facilitate resolution of the issues, appropriate steps need to be taken to protect the sensitive nature of the interests at stake.[67]

5.1.2.2 The Investment Committee

The Investment Committee (IC) is the OECD body in charge of overseeing the functioning of the Guidelines.[68] The non-binding nature of the Guidelines precludes the IC from acting in a judicial or quasi-judicial fashion.[69] The IC ensures that all elements of the OECD Declaration are respected and implemented and that they operate in harmony with each other.[70] The IC considers requests from the NCPs for assistance in carrying out their activities, including any doubts about the interpretation of the Guidelines in specific cases.[71] The IC considers the reports by the NCPs, takes into account the submissions by adhering countries or advisory bodies on the performance of the NCPs and can issue a clarification statement on the interpretation of the Guidelines by the NCPs.[72] The IC will furthermore recommend any improvements to the NCPs for furthering an effective implementation of the Guidelines, cooperate with international partners and engage with interested non-adhering states on matters covered by the Guidelines.[73] When giving advice on the implementation of the Guidelines, the IC may seek the advice from experts in the field.[74] In any and all of its undertakings, the IC is to execute its duties in an efficient and timely manner.[75]

[65] OECD Guidelines (2011), p. 71.
[66] OECD Guidelines (2011), p. 73.
[67] OECD Guidelines (2011), p. 73.
[68] OECD Guidelines (2011), p. 77.
[69] OECD Guidelines (2011), p. 88.
[70] OECD Guidelines (2011), p. 77.
[71] OECD Guidelines (2011), p. 74.
[72] OECD Guidelines (2011), p. 74.
[73] OECD Guidelines (2011), p. 74.
[74] OECD Guidelines (2011), p. 74.
[75] OECD Guidelines (2011), p. 74.

5.1.3 Implementation Procedures

Many of the functions of the implementation procedures reflect experience and recommendations by the OECD amassed over the years.[76] By including them in the 2011 Guidelines, the expectations of the OECD towards the adhering states and organizations are explicitly and transparently stated.[77] In all of their operations, the NCPs and IC must consider new developments and emerging practices concerning the responsible business conduct, they shall support the positive contribution made by the business sector towards economic, social and environmental progress. Lastly, NCPs and IC are to participate, where appropriate, in collaborative initiatives to identify and address risks of adverse impacts associated with business activities.[78]

5.1.3.1 Visibility

Governments nominate NCPs and inform the business community, worker organizations and NGOs about their availability.[79] Governments are also required to publish information relative to their NCPs and must take an active role when promoting the Guidelines.[80]

5.1.3.2 Accessibility

Simple access to the NCPs is important to ensure their effective functioning.[81] This includes providing easy access for businesses, NGO's and other members of the public. NCPs should respond to all legitimate requests for information and must deal with the specific issues raised in a timely and efficient manner.[82]

5.1.3.3 Transparency

Transparency is a crucial aspect of ensuring respect and accountability for the Guidelines and the procedures associated with them.[83] As a general principle, the operations of the NCPs and IC are to be transparent, although confidentiality in

[76] OECD Guidelines (2011), p. 78.
[77] OECD Guidelines (2011), p. 78.
[78] OECD Guidelines (2011), p. 81.
[79] OECD Guidelines (2011), p. 78.
[80] OECD Guidelines (2011), p. 79.
[81] OECD Guidelines (2011), p. 79.
[82] OECD Guidelines (2011), p. 79.
[83] OECD Guidelines (2011), p. 79.

specific proceedings must also be granted. Outcomes of Guideline procedures will be made public unless preserving confidentiality is in the best interest of the effective implementation of the Guidelines.[84]

5.1.3.4 Accountability

The active role of the NCPs and the IC in enhancing the profile of the Guidelines will put their activities in the public eye.[85] Annual reports and regular meeting with the sharing of experiences will encourage best practices and improve effectiveness.[86]

5.1.3.5 Impartiality

The NCPs as well as the IC are to ensure impartiality not only in all proceedings regarding the Guidelines but also in the resolution of specific occurrences.[87]

5.1.3.6 Predictability

Predictability should be ensured by providing publicly available, clear information on the role of the NCPs and IC in the resolution of issues, including the stages of the specific processes with indicative timeframes and the potential role they can play in monitoring the implementation of agreements specifically and of the Guidelines generally.[88]

5.1.3.7 Equitability

Any processes under the Guidelines should be on fair and equitable terms by providing reasonable access to sources of information.[89]

[84] OECD Guidelines (2011), p. 79.
[85] OECD Guidelines (2011), p. 79.
[86] OECD Guidelines (2011), p. 79.
[87] OECD Guidelines (2011), p. 82.
[88] OECD Guidelines (2011), p. 82.
[89] OECD Guidelines (2011), p. 82.

5.1.3.8 Compatibility

Actions undertaken by the NCPs or the IC must be in accordance with the principles and standards contained and enshrined by the Guidelines.[90]

5.1.4 Critical Assessment of the OECD Guidelines

Amongst the merits of the Guidelines is their transnational impact factor: the scope of the OECD Guidelines extends beyond the territory of the OECD state parties, as they apply to all corporations belonging to an adhering state party, even if they operate in a non-state party.[91] With the inclusion of human rights concerns in the 2011 OECD Guidelines, weight was added to the emerging trend of regulating corporate responsibility for human rights at international level.[92] State parties to the OECD are obliged to establish NCPs, thus offering anyone the opportunity to submit a complaint for violation of the Guidelines.[93] There has been growing consent that the Guidelines are becoming an important contribution to the international effort for corporate human rights responsibility, especially in the form of an empowerment tool to help strengthen states abilities to address corporate responsibility issues.[94] Although the OECD Guidelines for Multinational enterprises have been welcomed as the only global corporate responsibility instrument that has been formally adopted by state parties, they have in no way remained uncontested.[95] The OECD Guidelines fall short in two main areas: (1) The lack of enforcement possibilities and (2) Their non-binding nature.

The primary issue taken with regard to the OECD Guidelines is the inability to enforce them through legal instruments.[96] The human rights principles of the Guidelines are non-binding upon state parties and this soft law nature shifts the choice of appropriate implementation to the NCPs.[97] Even though soft law is often preferred by states due to its flexibility, this same flexibility leads to a broader spectrum for interpretation and application of the Guidelines, which could create confusion for the participants inside and outside of the procedure.[98] The lack of transparency these variations create, coupled with the limited availability of public statements for privacy reasons, undermine the credibility of the Guidelines.[99]

[90] OECD Guidelines (2011), p. 82.
[91] Cernic (2006), p. 96. Amao (2011), p. 35.
[92] Cernic (2006), p. 96.
[93] Cernic (2006), p. 96.
[94] Murray (2001), p. 267.
[95] Cernic (2006), p. 76.
[96] Cernic (2006), p. 94.
[97] Davarnejad (2011), p. 385.
[98] Murray (2001), p. 266.
[99] Davarnejad (2011), p. 385.

Although the decision-making through consensus approach of the OECD does not apply formal pressure on the members, its work product has resulted in a number of principles and guidelines that promote and define good governance in practice.[100] Furthermore, despite the fact that no enforcement or sanctions exist, the decisions can become publicly available, thus potentially significantly affecting stakeholders.[101] In order to increase the willingness to participate in the implementation of the Guidelines, the NCPs as implementation authorities must communicate to the stakeholders that cooperation is in everyone's interest.[102] Some contend that while hard law continues to be the prominent mean of enforcing and regulating corporate behavior, soft law mechanisms such as the Guidelines, have demonstrated their effectiveness through the use of the multi-stakeholder approach.[103]

Even though states are obliged to create the NCPs, there appears certain reluctance on the part of the states to give full effect to this obligation. Many national NCPs are affiliated with the local business or industry departments, giving the impression that they could be more inclined to support business interests than human rights.[104] The main problems associated with the Guidelines implementation by the NCPs is their lack of due process resulting from the failure to create a clear procedure, the unequal treatment of parties, the unwillingness to investigate claims and the lack of fact-finding, the inherent lack of transparency and lastly, but maybe most importantly, the unwillingness to declare a breach of the Guidelines.[105]

Thus, the greatest issue with regard to the Guidelines is their lack of an effective enforcement and sanctioning mechanism.[106] The implementation procedure of the NCPs is "*not comprehensive*": neither are all substantive parts of the Guidelines covered nor are all observing corporations in the scope of the Guidelines.[107] It has been shown that the implementation of the Guidelines by the NCPs is inconsistent, as apart from labor laws and labor relations, implementation has been less than substantial.[108] Some even go so far as to call the Guideline's implementation "*piecemeal and inconsistent*".[109]

The broader language used in the Guidelines indicates that it is still unclear how this updated version will fit into the broader framework of OECD policy.[110] In practice, the Guidelines demonstrate an evolution in international law, encouraging

[100] Santner (2011), p. 380.
[101] Santner (2011), p. 384.
[102] Davarnejad (2011), p. 385.
[103] Santner (2011), p. 388.
[104] Cernic (2006), p. 94.
[105] Cernic (2006), p. 94.
[106] Cernic (2006), p. 94.
[107] Schuler (2008), p. 1776.
[108] Schuler (2008), p. 1776.
[109] Zerk (2006), p. 243.
[110] Santner (2011), p. 384.

corporations to understand and undertake responsibilities with regard to human rights.[111]

Effective corporate governance under the OECD Guidelines is achieved by cooperation and decentralized soft implementation.[112] For further enhancement of the Guidelines, the implementation procedures must become more visible, more accessible, more transparent and more accountable.[113] Adhering corporations need to increase their participation and cooperation with the OECD and secure the effective implementation of the basic prescriptions enshrined in its Guidelines for Multinational Enterprises.[114]

5.2 ILO Tripartite Declaration

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy is one of the oldest initiatives targeting corporate conduct. It was drawn up to define and regulate the conduct of multinationals with their host countries in the 1960s and 70s.[115] The declaration was intended as a set of guidelines to aid TNCs, Governments and worker organizations in their operations and interactions. The original declaration was updated in 2006 to better adapt it to the role of TNCs in social and economic globalization today, and thus help to contribute to a climate better suited for economic growth and social development.[116]

Based on its tripartite structure, its experience and competence, the ILO deems itself fit to play an essential role in evolving principles for the guidance of transnational corporations.[117] Transnational corporations play an important part in the economics of the host countries by bringing efficient utilization of capital, technology and labor, furthering economic and social welfare.[118] On the other hand, this prominent status of TNCs can lead to abuses of the concentration of power and can conflict with national policy objectives and the interests of the workers.[119] The aim of the ILO tripartite declaration is thus to encourage the positive contribution of

[111] Murray (2001), p. 268. Santner (2011), p. 384.

[112] Schuler (2008), p. 1777.

[113] Schuler (2008), p. 1777.

[114] Schuler (2008), p. 1777. Murray (2001), p. 269.

[115] ILO Tripartite Declaration, Introduction, p. V. Van der Heijden (2012), p. 21.

[116] ILO Tripartite Declaration, Introduction, p. V. Kaufmann (2007), p. 166. Wieland and Schmiedeknecht (2010), p. 83.

[117] ILO Tripartite Declaration, p. 1. Ratner (2001–2002), p. 486.

[118] ILO Tripartite Declaration, p. 1.

[119] ILO Tripartite Declaration, p. 2.

TNCs to economic and social progress while at the same time minimizing the risks that come with their operations.[120] The principles within the declaration are voluntary guidelines, which do no limit or affect the adherence to other ILO conventions.[121]

5.2.1 General Principles

As general conditions, the ILO tripartite declaration requires the adhering parties to respect the sovereignty and sovereign rights of the states by obeying all laws and regulations.[122] Furthermore, TNCs are required to give due consideration to local custom and practice and they must take into account the objectives of their host country and should construe their activities accordingly.[123] The operational activities should be in harmony with the social aims and development ideals of the host nation, thus consultation between the corporation and the host government and other concerned parties are necessary.[124]

The principles of the tripartite declaration do not claim to introduce any inequalities of treatment between national and multinational enterprises. Rather, these principles reflect the good practices expected from all business enterprises wherever they may become relevant.[125] Lastly, host and home governments should promote good social practice in accordance with the principles laid out by the ILO.[126]

Even though the ILO tripartite declaration refers to human rights in Article 8, it does not devote a specific chapter to human rights like the OECD Guidelines.[127] As a result, the ILO's tripartite declaration has limited use as a tool for enforcing good human rights practices outside core labor issues in the corporate world.[128]

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[120] ILO Tripartite Declaration, p. 2.

[121] Buntenbroich (2007), p. 39.

[122] ILO Tripartite Declaration, Art. 8.

[123] ILO Tripartite Declaration, Art. 8.

[124] ILO Tripartite Declaration, Art. 10.

[125] ILO Tripartite Declaration, Art. 11.

[126] ILO Tripartite Declaration, Art. 12.

[127] States "should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress. They should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights and Work and its Follow-up, adopted in 1998. They should also honour commitments which they have freely entered into, in conformity with the national law and accepted international obligations."

[128] Karp (2014), p. 30.

5.2.2 *Critical Assessment of the ILO Tripartite Declaration as a Tool for Human Rights Implementation for Corporations*

The Tripartite Declaration was aimed at TNCs, states and worker unions, but it also reflects concerns of developing states and unions in the 1970s and again in 2000.[129] Despite the fact tripartite declaration itself is of voluntary nature, all the ILO conventions contained within it are binding, thus prohibiting discrimination in employment and child labor.[130] Even if the declaration does not explicitly address any human rights issues outside the labor sphere, it does mention in its preamble that multinational enterprises can make an important contribution to the enjoyment of all basic rights, underlining the power and the responsibility of TNCs with regard to these rights.[131]

What is more problematic than the actual declaration itself is the way it is implemented: governments and unions are asked to use surveys to assembly data and reports from TNCs in order to draw conclusions on policies and measures and to allow for suggestions and changes.[132] However, these surveys fail to convey the failures of corporations with regard to the declaration because the actual corporations are not named, effectively stripping the implementation mechanism of its *raison d'etre*.[133] There is no sense in having an implementation mechanism if it cannot effectively target the corporations in question because they are *off the record*. The national surveys have become meaningless since they often do nothing more than thank the corporations for the efforts they have made with regard to human rights and employment, effectively emasculating the process of holding corporations responsible.[134]

The ILO tripartite declaration, despite its shortcoming in complaint procedures, encourages the emerging international legal obligations of corporations.[135] Notwithstanding the fact that the declaration contains only recommendations and not binding obligations, it demonstrates that the labor regime has begun to embrace human rights, albeit in a limited fashion, for TNCs.[136] The major problem with the ILO declaration is that the majority of cases lie outside its scope of application, thus restricting its capacity.[137] Nonetheless, as corporations will increasingly come

[129] Carasco and Singh (2008), p. 360.
[130] Carasco and Singh (2008), p. 360. Kaufmann (2007), p. 167.
[131] Padmanabhan (2011), p. 9.
[132] Padmanabhan (2011), p. 10.
[133] Padmanabhan (2011), p. 11.
[134] Padmanabhan (2011), p. 11.
[135] Padmanabhan (2011), p. 12.
[136] Clapham (2006), p. 215.
[137] Padmanabhan (2011), p. 13.

within the reach of the ILO conventions and thus the declaration, positive obligations will begin to accumulate.[138]

The declaration, to date, has not been a practical human rights implementation tool for corporate conduct and significant changes will need to be made to better adapt it to the challenges of the future.[139] The obligations of TNCs under the ILO declaration need to be structured in a more direct way, creating compulsory obligations rather than voluntary ones.[140] Effectively enforcing the principles of the ILO will help in the creation of effective regulation targeting corporate human rights conduct. However until then, the ILO tripartite declaration remains ill-equipped to deal with the challenges of globalization and human rights violations by corporations outside the labor sphere.

5.3 Human Rights and Business in Europe

5.3.1 The Council of Europe

In 2010, the European Parliamentary Assembly adopted Resolution 1757 and Recommendation 1936 on the topic of business and human rights. In these documents, the assembly acknowledged the imbalance between human rights and business in the EU and, in 2011, asked the Steering Committee for Human Rights (CDDH) to engage in a feasibility study to elaborate the corporate social responsibility in the field of human rights.[141]

5.3.1.1 Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights

In mid-2012, the CDDH published a draft preliminary study on corporate social responsibility in the field of human rights where it outlined the existing standards and issues.[142] As several European-based firms have been accused of human rights violations, the topic was of high relevance to the Council of Europe.[143] The report noted that the likeliness of initiating civil proceedings against corporations for human rights violations was slim, as European States do not recognize the

[138] Clapham (2006), p. 215.

[139] Amao (2011), p. 31.

[140] Padmanabhan (2011), p. 14.

[141] Corporate social responsibility in the field of human rights, Council of Europe, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Default_en.asp.

[142] Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights, CDDH (2012) 012.

[143] The list includes IKEA, Nokia, Siemens, Nestlé and News of the World.

application of their law extraterritorially. Even though Art. 2 of the Brussels Regulation on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters precludes a state from declining to adjudicate matters based on a *forum non conveniens* consideration, very few cases have been brought against companies under the provision.[144]

Additionally, there is no uniform national legislation in Europe concerning the idea of corporate liability for human rights violations, for some claim that a multinational corporation lacks legal personality or that the actions of a subsidiary cannot be made the responsibility of the parent company.[145] In addition, the ECtHR only allows individuals to bring cases against state parties and not private companies, thus effectively excluding them from its jurisdiction *ratione personae*.[146]

As it currently stands, the ECtHR does not hear cases pertaining to corporate human rights violations, as they are inadmissible *ratione personae* according to Art. 35 para. 3a ECHR. Claims of ECHR violations can only be made against High Contracting Parties as stated in Art. 34 of the Convention, effectively granting private actors immunity.[147] What is odd about this construct, however, is the fact that although they cannot be sued, corporations may indeed sue before the ECtHR for a violation of their Convention-granted rights, according to Art. 34 ECHR.[148] This inevitably leads to a legal protection anomaly where a corporation may make use of the rights enshrined in the Convention but, conversely, has no duties arising out of the same document.

In their reply to the Parliamentary Assembly Recommendation 1936 (2010) however, the Committee of Ministers argued that "*with regard to the Assembly's proposal to draft a convention or an additional protocol to the European Convention on Human Rights in this area, the Committee of Ministers considers that this is not the most appropriate solution.*"[149] The committee instead suggested the creation of a soft-law instrument to fill the governance gap at European level.

This suggestion by the committee should be rejected outright. The number of existing soft-law mechanisms, as demonstrated throughout this research, is considerable and adding another would only increase decentralization and creates further drifts in terminology. Soft-law mechanisms were an excellent tool when the human rights and business nexus was highly contested yet the issue up for debate now is "how" these obligations should be implemented and no longer "if". An enforceable strategy has become necessary.[150]

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[144] CDDH (2012) 012, p. 8. For a detailed discussion of using Art. 2 of the Brussels Regulation as a vehicle for human rights enforcement, see Massoud (2013), pp. 45 et seq.

[145] CDDH (2012) 012, p. 9

[146] CDDH (2012) 012, p. 10.

[147] CDDH (2012) 012, p. 10. Amao (2011), p. 27.

[148] Pinto and Evans (2013), p. 179. Addo (1999), p. 194.

[149] Parliamentary Assembly Recommendation 1936, CM/AS(2011) Rec1936 final, https://wcd.coe.int/ViewDoc.jsp?id=1812341&Site=CM.

[150] Herrmann (2004), p. 230. See Sect. 7.4.4.3.3.

Europe should take a leading role in the creation of this "how", not only because many of the large multinational corporations have their headquarters in European states but, more importantly, because the ECHR is a beacon for human rights protection. The importance of the ECHR, as the Council of Europe itself notes:

> Lies not just in the rights it protects but also in the supervisory system set up to consider alleged violations and ensure that states abide by their treaty obligations. This requires them to grant these rights and freedoms to anyone within their jurisdiction, and not just their own nationals.[151]

As a result and in order to solve the inability of the ECtHR to hear cases pertaining to human rights violations by corporate entities, states must be held accountable for human rights violations by companies within their jurisdiction.[152]

> While the ECHR is a comparatively advanced system of human rights protection against extraterritorial corporate abuse, it is still far from providing clear and unequivocal guidance for States in relation to their human rights obligations. Yet the procedural and substantive standards of protection developed in the jurisprudence of the ECtHR could serve as a basis for the European Union and its Member States to further clarify and develop normative standards on business and human rights. Such normative standards could feed into, for example, the new Commission's CSR policy and the EU Member State business and human rights strategies. They could provide guidance to different EU and EU Member State public authorities and agencies that directly interact with business, thus contributing to reducing existing legal and policy incoherence. Furthermore, they could clarify what States expect from corporations as regards their responsibility to respect human rights.[153]

The best solution for the unaccountability problem under the ECHR is the indirect route via state responsibility for human rights violations in their territory and jurisdiction. As the Court held in *Hatton and Others v. United Kingdom*: "*Art. 8 may apply in environmental cases whether the pollution is directly caused by the State or whether the State responsibility arises from the failure to regulate private industry properly*."[154] Thus, a state will incur liability under the Convention not only when it fails to act according to the rights enshrined under it but also when it fails to appropriately regulate the conduct of private entities within its jurisdiction. The essence of *Hatton* is echoed in the Court judgements of *Guerra and Others v. Italy*, *Lopez Ostra v. Spain* and *Dubetska and Others v. Ukraine*.[155] As the court held in *Guerra*:

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[151] Council of Europe, http://hub.coe.int/what-we-do/human-rights/european-convention.

[152] Cernic (2006), p. 265.

[153] Augenstein (2010), p. 10.

[154] *Hatton and Others v. The United Kingdom* (36022/97), p. 22. Compare to the decision of the African Commission in the case of Shell, where the Commission held: *"Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis."* African Commission on Human and Peoples' Rights, Decision on communication of The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria (155/96).

[155] *Guerra and Others v. Italy* (116/1996/735/932), *Lopez Ostra v. Spain* (16798/90), *Hatton and Others v. The United Kingdom* (36022/97), Dubetska and Others v. Ukraine (30499/03).

> The Court considers that Italy cannot be said to have "interfered" with the applicants' private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life (see the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 17, § 32).[156]

The holdings in relation to Art. 8 ECHR illustrate that the rights enshrined in the Convention are not only intended as direct rights of protection against the state but also as a protective veil against state inaction. If the Court would adjudicate claims against states for failure to regulate corporate conduct within their territory and jurisdiction, this would not only motivate states to better address and review their domestic policies with regard to TNCs, it would also create new precedent for adjudication. Critics of this approach contend that most human rights violations do not occur within the territory of applicability of the ECHR, making this idea obsolete. However, Art. 1 ECHR states that "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*."

Thus, if the alleged victim resides outside of the territory of application, it will not come within its jurisdiction and consequently will not be protected by the ECHR. The sole cases where the ECHR has accepted extraterritorial application of the ECHR was in cases of effective control of a member state over the territory in question.[157] In all other cases, actions by a European Company and its effects on persons outside of Europe do not engage any responsibility of the High Contracting Parties under the ECHR if there is no jurisdictional link between them.[158] This creates a jurisdictional vacuum.

The draft study allowed for the identification of existing issues of corporate social responsibility in the field of human rights at the European level in comparison to other existing international frameworks. In a next step, the CDDH undertook a feasibility study as to the main focal areas of the issues, such as the concept of corporate social responsibility, the scope and potential addressees of a Council of Europe instrument targeting corporate human rights conduct as well as the existing horizontal issues of access to remedies and general jurisdictional concerns.[159]

[156] *Guerra and Others v. Italy* (116/1996/735/932), para. 58.

[157] *Bankovic and others v. Belgium et al* (no. 52207/99) Decision of 12 December 2001, *Medvedyev and others v. France* (no 3394/03) Judgment of 29 March 2011. Compare McCorquodale (2009), pp. 240 et seq.

[158] CDDH (2012) 012, p. 12.

[159] CDDH (2012) 012, p. 18.

5.3.1.2 Feasibility Study on Corporate Social Responsibility in the Field of Human Rights

In Addendum VII of the Steering Committee Report of November 2012, the CDDH submitted its feasibility study on corporate responsibility in the field of human rights.[160] The study first analyzed whether there existed a need for a new standard setting, especially in view of the adoption of the UN Guiding Principles as a global standard. Rather than creating a new set of standards, the CDDH found that the Guiding Principles were already an authoritative reference point for the work on corporate social responsibility and thus the working group should focus on them as existing standard.[161] Any action by the Council of Europe should thus serve as complimentary action to fill the implementation gap, namely the lack of compliance and governance in this area. The EU endorsed the UN Guiding Principles as the main focal point for EU policy in 2014, thus the issue of human rights and business would offer the Council of Europe a suitable topic for closer cooperation and partnership with the EU.[162]

As the ECHR does not directly horizontally affect corporations, the CDDH study suggests that this gap must be remedied through the creation of substantive or procedural obligations for states in any new standard of the Council on human rights and business matters.[163] Additionally, accountability for states needs to be addressed in cases where private companies exercise governmental functions.[164] Particular attention must also be paid to the gaps in access to remedies and extraterritorial issues.

5.3.1.2.1 Remedy Gaps

The third pillar of the UN "Protect Respect and Remedy Framework" addresses the issue of incomplete or inexistent possibilities for victims of human rights abuses to gain access to remedies. Even though the principles discuss the need for such remedies, they themselves do not provide such a mechanism.[165] The CDDH study finds that, at European level, no judicial mechanisms or possibilities exist that would allow for a civil suit against corporations for human rights violations.[166] Adding to the absence of legal provisions allowing for such suits in Europe, the high

[160] CDDH (2012) R76, Addendum VII.
[161] CDDH (2012) R76, Addendum VII, p. 3.
[162] CDDH (2012) R76, Addendum VII, p. 8.
[163] CDDH (2012) R76, Addendum VII, p. 12.
[164] CDDH (2012) R76, Addendum VII, p. 13.
[165] CDDH (2012) R76, Addendum VII, p. 13.
[166] The study contrasts the situation in Europe with the USA, and despite the significant limitation of the ATS by *Kiobel*, remains very instructive on the different approaches in common law vs. civil law jurisdictions.

cost, restricted access to legal aid and the complex structures of corporate entities prevent the creation of an effective legal remedy in the field.[167] An additional consideration for the creation of any European remedy must be that the actions of European corporations outside of the jurisdiction of the ECHR will not engage any responsibility of a High Contracting Party if there is no jurisdictional link between the two.[168] This problem, however, could be resolved by imitating other Council of Europe treaties, which require the extension of jurisdiction by the State parties for specific actions.[169]

5.3.1.2.2 Measures to Raise Awareness

Adding to the need to create effective grievance mechanisms, the CDDH study requires heightened awareness of the issue of corporate human rights violations by all stakeholders.[170] Raising awareness could be achieved by a possible declaration of the Committee of Ministers, through seminars and workshops, through coordination with national human rights institutions or through the recognition and support of good business practices.[171] With regard to the last point, the CDDH offers a recommendation encouraging the Council of Europe states to invest ethically, refuse to work with corporations who are associated with human rights abuses and insist that corporations comply with human rights standards when handing out government contracts.[172]

The study concludes that awareness of the human rights and business agenda must be strengthened, recommendations to fill the governance gap must be issued and a guide of good practices should be implemented.

5.3.1.2.3 Aftermath

In April 2014, the Committee of Ministers of the Council of Europe issued a declaration on the UN Guiding Principles on human rights and business where it reaffirmed its commitment to human rights and recognized that businesses also had a responsibility to respect them.[173] It furthermore established that the Guiding

[167] Augenstein (2010).

[168] CDDH (2012) R76, Addendum VII, p. 14. See Sect. 5.3.1.1.

[169] Examples include Art. 44 of the Convention on Preventing and Combating Violence against Women and Domestic Violence or Art. 17 of the Criminal Law Convention on Corruption.

[170] CDDH (2012) R76, Addendum VII, p. 16.

[171] CDDH (2012) R76, Addendum VII, p. 18.

[172] The recommendation by the Parliamentary Assembly closely mirrors the approach taken by Nordic Nations when choosing companies to invest Pension Fund money in.

[173] Declaration by the Committee of Ministers of the Council of Europe on the UN Guiding Principles on Human Rights and Business.

Principles would function as a baseline for all future Council of Europe work on the issue and that the principles were to be implemented in cooperation with the EU, at European Level and possibly beyond European borders. The declaration stressed that the question of implementation was most pressing and that appropriate solutions needed to be found to fill in the governance gaps at the European level. Lastly, the Committee called on Member States to take the necessary steps to protect against human rights violations by corporations, to create and implement policies to foster corporate human rights respect and to effectively remedy violations that occurred within their jurisdiction.[174]

The Committee of Ministers' declaration on the business and human rights agenda can directly be attributed to the studies of the CDDH in 2012 and shows that they were indeed considered seriously. Nonetheless, this declaration, as it stands, fails to propose adequate steps to be taken in the near future. Although it does call on the Member States to protect those within its jurisdiction from corporate human rights abuses, it fails to recognize the real problem: victims of corporate violations by European companies which do not fall under member state jurisdiction. In fact, the declaration does little more than reiterate the issues that have already been mentioned by the CDDH. It does not propose solutions to the existing jurisdiction dilemma nor does it attempt to further the creation of operative remedies. The declaration thus should be considered as recognition of the Committee of Ministers of the work done by the CDDH on the subject as well as a reiteration of its commitment on the matter.

5.3.2 The EU Strategy for Corporate Social Responsibility

The EU has been less strategic than the Council of Europe in its creation of a human rights and business agenda.[175] At the first UN Forum on Business and Human Rights in Geneva in 2012, the EU Special Representative for Human Rights, Stavros Lambrinidis, gave a keynote speech outlining the EU's plan of action for human rights obligations for business entities.[176] He underlined the commitment of the EU to use the UN Guiding Principles as a reference point for EU policy and noted the work of the Commission to improve the functioning of the EU internal market by making it more transparent and accountable.

In fact, the EU Commission published a renewed EU strategy for Corporate Social Responsibility for 2011–2014 on October 25th 2011 which outlined its procedure on the issue. CSR, according to the strategy, enables businesses to better

[174] Declaration by the Committee of Ministers of the Council of Europe on the UN Guiding Principles on human rights and business.

[175] Van der Heijden (2012), p. 25.

[176] Keynote speech, available http://www.ohchr.org/Documents/Issues/Business/ForumSession1/SubmissionsStatements/StavrosLambrinidis.pdf.

anticipate societal changes and will significantly contribute to the EU's 2020 Strategy for smart, sustainable and inclusive growth.[177] The Commission aims to create market conditions favoring sustainable growth and responsible business conduct to combat the damaged consumer confidence and trust in business that is evident in Europe following the economic crisis and its social consequences.[178]

Although the EU has been a pioneer in the development of public policies promoting CSR since the creation of its Green Papers in 1993, many EU companies have still not integrated social and environmental concerns into their operational strategies.[179] This is highly alarming, especially when considering that only 15 of the 27 EU member states have national plans to promote CSR.[180] In order to combat this regulatory gap, the EU proposes to clarify what is expected of enterprises, to promote responsible business conduct, to consider self and co-regulation schemes, to address company transparency and to give greater attention to human rights as a prominent aspect of CSR.[181]

Through its agenda for action 2011–2014, the Commission strove to disseminate good practice, to foster learning and to encourage European business entities to develop their own strategies for responsible accountable behavior.[182] A primary concern for the Commission is the level of trust in EU businesses. The European business community should be among the most trusted groups in society: limiting false social or environmental credentials and corporate misconduct abroad must be a primary concern for the EU. The issue of misleading marketing of products, so-called green-washing,[183] shall be addressed as well and an open dialogue between consumers and businesses to understand expectations must be fostered.[184]

Improving self and co-regulation processes as part of a better EU regulation agenda through the launch of a code of good practice is a further aim of the new EU strategy. Self- and co-regulation processes are most effective when they are based on an analysis of the relevant problems and result in a clear commitment by all stakeholders to improve and rectify any issues. Additionally, they must be complimented by an accountability mechanism and a performance review. The EU Commission aims to foster the creation of these processes to improve the effectiveness of CSR policies throughout the EU.[185]

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[177] COM(2011) 681, p. 3.

[178] COM(2011) 681, p. 4.

[179] COM(2011) 681, p. 5. See also COM(2011) 366. Herrmann (2004), p. 221. Hardtke and Kleinfeld (2010), p. 18.

[180] Corporate Social Responsibility: National Public Policies in the EU, European Commission, 2011.

[181] COM(2011) 681, p. 5.

[182] COM(2011) 681, p. 8.

[183] Compare to the Human Rights Equivalent of "*bluewashing*"under the UN Global Compact. See Sect. 6.1.4 specifically.

[184] COM(2011) 681, p. 9.

[185] COM(2011) 681, p. 10.

The Commission desires to facilitate the integration of social and environmental considerations into public procurement, albeit without creating additional administrative burdens or hurdles and keeping in mind the principle of awarding contracts to those competitors which have the biggest economic advantage.[186]

As a lesson learnt from the financial crisis the Commission is working to ensure an increasingly transparent financial system. To reach this goal, the Commission considers the implementation of a requirement for all investment firms to inform their clients about the ethical or responsible investment criteria they apply or the standards to which they adhere.[187]

A further step of the 2011–2014 strategy by the Commission was the improvement of company disclosure of social and environmental information. Disclosure of such information will facilitate stakeholder engagement and contribute to transparency and accountability of corporate entities. To date however, only 2500 of the 42,000 corporations in Europe publish social and environmental information of their business operations.[188]

The seemingly core concern of the Commission strategy, however, is the alignment of European policies with the global approaches of the CSR agenda. To create a more level playing field, the Commission will step up the cooperation with member states and partner countries to foster respect for the global accountability principles. Of particular relevance for this task, according to the Commission, are the OECD Guidelines, the ILO Tripartite Declaration, the UN Global Compact, the ISO 26000 Standard and the UN Guiding Principles. The Commission urges all European companies having more than 1000 employees to commit to at least one international initiative by 2014 and to take into account the ISO 26000 Standard in its operative procedures.[189]

The most critical challenge for the EU policies is coherence with international business and human rights strategies. Better adherence to and implementation of the UN Guiding Principles will aid in fulfilling EU objectives pertaining to human rights issues and labor standards. The Commission intends to work with companies and stakeholders in specific sectors to draw up human rights guidance for SME's based on the UN Guiding Principles. Furthermore, a clear list of priorities of the EU with regard to the implementation of the Guiding Principles shall be published and all EU companies are expected to meet the responsibility to respect enshrined in the Guiding Principles.[190]

Finally, the EU Commission intends to identify methods of promoting responsible business conduct in its future policies in order to create more inclusive and sustainable growth in third states. The Commission will monitor its progress as well

[186] COM(2011) 681, p. 11.
[187] COM(2011) 681, p. 11.
[188] COM(2011) 681, p. 12.
[189] COM(2011) 681, p. 13.
[190] COM(2011) 681, p. 14.

as that of the EU Member States and calls upon all entities concerned to establish clear and coherent business conduct targets for 2015–2020.[191]

In their statement at the Forum on Business and Human Rights in 2013, the European Union reiterated its commitment to the UN Guiding Principles and the primal role of states to "*ensure the protection of human rights by law and in practice*".[192] The EU has dedicated itself to a twofold approach by primarily ensuring that the UN Guiding Principles are understood and implemented at EU level and by also promoting their implementation through external actions.[193] The EU Commission has developed Guidance material for ICT, oil, gas and employment companies and has been promoting a level playing field for business and human rights. The EU has included CSR provisions in recent Free Trade Agreements and intends to pursue this approach in future trade negotiations. The EU concedes, however, that it is still at the beginning of the implementation process relating to the Guiding Principles, yet it remains firmly committed to the goals it has established in its 2011–2014 Strategy.[194]

5.3.3 Achievements of the European Scheme

Europe was quite late in tackling the human rights and business agenda and, arguably, still has not created an effective response to the problem. The major benefit of the investigation by the CDDH is its aim to create coherence between the European approach and that of the UN Guiding Principles.

The European system, even after the severe limitation of the ATS, remains less welcoming for corporate human rights claims than the United States'.[195] European legal tradition seems to favor informal mechanisms of conflict resolution such as arbitration or soft law mechanisms over formal court litigation.[196] Its judicial requirements of territoriality and jurisdiction furthermore discourage some victims and exclude others. What is required from the Council of Europe and European states in general is a conceptual shift from the idea that domestic courts cannot hear cases pertaining to corporate human rights violations abroad to accepting that they may well be the best equipped to do so.[197] To date, no European state has jurisdiction to hear foreign claims of corporate misconduct abroad.[198] Art. 2 of the Brussels Regulation on Jurisdiction and the Enforcement of Judgements in Civil

[191] COM(2011) 681, p. 15.

[192] European Union Address at the Business and Human Rights Forum 2013.

[193] European Union Address at the Business and Human Rights Forum 2013, p. 2.

[194] European Union Address at the Business and Human Rights Forum 2013, p. 3.

[195] Wouters and Ryngaert (2009), p. 942.

[196] Wouters and Ryngaert (2009), p. 974.

[197] Wouters and Ryngaert (2009), p. 943.

[198] Wouters and Ryngaert (2009), p. 944.

and Commercial Matters is promising for victims of corporate human rights abuses as it offers the possibility to sue a corporation in its home state irrespective of where the tort occurred; nonetheless it has never been used to hold corporations accountable for human rights misconduct. Additionally, Art. 2 is limited by the *locus-delicti* rule of Art. 5.3 of the Regulation where:

> A person domiciled in a Member State may, in another Member State, be sued :(. . .) 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

As a result, Art. 5.3 limits jurisdiction for tort matters to the location of where the tort has occurred, effectively excluding non-European claims.

European states appear to be more at ease to establish corporate human rights liability through neglect than to extend jurisdiction beyond the home state as the former is less likely to incur sovereignty or non-intervention issues.[199] The concern of European States to impose their regulatory standards on other nations might as well relate to fears of slowing economic growth or overwhelming European cultural imperialism and intervention in the affairs of developing nations.[200] These concerns can, however, be somewhat appeased.

If one can link the violations of the company's duty of care and due diligence in the human rights sector to violation of international human rights laws, then the enforcement of these laws will no longer be viewed as sovereignty violations but rather as implementation of good law.[201] By linking corporate human rights violations committed abroad to violations of international norms, extraterritoriality concerns will effectively remove procedural technicalities such as those of Art. 5 para. 3.[202] If European Corporations do indeed commit to the UN Guiding Principles as the Committee of Ministers encourages them to do in Point 9 of its Declaration, then this could be used as a basis to argue that a failure to comply with them is also a failure to live up to their duty of respect. Linking the Guiding Principles with EU human rights standards weakens the concerns of jurisdictional overreach, especially considering the global acceptance of the UN Guiding Principles.[203]

Much remains to be done by Europe in the field of corporate human rights abuses. As Wouters and Ryngaert propose, European policymakers must consider several questions when creating their effective corporate human rights policy: (1) what legal instruments should be made available to European states to create corporate accountability? (2) How to establish the cross-border application of human rights? (3) Whether tort litigation is an adequate tool to achieve the aim of corporate accountability? (4) Should a statutory cause of action comparable to the

[199] Wouters and Ryngaert (2009), p. 952.

[200] Wouters and Ryngaert (2009), p. 954.

[201] Wouters and Ryngaert (2009), p. 955.

[202] Wouters and Ryngaert (2009), p. 956. See also Anderson (2002), pp. 424–425.

[203] Wouters and Ryngaert (2009), p. 957.

ATS be introduced? And finally (5) If a statutory cause of action is established, what procedural instruments need to be implemented?[204]

The reluctance of Europe to create binding legal obligations for corporations with European headquarters can be explained by the cultural disposition of Europeans: European states, even though most of them recognize the problem of corporate human rights violations, do not view court action as the most effective means to bring corporations to justice. The fear of creating legislation pertaining to corporations and human rights may be fathomable due to jurisdiction and sovereignty concerns, the weak actions taken so far by the Council of Europe are somewhat discomforting.

Having only begun a serious quest to close the governance gap in the area in 2012, considerable results cannot and should not be expected for another 5 or even 10 years. This delay is inexplicable, especially considering that the human rights focus by other organizations such as the UN, the ILO or the OECD has been ongoing since the early 2000s. Rather than contenting itself with the Ministerial declaration and a general commitment to the Guiding Principles, the Council of Europe and the EU must now take great strides to ensure that their policies do not remain vague formulations in declarations and statements of intent but rather form the basis of an operative and forceful commitment to human rights in the business sector.

5.4 The Voluntary Principles on Security and Human Rights

In 2000, a joint operation by the UK Foreign Ministry and the US State Department appealed to various NGOs and corporations of the extractive sector to begin a "*continuing dialogue among diverse stakeholders*"[205] on the pressing issue of corporations, human rights and security.[206] Despite the tensions on the topic of human rights and foreign investment, Amnesty International, Human Rights Watch and International Alert joined Shell, BP and Chevron in an "*unprecedented dialogue*"[207] which culminated in the creation Voluntary Principles.

[204] Wouters and Ryngaert (2009), p. 965.

[205] Freeman and Hernandez Uriz (2003), p. 244.

[206] Hofferberth (2011), p. 11. Ratner (2001–2002), p. 537.

[207] Press Brief of Madeleine Albright, December 20th 2000, http://secretary.state.gov/www/statements/2000/001220.html.

5.4.1 Background

The issues giving the initial impulse for the Voluntary Principles date back to Shell's Nigerian crisis.[208] The executions of Ken Saro-Wiwa and Barinem Kiobel focused the international attention of human rights activists on the role of the oil companies and their difficult coexistence with the indigenous populations.[209] The oil companies became the focal group of conflict, as they were seen as proxies for the amassed wealth and brutal authority of the local governments.[210] Their estates became the symbol of oppression and targets for attack. The USA and the UK acknowledged the shared political and economic value of ensuring that corporations are able and willing to continue working in remote areas like Nigeria while at the same time recognizing the importance of promoting respect for human rights.[211] For the governments the was the unique opportunity for creating an initiative encouraging respect for human rights and contributing to a more sustainable corporate business environment.[212] The resulting Voluntary Principles capture and crystallize the emerging corporate policy and practice, enriched by the input from NGOs and recommendation by the governments.[213]

5.4.2 Multi-Stakeholder Character

The Voluntary Principles are a multi-stakeholder initiative of governments, corporations and NGOs. They are to provide corporations from the mining, oil and gas sector with principles regarding security for their operations in a manner respecting human rights.[214]

The Voluntary Principles were designed as an initiative based on the understanding that corporations from the extractive sector often operate in difficult situations, making security and respect for human rights a fundamental need.[215] Although the primary responsibility of promoting human rights lies with the government, all parties involved in this multi-stakeholder initiative recognize the promotion of human rights as being a common goal in ensuring the integrity of foreign investment.[216] The principles offer companies a comprehensive

[208] Freeman et al. (2000–2001), p. 426.
[209] The Price of Oil (1999), p. 168.
[210] Freeman et al. (2000–2001), p. 426.
[211] Freeman et al. (2000–2001), p. 427.
[212] Freeman et al. (2000–2001), p. 427.
[213] Freeman et al. (2000–2001), p. 427.
[214] www.voluntaryprinciples.org.
[215] The Voluntary Principles on Security and Human Rights Declaration, p. 1.
[216] Hofferberth (2011), p. 11.

understanding of the human rights risks of their engagements abroad and aim to ensure that human rights will be protected along with the exploitation facilities.

In order to safeguard the honor of corporations operating abroad, the corporations participating in the Voluntary Principles recognize their commitment to act in a manner, consistent with and respectful of human rights.[217] As extractive activities can have a vast effect on the local communities in which they operate, the Voluntary Principles urge the participants to engage with the locals and the host governments to help contribute to the wellbeing of the community while preventing potential conflicts.[218] In order for a corporation to be able to effectively assess any potential threats to security and human rights, a peer-to-peer sharing network needs to be implemented. By governments, corporations and NGO's sharing their experiences as to practices and procedures, the human rights situation and thus the security situation will dramatically improve.[219]

Essentially, the Voluntary principles cover three main issues with regard to security and human rights in the extractive sector: (1) Risk assessment, (2) the relationship between enterprises and public security forces and (3) the relationship between corporations and private security contractors.[220]

5.4.3 Risk Assessment

Corporations must take a broader perspective on risk assessment before they invest in a region that is unstable or critical.[221] If a corporation is able to adequately assess the risks of its operating environment, this can provide critical information to both the personnel on the ground and the local community.[222] In addition, an effective risk assessment is essential to achieving both long-term and short-term goals as well as enabling a corporation to actively promote and protect human rights.[223] Host and home governments and NGOs should be consulted, as risk assessment of complex social, political and economic realities requires consolidation between the stakeholders.[224] To sufficiently assess any potential risks of foreign investment, regularly updated, credible information must be obtained from a vast array of trustworthy sources.

[217] The Voluntary Principles on Security and Human Rights Declaration, p. 1.
[218] Hofferberth (2011), p. 11.
[219] The Voluntary Principles on Security and Human Rights Declaration, p. 1.
[220] Hofferberth (2011), p. 11.
[221] Hofferberth (2011), p. 11.
[222] Freeman et al. (2000–2001), p. 437.
[223] Freeman et al. (2000–2001), p. 437.
[224] Hofferberth (2011), p. 11.

5.4.3.1 Identification of Risks

Risks to the security of personnel, locals or the plantation can be attributed to a variety of factors: political, economic, social or conflict-related. What is more, these risks may vary according to the target groups and asset locations. If the actual or potential risks of violations are assessed according to the required standard, corporations can take measures to minimize the risks and prevent future human rights violations.[225] Only if corporations can correctly identify the risks of their investment, can the solution mechanisms tackle the problem effectively.

5.4.3.2 Potential for Violence

Depending on the region where corporations engage in business, the potential for violence can be intensified.[226] The corporation must consult with the host governments as well as with the local population in order to discern the potential for violence as well as the implications for the operation.[227] The evaluation must take into account the patterns of violence in the region. By requiring corporations to assess any risks before engaging abroad, human rights violations and potential situations of conflict can be anticipated.

5.4.3.3 Human Rights Records

Effective risk assessment must take into account the human rights situation of the host state. The human rights records of governments and security forces should be analyzed and familiarity with national laws sought.[228] Only by preparing fully for the situation and by being aware of past abuses can a corporation avoid recurring human rights violations and promote accountability.[229]

5.4.3.4 Rule of Law

The local prosecution and the judiciary's capacity to bring those who violate fundamental laws to justice must be assessed.[230] In addition to the capacity of bringing an individual to justice, it must also be ensure that any trial in the host state is respectful of the rights of the accused and will guarantee to be fair and just.[231]

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[225] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[226] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[227] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[228] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[229] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[230] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[231] The Voluntary Principles on Security and Human Rights Declaration, p. 2.

5.4.3.5 Conflict Analysis

Corporations operating in foreign environments must understand the national dynamics and root causes of ongoing local conflict.[232] In addition to understanding the operational context, the level of adherence to human rights standards must be clarified in order to allow for a full risk assessment, also in view of potential future crises.[233]

5.4.4 Interactions Between Companies and Public Security

Despite the fact that is the role of the government to ensure security and respect for human rights, corporations also have a fundamental interest in ensuring that actions taken by governments or de facto government officials are in accordance with international legal obligations.[234] Public security firms are the primary security provider and companies must be able to rely on them for support.[235] In order to ensure that security provided by the state acts in a manner consistent with international obligations and promotes respect of human rights, the Voluntary Principles urge corporations to take a set of measures in combatting potential difficulties concerning security provided on site.

5.4.4.1 Security Arrangements

Companies should consult with the host state government regularly about the impact of the security measures on the population.[236] Policies concerning ethical conduct and human rights must be communicated to the security providers as to ensure that the company is represented in a manner that is consistent with it policies and codes.[237] Furthermore, it must be permitted and encouraged to make security measures as transparent and adequate as possible.[238]

[232] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[233] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[234] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[235] Hofferberth (2011), p. 11.
[236] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[237] The Voluntary Principles on Security and Human Rights Declaration, p. 2.
[238] The Voluntary Principles on Security and Human Rights Declaration, p. 3.

5.4.4.2 Deployment and Conduct

The primary role of security forces protecting corporate activities should be the upkeep of the rule of law, the safeguard of human rights and the deterrence of any acts that could potentially cause violence and conflict.[239] The security forces must be competent, appropriate and proportional to the threat level, satisfying the requirements of the law.[240] In order to ensure that international law and human rights are safeguarded, corporations should take specific measures including hiring only individuals without implications in human rights abuses, using of force only when strictly necessary and proportionate and not violating the rights of individuals while they are exercising their right to peaceful assembly, collective bargaining or any other rights related to employees as recognized in the ILO Declaration on Fundamental Principles and Rights at Work.[241]

Should force be used, a detailed report is to be submitted to the state and the corporation for assessment. Furthermore, the Voluntary Principles require medical assistance to be given to those who are injured in the event of the use of force.[242]

5.4.4.3 Consultation and Advice

Companies are requested to hold structured meetings with their security detail to discuss human rights, workplace issues and general security concerns.[243] Consultation with other companies, the host government and civil society on the impact of security measures is encouraged to aid in preventively addressing any discomforts of the people concerned by foreign investment. If several corporations operate in the same environment and have similar concerns, they should consider raising these concerns collectively with the host government in order to achieve a lasting, uniform solution.[244] In any consultation with the government, security forces or de facto government officials, corporations should stress the importance of international law, respect for human rights and the implementation of the UN Codes regarding the Use of Force and Firearms.[245] Corporations are encouraged to aid the efforts by host governments and security personnel to provide training on human right and to strengthen the state institutions to ensure accountability and respect for human rights.[246]

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[239] The Voluntary Principles on Security and Human Rights Declaration, p. 3.
[240] The Voluntary Principles on Security and Human Rights Declaration, p. 3.
[241] The Voluntary Principles on Security and Human Rights Declaration, p. 3.
[242] The Voluntary Principles on Security and Human Rights Declaration, p. 3.
[243] The Voluntary Principles on Security and Human Rights Declaration, p. 3.
[244] The Voluntary Principles on Security and Human Rights Declaration, p. 3.
[245] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, http://www.achpr.org/instruments/principles-use-force-firearms/.
[246] The Voluntary Principles on Security and Human Rights Declaration, p. 4.

5.4.4.4 Responses to Human Rights Abuses

Corporations are encouraged to record credible allegations of human rights abuses in their areas of operations and report these to the host governments.[247] If appropriate, corporations should take actions to prevent future occurrence of violations and press for their investigation and resolution.[248] Any information regarding human rights violations must be based on reliable evidence in order to protect security personnel from false accusations.[249]

5.4.4.5 Interactions Between Companies and Private Security

In cases where the host governments cannot or will not supply security forces for the protection of company personnel and assets, it may be required to hire private security companies.[250] Security by private actors should only be considered as an *ultima ratio* when no help from the government can be expected. In order to accommodate the potential risks of such engagements, the Voluntary Principles require corporations to hold private security contractors to their ethics code, international law and professional standards of the country of operation as well as the best practices developed by the industry.[251] The Voluntary Principles furthermore require any private security actors to operate in a lawful manner, exercising restraint and caution compatible with the requirements of international law.[252]

Corporations employing private security must monitor their actions to ensure that they adhere to the standards required of them.[253] The background of the security forces should be investigated to eliminate hiring any companies with dubious human rights background. Also, corporations are requested to regularly consult with the host government and local population in order to gain feedback on the experiences with private security.[254]

[247] The Voluntary Principles on Security and Human Rights Declaration, p. 4.
[248] The Voluntary Principles on Security and Human Rights Declaration, p. 4.
[249] The Voluntary Principles on Security and Human Rights Declaration, p. 4.
[250] The Voluntary Principles on Security and Human Rights Declaration, p. 5.
[251] The Voluntary Principles on Security and Human Rights Declaration, p. 4.
[252] See generally Seiberth (2014).
[253] Hofferberth (2011), p. 11.
[254] Hofferberth (2011), p. 7.

5.4.5 Implementation Aid for Corporations on the Voluntary Principles

The Voluntary Principles provided the stakeholders with a Background Paper on implementation and divides the execution process into two main phases: (1) sharing of best practices and lessons learnt and (2) multi-stakeholder collaborative problem solving.[255] This background paper aims to show that by fully implementing the Voluntary Principles, business will reap benefits, both financial and reputational.

5.4.5.1 Sharing Best Practices and Lessons Learnt to Strengthen Internal Policies

The first step ensuring implementation consists in analyzing the peer-to-peer mechanism of the Voluntary Principles. This mechanism demonstrates that the sharing and learning processes can generate policies and strategies to target human rights and violence issues and will be beneficial to the corporation and its investments.

5.4.5.1.1 Prioritizing Resources by Risk Determination

Through the Voluntary Principles, corporations can develop human rights risk assessment policies to anticipate situation which may foster human rights abuses. These policies may then serve as strategies for individuals on the ground to target and mitigate human rights risks.[256] By implementing the Voluntary Principles, the on-site performance of security will improve, positively affecting relations with the local community and host governments, significantly lowering the risks of human rights abuses and the eruption of violence.[257]

5.4.5.1.2 Developing Risk Mitigation Strategies

Providing a forum for companies to collaborate on the development of internal policies regarding the minimization of human rights risks, companies can learn from one another in targeting and preventing human rights abuses.[258] Through this peer-to-peer network, corporations have adapted their policies on the carrying of

[255] VP Background Paper (2013).
[256] VP Background Paper (2013).
[257] VP Background Paper (2013).
[258] VP Background Paper (2013).

firearms to allow firearms only after a risk assessment had determined the necessity and justification, subject to periodical review.[259]

5.4.5.1.3 Adopting Assessment Procedures to Improve Progress

Reviewing their implementation of the Voluntary Principles on a regular basis, corporations ensure the improvement of the usage of the principles.[260] Internal review procedures put into place by most of the stakeholders issue recommendations, which can then be implemented by the corporation in question.[261]

5.4.5.2 Multi-Stakeholder Collaborative Problem Solving

The second approach of the background paper brings together governments, corporations and NGO's in order to develop a set of best practices when dealing with security and human rights challenges.[262] The sharing of valuable information between NGOs and corporations can help define and clarify the potential risk TNCs face when operating in a specific environment.[263] This will support corporations in devising plans for mitigating concerns, reaching out to the local community and improving compliance with the Voluntary Principles.[264]

5.4.6 Practical Implementation of the Voluntary Principles: BP and Chevron Case Study

The Voluntary principles have been criticized as being ineffective due to their non-binding nature. A case study on BP and Chevron however, demonstrates that, despite their non-binding nature, the Voluntary Principles have had considerable effect on the human rights policies of two large oil firms.[265] The study analyzed how BP and Chevron incorporated the requirements of the Voluntary Principles, because their approach to Corporate Social Responsibility has been fundamentally different in how the Voluntary Principles were perceived and consequently translated into corporate policies.[266]

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[259] VP Background Paper (2013).
[260] VP Background Paper (2013).
[261] VP Background Paper (2013).
[262] VP Background Paper (2013).
[263] VP Background Paper (2013).
[264] VP Background Paper (2013).
[265] Hofferberth (2011), p. 12.
[266] Hofferberth (2011), p. 12.

5.4.6.1 BP

At the time of the introduction of the Voluntary Principles, BP had begun redefining its corporate identity.[267] Apart from changing their name and logo,[268] BP was well equipped in terms of corporate social responsibility and human rights strategy.[269] Within its general principles, BP underlines the importance of human rights and asserts that the "*promotion and protection of all human rights*" is a major concern for the corporation.[270] The Human Rights Guidance Note, published in 2005, furthermore outlines BP's contribution to the establishment of industry standards with respect for human rights.[271] BP, as a founding member of the Voluntary Principles, aimed at making its commitment to the principles a reality for its operations.[272] In its annual reports, the company constantly refers to the Voluntary Principles, which it views as a learning tool "*vital in building strong and lasting relationships with stakeholders*."[273] Despite the good rhetoric BP used in its reports and statements on the matter, the study shows that the implementation of the Voluntary Principles was by no means as swift as anticipated.[274]

In their monitoring report of 2001, Ernst & Young[275] concluded only a limited awareness on BP's part towards the Voluntary Principles.[276] In the follow-up report of 2002, it was noted: "*expectations and assurance mechanisms of the VPSHR implementation could be strengthened*"[277] while the 2003 report did not see progress made in regard to the implementation of the Voluntary Principles.[278] Until 2003, BP had made little if any progress on developing implementation tools for the Voluntary Principles, even though they were claimed to be a fundamental part of BP's corporate identity.[279] In light of negative reviews, BP began to meet with various NGOs, the British Foreign Ministry and other corporate stakeholders in order to ensure better performance at their next reviews.[280] It employed full-time security and human rights specialists to examine and develop BPs approach to the

[267] Hofferberth (2011), p. 13.

[268] The name changed from British Petroleum to Beyond Petroleum, while the logo was changed from the yellow BP letters on a green base to a green, yellow and white floral design with green BP letters on the top right.

[269] Avery (2000), p. 35.

[270] BP Business Policies (2002), p. 12.

[271] BP Human Rights Guidance Note (2005), p. 2.

[272] BP Annual Report on the Implementation of the Voluntary Principles (2012).

[273] BP Sustainability Report (2008), p. 17.

[274] Hofferberth (2011), p. 14.

[275] Ernst & Young, now EY, is responsible for BP's auditing.

[276] BP Sustainability Report (2001), p. 15.

[277] BP Sustainability Report (2002), p. 18.

[278] BP Sustainability Report (2003), p. 33.

[279] Hofferberth (2011), p. 15.

[280] Hofferberth (2011), p. 15.

Voluntary Principles.[281] The Voluntary Principles were also included in the security contracts that BP signed as of 2003, giving the Voluntary Principles previously unanticipated contractual status.[282]

Although it had starting difficulties at the implementation stage of the Voluntary Principles, BP recognized its shortcomings following the auditing reports and began giving the Voluntary Principles full effect thereafter. BPs quest to involve the local communities has been noted by Amnesty International in their 2005 report on Nigeria, where the Akassa Project has been named as an effective method of involving the local community in a meaningful way.[283] Even though BP's policies with regard to the Voluntary Principles have shown progress, they are by no means sufficient in addressing the issue of corporations and human rights. What is encouraging in BP's case, however, is that the corporation has continuously translated human rights requirements into their business actions since 2003.[284] BP's organizational structure has been reformed to fit the needs of the Voluntary Principles, and, despite the *Deepwater Horizon* fiasco in 2008, BP has shown promise in expressing new notions of what is required to operate as a corporation in the extractive sector.[285]

5.4.6.2 Chevron

Chevron is the counter-example to BP for the implementation of the Voluntary Principles. While Chevron emphasizes the value of integrity and diversity, it clearly prioritizes economic performance over CSR issues.[286] Even though the corporation joined the Voluntary Principles as a founding member, it rests firmly on its understanding that the primary responsibility with regard to human rights lies with the state.[287] Despite this approach, Chevron accepts that it may have an impact on the issue: it defines its role, the Chevron Way,[288] as respecting the law, supporting human rights, protecting the environment and benefitting the communities in which it operates.[289]

There is an undeniable ambiguity between the way Chevron perceives economic performance and the Voluntary Principles. To Chevron, the principles are a

[281] BP Annual Report on the Voluntary Principles (2011), p. 5.

[282] Hofferberth (2011), p. 16.

[283] Amnesty International Report (2005), p. 33.

[284] Hofferberth (2011), p. 16.

[285] Hofferberth (2011), p. 17.

[286] Hofferberth (2011), p. 17.

[287] Chevron's Approach to Human Rights, http://www.chevron.com/corporateresponsibility/approach/humanrights/.

[288] The Chevron Way, http://www.chevron.com/about/chevronway/.

[289] Chevron Ethics Governance, http://www.chevron.com/corporateresponsibility/approach/ethicsgovernance/.

network to balance the need for safety and human rights, creating a strategic framework to guide corporations in their decision-making on human rights issues.[290] While human rights do remain an important focal point for Chevron, they can only be respected as long as they are deemed consistent with the role of business.[291] At the same time, however, Chevron highlights its role as a convening member of the Voluntary Principles, emphasizing its contribution to the process.[292]

In 2009, Chevron issued its human rights strategy, in which it affirms its commitment to international human rights, yet seems to remain static in the position it takes on the issue:

> We believe that although governments have the primary duty to protect and ensure fulfillment of human rights, we have a responsibility to respect human rights and can play a positive role in the communities where we operate.[293]

Notwithstanding its reaffirming statements and development of human rights policies and standards, Chevron's approach to implementing the Voluntary Principles has been vague and imprecise.[294] Although the Voluntary Principles are mentioned in annual reports, implementation mechanisms lack or are incomprehensive.[295] There is no official communication on human rights training or cooperation with NGOs. Amnesty International has even criticized Chevron for its slow implementation of the Voluntary Principles, as human rights training remains voluntary and thus has only limited effect.[296] Despite Chevron recognizing the Voluntary Principles, its own role within the framework remains ambiguous.[297] Although Chevron has been influenced by the Voluntary Principles, a change of behavior can only be observed at the outskirts of its policies.[298] The company seems to enjoy reaping reputational benefit from the Voluntary Principles, without however engaging in the necessary implementation processes—a questionable approach.

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[290] Hofferberth (2011), p. 17.

[291] Hofferberth (2011), p. 17.

[292] Chevron Sustainability Report (2005), p. 26.

[293] About Chevron's Human Rights Policy, http://www.chevron.com/documents/pdf/AboutOurHumanRightsPolicy.pdf. One should note, however, that Chevron endorsed the UN Protect, Respect and Remedy Framework as well as the Guiding Principles in 2011.

[294] Hofferberth (2011), p. 19.

[295] Hofferberth (2011), p. 19.

[296] Nigeria: Ten years on: injustice and violence haunt the Oil Delta, Amnesty International Report (2005), p. 40.
http://www.amnesty.org/en/library/info/AFR44/022/2005.

[297] Hofferberth (2011), p. 19.

[298] Hofferberth (2011), p. 19.

5.4.7 *Strengths and Weakness of the Voluntary Principles*

The Voluntary principles have extended responsibilities of corporations from the shareholders to the communities and marketplace in which they operate.[299] Three factors affect the effectiveness of corporate codes: (1) a corporate code must inform corporate decision-making, (2) it must be integrated into the development of the corporate structure and (3) stakeholders must be involved in their development.[300] As TNCs are amongst the most dynamic actors on the international stage today, most international codes have been aimed at increasing control over them.[301] The Voluntary Principles, however, are decidedly different: they are a combination of dialogue between the parties and a work in progress.[302] The Voluntary Principles are the first corporate code to emerge from a government initiated dialogue dealing with human rights and security, bringing corporations and NGOs to the same table.[303]

The main point of criticism with regard to the principles is their voluntary nature.[304] Although this aspect is not unique to the Voluntary Principles, it remains a contested issue, especially when seeking to obtain greater enforceable accountability for companies.[305] The lack of centralized enforcement mechanisms underlines the problem of the voluntary nature and can be considered a challenge to the success of to Voluntary Principles.[306] Leaving the enforcement of the VP's to the TNC's may foster adherence yet could result in undermining their credibility.

Consumers currently have little basis for distinguishing corporations from another, yet with the availability of the Voluntary Principles, corporate human rights commitment enables consumers to make purchasing decisions.[307] The demonstrated willingness of corporations to consider human rights in their business plan without having been forced demonstrates a special commitment to society, underling the value of the Voluntary Principles.[308]

The development of human rights standards is a growth process.[309] Voluntary standards may become binding tomorrow. The Voluntary Principles on Human Rights and Security are a significant step in the direction of initiating an open dialogue between a multitude of stakeholders.[310] TNCs increasingly committing to

[299] Freeman et al. (2000–2001), p. 429.
[300] Freeman et al. (2000–2001), p. 430.
[301] Freeman et al. (2000–2001), p. 430.
[302] Börzel and Hönke (2011), p. 14. Freeman et al. (2000–2001), p. 430.
[303] Freeman et al. (2000–2001), p. 431.
[304] Börzel and Hönke (2011), p. 8. Zalik (2005), pp. 111 et seq.
[305] Börzel and Hönke (2011), p. 8.
[306] Börzel and Hönke (2011), pp. 13–14.
[307] Freeman et al. (2000–2001), p. 434.
[308] Freeman et al. (2000–2001), p. 434.
[309] Guaqueta (2013), p. 133.
[310] Hofferberth (2011), p. 21. Freeman et al. (2000–2001), p. 440.

voluntary initiatives such as the Voluntary Principles shows that although there may still be a way to go to make them enforceable, consensus as to the duties and obligations of corporations in the social sector already exists.[311]

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[311] Guaqueta (2013), p. 142.

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Chapter 6
Business and Human Rights at the UN

Abstract The UN has been at the forefront of the business and human rights discourse for over 10 years. It has established two global initiatives of considerable magnitude and impact in the area and continues to advance the dialogue between the shareholders. The UN Global Compact and the UN "Protect, Respect and Remedy" framework have considerably changed the bottom line of corporate human rights compliance and will continue to impact corporate policy in the coming years.

Keywords UN • UN Global Compact • UN Protect • Respect and Remedy Framework • John Ruggie

6.1 UN Global Compact

The UN Global Compact was launched in July 2000 as a voluntary platform for the development, implementation and sharing of responsible and sustainable corporate policies.[1] Its main aim is to align business operations and strategies with principles ranging from human rights to labor and environment law.[2] The Global Compact is not intended to be a regulatory tool but rather, a voluntary initiative depending on public accountability, transparency and disclosure to complement regulation and to further innovation and collective action in the field.[3] With over 10,000 participants, it is the world's largest voluntary corporate sustainability initiative. The Global Compact made a significant impact on corporate human rights regulation because it proposed that corporations could indeed be held accountable for their human rights violations if they were either complicit in the state's human rights violations or if violations occurred within their sphere of influence.[4]

[1] UN Global Compact – Corporate Sustainability in the World Economy, p. 1. Roth (2014), p. 76. Koeltz (2010), p. 163. Wieland and Schmiedeknecht (2010), p. 83.

[2] Köster (2010), p. 90. Kaufmann (2007), p. 160. Van der Heijden (2012), p. 22.

[3] UN Global Compact – Corporate Sustainability in the World Economy, p. 1. See also Köster (2010), p. 90. Roth (2014), p. 77.

[4] Leisinger (2010), pp. 32–33. Federal Council Position Paper (2015), p. 20.

J.R.-M. Wetzel, *Human Rights in Transnational Business*,
DOI 10.1007/978-3-319-31325-2_6

The Global Compact operates through specialized work streams, management tools and topical programs in order to mainstream its ten principles in business activities worldwide, and to catalyze actions in support of the broader UN goals.[5] Through this process, businesses as the primary derivers of globalization ensure that the markets advance in a fashion benefitting economy and society by contributing to a sustainable global economy.[6]

6.1.1 The Global Compact Management Model

Once a corporation has signed onto the Global Compact, it pledges to implement the Global Compact principles by including them in the business strategies.[7] Implementation is expected to be complete and long-term.[8] Despite freedom of execution, the Global Compact does give several indications for a successful realization:

> *(1) Treating the principles not as an add-on, but as an integral part of the business strategy, (2) Communication of the commitment throughout all levels of the corporation, (3) Developing a transparent system of communication and (4) the willingness and ability to learn and share good practices.*[9]

To fully implement the Global Compact, corporations are asked to give effect to the *Global Compact Management Model*. This requires corporations to act based on a process of formally committing to, assessing, defining, implementing, measuring, and communicating a sustainability strategy based on the Global Compact.[10] The management model first and foremost requires any stakeholder to fully commit to the Global Compact, its aim and its principles. A company signals its commitment to stakeholders by making it part of the business strategy with oversight by transparent governance structures.[11] This commitment needs to be renewed every year to demonstrate that the corporation is still willing and able to adhere to the principles enshrined in the Global Compact.[12]

Following the commitment pledge, the company is required to assess the risks and opportunities across the board in situations directly concerning Global Compact issues and to define strategies based on this assessment.[13] This risk assessment strategy can aid in prioritizing goals, strategies, and action plans, as well as defining

[5] UN Global Compact – Corporate Sustainability in the World Economy, p. 1.

[6] Köster (2010), p. 90.

[7] UN Global Compact – After the Signature, p. 11, Koeltz (2010), p. 164.

[8] UN Global Compact – After the Signature, p. 11.

[9] UN Global Compact – After the Signature, p. 11.

[10] UN Global Compact – After the Signature, p. 12.

[11] Rasche and Kell (2010), p. 4. UN Global Compact – Management Model, p. 10.

[12] UN Global Compact – Management Model, p. 11.

[13] UN Global Compact – Management Model, p. 12. Koeltz (2010), p. 165.

the policies necessary to ensure that any risks are addressed and dealt with.[14] This strategy is then to be fully implemented through the definition of goals and the creation of a roadmap for attaining these goals.[15] Monitoring should be created to tackle any issues or progressions in relation to the defined goals and roadmaps.[16]

Any progress should be communicated to the Global Compact stakeholders via the Communication on Progress (COP) tool.[17] In addition to the yearly COP, companies engage in a stakeholder dialogue in order to share experience and to gain feedback.[18]

The Global Compact approaches the corporate human rights issue from two angles: (1) analyzing what human rights are and why they are relevant for business today and (2) what can corporations do in their sphere of influence to respect and support human rights.[19] The business community has a responsibility to respect human rights in the context of their own activities and business relationships.[20] In order to fulfil this requirement, Global Compact implements two human rights principles: (1) business should support and respect human rights and (2) business should ensure that they are not complicit in human rights violations.[21]

6.1.2 Principle 1: Business Should Support and Respect Human Rights

The Global Compact acknowledges that the primary responsibility to protect human rights lies with the states and governments.[22] At the same time, however, it recognizes that individuals and organizations have an important role in supporting and respecting human rights.[23] The business community has the responsibility to not infringe upon human rights in the context of their activities and business relationships.[24] Company activities, operational context and business relations can potentially negatively affect human rights yet they can also offer an opportunity to support and promote human rights all the while encouraging

[14] UN Global Compact – Management Model, p. 12.

[15] UN Global Compact – Management Model, pp. 14–16.

[16] UN Global Compact – Management Model, p. 18.

[17] UN Global Compact – Management Model, p. 20.

[18] UN Global Compact – Management Model, p. 20.

[19] Note on the UN Global Compact, p. 1, http://www.unglobalcompact.org/docs/issues_doc/human_rights/Note_on_Global_Compact_Business_Human_Rights.pdf.

[20] UN Global Compact Principle One.

[21] United Nation Global Compact Human Rights, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html.

[22] UN Global Compact Principle One, p. 1.

[23] UN Global Compact Principle One, p. 1.

[24] UN Global Compact Principle One, p. 1.

business ventures.[25] The Global Compact holds that societies respecting and promoting human rights are more stable and provide a better business environment.[26]

6.1.2.1 Practical Implications

Globally operating companies are visible to a large audience across the globe, thus addressing human rights issues at local and international level will bring community goodwill.[27] The age of technology has led to global information access at the push of a button, meaning that consumers have become acutely aware of where goods come from and how they are produced.[28] Global sourcing and distribution procedures imply that corporations become aware of the potential human rights issues arising both "*upstream and downstream*."[29] Workers who are paid fair wages and treated with dignity are more likely to remain loyal to their employer; furthermore, new candidates tend to look more and more at the governance record of companies when choosing an employer.[30]

6.1.2.2 Respect for Human Rights

Businesses have the ability to both positively and negatively affect almost all human rights, so they must consider the potential impact on all rights and not a select few.[31] Nonetheless, some actual or possible impact will require special consideration, especially in cases where the violation is very serious or the correlation between the company and the abuse is strong.[32]

Companies must comply with all applicable laws and respect the internationally recognized human rights laws in any and every context of their operations.[33] They need to be aware of their responsibility to respect, independently of the state's duty to protect. As a result, companies have the responsibility to respect even when they are operating in areas where governance is fragile or fading.[34] This is especially important in areas of weak governance where human rights abuses tend to occur most often.[35] In order to aid companies operating in conflict zones or high-risk

[25] UN Global Compact Principle One, p. 1.
[26] UN Global Compact Principle One, p. 1.
[27] UN Global Compact Principle One, p. 2. Koeltz (2010), p. 168.
[28] UN Global Compact Principle One, p. 1.
[29] UN Global Compact Principle One, p. 1.
[30] UN Global Compact Principle One, p. 1.
[31] UN Global Compact Principle One, p. 2.
[32] UN Global Compact Principle One, p. 2.
[33] UN Global Compact Principle One, p. 2.
[34] UN Global Compact Principle One, p. 2.
[35] UN Global Compact Principle One, p. 2.

areas, the Global Compact has issued a guiding booklet to aid with implementation.[36] The responsibility to respect is a baseline expectation of the Global Compact, meaning that failure to respect human rights cannot be compensated for by the corporation by performing "good deeds" elsewhere.[37]

6.1.2.3 Determining the Scope of Responsibility

First and foremost, the company needs to take into consideration the country and the local context in which it is operating.[38] The context of business operations will always be the most useful in determining which human rights challenges may arise for the business.[39] In countries known to come up short on their commitment to international legal norms, specific care must be taken to define the scope of responsibility.[40] Government agencies, NGOs, trade unions, international organizations or specific risk assessment institutions can guide corporations in their quest.[41]

Secondly, the company needs to evaluate whether it is contributing to or causing any human rights violations itself based on its operational context.[42] Negative impacts should be addressed by adjusting policies and practices to prevent the impact from occurring or to stop it from going on further.[43]

Finally, the firm must analyze its relationship with the government of the host country, its other business partners and suppliers in order to evaluate which, if any, could pose a risk to the company's human rights commitment.[44] The track record of entities doing business with the company should be assessed to determine whether they could potentially be associated with human rights abuses.[45] Companies should create a policy statement, approved by the board, aimed at their public commitment to fulfil their human rights responsibilities.[46] Rather than opting for an all-encompassing statement on the respect for human rights, detailed commitment

[36] Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors, http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.

[37] UN Global Compact Principle One, p. 3.

[38] UN Global Compact Principle One, p. 3.

[39] UN Global Compact Principle One, p. 3.

[40] UN Global Compact Principle One, p. 3.

[41] UN Global Compact Principle One, p. 3. See also the Danish Institute for Human Rights Country Risk Portal, http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/HRB_Country%20Risk%20Portal%20Announcement%20-%20Jan%2011%202010.pdf.

[42] UN Global Compact Principle One, p. 3.

[43] UN Global Compact Principle One, p. 3.

[44] UN Global Compact Principle One, p. 3.

[45] UN Global Compact Principle One, p. 3.

[46] UN Global Compact Principle One, p. 3.

in specific functional areas is for practical influence.[47] The policy statement should also be reflected in the commitments and operational policies of the company and should be embedded throughout the business function.[48]

6.1.2.4 Human Rights Due Diligence

Corporation are to undertake due diligence so as to demonstrate that they are meeting their responsibility under the Global Compact. According to the Global Compact, due diligence requires constant identification, prevention and mitigation of adverse human rights impacts potentially or factually caused by the company.[49] The scope of due diligence will vary depending on company complexity and size. Nevertheless five main components should appear in any successful due diligence strategy: (1) assessment, (2) integration, (3) taking action, (4) tracking performance and (5) communication.

6.1.2.4.1 Assessment

A fair share of human rights issues arise because a corporation fails to appropriately assess how the operating context affects the community.[50] Any assessment must take into account the particular industry, the type and the scale of operations and should draw on internal and external expertise.[51] Information gained form the assessment process should be used to refine and adapt the business strategy of the company in order to prevent negative human rights impacts.

6.1.2.4.2 Integration

The biggest challenge for a corporation is the full integration of a human rights policy into daily processes.[52] Awareness of human rights issues and their implications for the business as a whole must be communicated to all departments of the company. Leadership from the top is essential for implementing human rights throughout the business, addressing impacts at the right levels and developing an oversight process.[53] Personnel must be appropriately trained and their capacity to respond well to unforeseen situations fostered.[54]

[47] UN Global Compact Principle One, p. 4.
[48] UN Global Compact Principle One, p. 4.
[49] UN Global Compact Principle One, p. 4.
[50] UN Global Compact Principle One, p. 4.
[51] UN Global Compact Principle One, p. 4.
[52] UN Global Compact Principle One, p. 4.
[53] UN Global Compact Principle One, p. 5.
[54] UN Global Compact Principle One, p. 5.

6.1.2.4.3 Taking Action

If the corporations has caused or contributed to a human rights violation or it can be directly linked to one, it must take the applicable steps to cease or prevent the violation. Furthermore, it must use any leverage it has to ensure that those affiliated with the company do not engage in any more harmful behavior.[55]

6.1.2.4.4 Tracking Performance

Monitoring and auditing processes permit corporations to track their developments in the human rights sector, just as in any other aspect of their business.[56] Regular reviews are crucial for the prevention of human rights violations and permit the company to adapt and refocus its strategies.[57]

6.1.2.4.5 Communication

Reporting procedures are drivers for corporate change, both internally and externally.[58] Reporting obliges the company to account for how it has addressed the human rights issue from a general and a violation-based standpoint.[59] This reporting strategy will allow the company to monitor its performances, furthermore enhancing shareholder perception of the company, building trust and providing a stimulus for positive internal development.[60] Any communication relative to the human rights performance should be available at regular intervals, accessible to the public and provide sufficient information for stakeholders to assess the performance of the company independently.[61]

6.1.2.5 Supporting Human Rights in the Business Context

Respect and support for human rights are interlinked in practice as the management steps required to enable respect and support for human rights are similar.[62] Supporting human rights requires promoting and advancing human rights through: (1) the support of the UN goals and issues at the core of business activities, through

[55] UN Global Compact Principle One, p. 5.
[56] UN Global Compact Principle One, p. 5.
[57] UN Global Compact Principle One, p. 5.
[58] UN Global Compact Principle One, p. 5.
[59] UN Global Compact Principle One, p. 5.
[60] UN Global Compact Principle One, p. 5.
[61] UN Global Compact Principle One, p. 5.
[62] UN Global Compact Principle One, p. 5.

(2) strategic social investment and philanthropy, (3) advocacy and public policy engagement and (4) partnership and collective action.[63]

Socially responsible organizations develop a broad capacity and desire to support human rights within their sphere of operations, which are linked directly to their core business activities.[64] Promoting the understanding of human rights, their relevance to the business community and what business can do to address human rights issues will foster respect and support for human rights.[65] Human rights can be integrated into the existing processes and procedures and will thus provide the company with a more sustainable and successful way of doing business.[66]

6.1.3 *Principle 2: Businesses Should Make Sure They Are Not Complicit in Human Rights Abuses*

Corporations must avoid complicity in human rights violations, especially in areas prone to conflict or with weak governance.[67] Complicity requires an act or omission by a company or those affiliated with it furthering a human rights violation or the knowledge by a company that an act or omission could have prevented or helped to prevent a violation.[68] Most national jurisdictions already prohibit the complicity in the commission of a crime and the existing international standards today recognize that corporations can also be complicit.[69]

Allegations of complicity are not limited to situations in which the company could be held liable for its involvement in human rights abuses but can also include instances where the media or the public feel that the company is benefitting from other actors human rights violations, such as in the case of Shell in Nigeria. However, the Global Compact underlines the fact that the simple presence in a country or the payment of taxes does not suffice to create complicity in a human rights violation.[70]

Through globalization, companies have expanded their activities into countries previously untouched by the global markets.[71] Some of these countries have a poor

[63] UN Global Compact Principle One, p. 6.

[64] UN Global Compact Principle One, p. 6. The Global Compact cites workplace safety, freedom of association, prevention of displacement of groups or individuals, protecting the local community and fostering the education and inclusion of minorities as way to encourage human rights as part of their business operations.

[65] UN Global Compact Principle One, p. 7.

[66] UN Global Compact Principle One, p. 7.

[67] UN Global Compact Principle Two, p. 1.

[68] UN Global Compact Principle Two, p. 1.

[69] For an in-depth analysis of the aiding and abetting, see Sect. 6.2. See furthermore Sect. 4.5.

[70] UN Global Compact Principle Two, p. 1.

[71] UN Global Compact Principle Two, p. 2.

human rights record and the state capacity or willingness to make the necessary changes is limited. It is in these circumstances that good corporate governance and the promotion of human rights respect is particularly important.[72] The need for transparency has come hand in hand with the challenges brought on by globalization.[73] The advances in technology and global communication have led to an informed global population and companies cannot conceal their poor or questionable practices anymore.[74] To prevent complicity issues, companies should implement an effective due diligence procedure as already required by the first principle of the Global Compact.[75]

6.1.4 *Contribution of the Global Compact to the UN Human Rights and Business Agenda*

Those who support the Global Compact believe that it effectively contributes to sustainable development by better distributing wealth between the *North and the South* through its inclusive and legitimate mechanisms of governance.[76] The Global Compact responds to the mutual interest of transnational corporations and the developing world by adding social legitimacy to the global markets.[77] Through the creation of a flexible, read non-binding, framework, social needs are integrated into the market, allowing the Global Compact to deal with the social and environmental issues linked to international trade.[78] This is precisely the *raison d'etre* of the Global Compact: closing the governance gap by embedding the global markets in principles to which the whole community can adhere.[79] Supporters argue that the Global Compact simply *works*: membership is constantly increasing and has become increasingly diverse over the years, spanning geography and sectors, fostering positive changes in behavior.[80] The Global Compact also increases the legitimacy of the UN by allowing it back into the spotlight of global governance and aiding it to adapt to the challenges of globalization.[81]

While the supporters of the Global Compact are quick to point out that the framework is successful because of its widespread use and endorsement, the critics argue that the Global Compact is flawed from the outset because it aggravates the

[72] UN Global Compact Principle Two, p. 2.
[73] UN Global Compact Principle Two, p. 2.
[74] UN Global Compact Principle Two, p. 2.
[75] UN Global Compact Principle Two, p. 2.
[76] Thérien and Pouliot (2006), p. 63. See also Ruggie (2001), pp. 372–374.
[77] Thérien and Pouliot (2006), p. 63. Koeltz (2010), p. 174.
[78] Thérien and Pouliot (2006), p. 64.
[79] Thérien and Pouliot (2006), p. 64. See also Ghafele and Mercer (2010), p. 54.
[80] Thérien and Pouliot (2006), p. 64.
[81] Thérien and Pouliot (2006), p. 65. Supported by King (2001), p. 483.

inequalities of development by giving greater power to the private sector and thus trampling on democratic principles underpinning the international economic order.[82] The criticism of the Global Compact further centers around the fact that it is a non-binding initiative without sanctions or monitoring, epitomizing the ideological shift of the UN towards trade and investment and that the absence of specific criteria for identifying violations makes the framework nothing more than a paper tiger.[83] The Global Compacts principles are vague, lacking a sufficient basis for designing enforceable standards.[84] The ensuing lack of conceptual clarity leaves a large margin of appreciation to the business community regarding the interpretation of the Global Compact's principles.[85] Thus, the exact nature of a company's responsibility for human rights under the Global Compact is subject to practical interpretation, with the human rights community and the business community likely offering contrasting views.[86] Rather than "*congratulating itself on being the largest and most widely embraced corporate citizenship*", the Global Compact should focus on extending its reach with greater seriousness.[87] There exists a demand for a higher degree of accountability from the corporations involved as well as the ability to sanction those who fail to live up to their commitments.[88]

It is argued that initiatives like the Global Compact cannot replace state regulation because they impede development by disguising profit-making aspirations under a veil social conscience.[89] Many fear that the new focus of globalization and the Global Compact are unethical to the mandate of the UN by allowing multinationals to usurp power within the organization.[90] Economy and market development fall outside of the worthy UN goals of promoting peace, human rights, the environment, social justice and democracy.[91]

The biggest concern remains the idea of corporations *bluewashing* their images by adhering to the Global Compact, using the benefits of displaying the UN flag on their websites while at the same time committing gross human rights violations abroad, thus tarnishing the UN's reputation.[92] The idea of *bluewash* is directly linked to the lack of enforcement tools in the Global Compact, leading to TNCs using the Global Compact to improve their image while continuing to violate human rights.[93]

[82] Karp (2014), p. 32. Additionally Thérien and Pouliot (2006), p. 66.
[83] Thérien and Pouliot (2006), p. 67. See also Ghafele and Mercer (2010), p. 47.
[84] Nolan (2005), p. 460. Deva (2006), p. 150. Oshionebo (2007), pp. 23–25.
[85] Nolan (2005), p. 460. Koeltz (2010), p. 175.
[86] Nolan (2005), p. 460. Lohmann (2005), p. 121.
[87] Deva (2006), p. 150. Oshionebo (2007), p. 22.
[88] Oshionebo (2007), p. 20. Ghafele and Mercer (2010), p. 47.
[89] Thérien and Pouliot (2006), p. 67.
[90] Taylor (2001), p. 980.
[91] Taylor (2001), p. 980.
[92] Thérien and Pouliot (2006), p. 69. Roth (2014), p. 24. Koeltz (2010), p. 177.
[93] Bigge (2004), p. 12.

This fear is not drawn from thin air: a number of corporations have been singled out for abusing the Global Compact system, among them Shell, Nike and Rio Tinto.[94] Ralph Nader, a prominent American activist, has pointed out that although all three companies signed onto the Global Compact right when it was created at the time Shell was complicit in the human rights violations of the Nigerian Government, Rio Tinto was damaging the environment in Papua New Guinea and Nike used sweatshop workers in Asia:

> The UN has shown poor judgment in allowing executives like Nike's Phil Knight to be photographed with Mr. Annan in front of the UN Flag, without any substantial effort by the company to adhere to the Global Compact principles.[95]

While it is true that the Global Compact is flawed due to its unbinding and unenforceable nature, it is also the biggest international initiative dealing with business and human rights. If it were nothing more than a logo on a website, it would not have been successful for almost 15 years. The Global Compact, much like the OECD Guidelines or the ILO Tripartite Declaration, fails to create binding obligations for business entities regarding human rights yet, it manages to unite different sectors under the UN Banner for a common cause. The problem of corporations *bluewashing* their image is considerable and should not be ignored but at the same time should not be used to discredit the initiative as a whole.

As a matter of fact, the Global Compact has reacted by moving any corporations who do not file progress reports for 2 years to the "inactive" list. It may seem like a small step, but this action demonstrates that there is the understanding that the Global Compact needs to be developed further and that appropriate steps are being taken.

The Global Compact may not be the ultimate solution to the problem of corporate human rights violations, but it has managed to bring together business and human rights activists on a common platform, leading to dialogue and the development of common goals and ways to achieve these.

6.2 The UN "Protect, Respect and Remedy" Framework and the UN Guiding Principles

With resolution 2005/69, the Commission on Human Rights of the United Nations requested that the UN Secretary-General appoint a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Kofi Annan, UN Secretary-General at the time, appointed John Ruggie[96] on

[94] Bigge (2004), p. 13.

[95] Nader, Corporations And The UN: Nike And Others "Bluewash" Their Images, San Francisco Bay Guardian, http://www.commondreams.org/views/091900-103.htm.

[96] John Ruggie was the former Assistant Secretary-General and senior advisor for strategic planning to Kofi Annan as well as being the Berthold Beitz Professor in Human Rights and

July 28th 2005 to clarify standards of corporate responsibility and accountability, to elaborate the role of states in effectively adjudicating business activities and to identify the best practices by states and companies with regard to human rights.[97]

In his February 2007 report on mapping international standards of responsibility and accountability for corporate acts,[98] Ruggie noted that curtailing individual and social harms imposed by markets were often overlooked and that without institutional underpinnings, markets will fail to deliver their full benefits and may even become socially unsustainable.[99] There exists a misalignment between the scope and impact of economic actors and the capacities of societies to manage the adverse consequences produced by these non-state actors. This creates an environment in which corporations can commit reprehensible acts without the possibility of adequate sanctioning or reparation of damage: "*for the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed*."[100]

The mandate required the Special Representative to identify and clarify the issues, to research and elaborate upon the existing problems and to compile materials in order to provide a mapping of current standards and practices targeting human rights and corporate conduct. He was also to submit his view and recommendations for consideration by the UN Human Rights Commission. With his final report in 2011, John Ruggie presented the Commission with the "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework".[101]

6.2.1 The Interim Report of 2006

In the interim report of 2006, the Special Representative defined the premises for the elaboration of the final report and elaborated on the problems of corporate conduct and human rights. The objective of the UN mandate was to strengthen the promotion and protection of human rights values with regard to corporations, all the while understanding that it is governments who bear the principal responsibility for the vindication of these rights.[102] The initial assessment was divided into three

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International Affairs at Harvard's Kennedy School of Government and affiliate Professor in International Legal Studies at Harvard Law School. He furthermore directed the University of California Institute on Global Conflict and Cooperation system-wide. Ruggie was praised with the Guggenheim Fellowship, the American Academy of Arts and Sciences Fellowship and the International Studies Association's Distinguished Scholar Award.

[97] A/HRC/4/35. See generally Schniederjahn (2013), pp. 111 et seq.

[98] A/HRC/4/35.

[99] A/HRC/4/35, p. 3.

[100] A/HRC/4/35, p. 3. Martens (2014), p. 11.

[101] A/HRC/17/31.

[102] E/CN.4/2006/97.

categories: (1) globalization, (2) alleged corporate human rights abuses and (3) existing responses.

6.2.1.1 Globalization

When the UN was created in 1945, it was based on a state-centered order.[103] States were the unique decision makers and also the only duty-bearers responsible for securing human rights.[104] When the idea of human rights emerged, it transcended this understanding of a state-centered society because its obligations went beyond statehood and sovereignty.[105]

Globalization changed the fundamental understanding of the world order. Today, there exists an economic command that consists of external transactions taking place between different national markets.[106] The ability of transnational firms to operate and expand globally has extended greatly due to trade agreements, bilateral investment and domestic liberalization.[107] The globalization process has generated higher living standards and provided for unprecedented reduction of poverty.[108] It is thus not surprising that the business sector has attracted increasing attention from other social actors, such as civil society or even states.[109]

This increasing international attention has been attributed to three distinct factors: first, the accumulation of power by one actor will always result in efforts by others to counter this power. When corporations first became major players on the international scene, labor and faith communities began their countervailing efforts.[110] Second, some corporations have attracted this increased attention by conducting their business ventures in a way that seriously harmed human rights, labor standards and the environment.[111] This behavior generated public demand for greater corporate responsibility and accountability. Third, considering that corporations have global reach, they function at a capacity and scale that governments cannot compete with.[112]

[103] E/CN.4/2006/97, p. 4.
[104] E/CN.4/2006/97, p. 4.
[105] E/CN.4/2006/97, p. 4.
[106] E/CN.4/2006/97, p. 5.
[107] E/CN.4/2006/97, p. 5.
[108] E/CN.4/2006/97, p. 5.
[109] E/CN.4/2006/97, p. 5.
[110] E/CN.4/2006/97, p. 5.
[111] E/CN.4/2006/97, p. 6.
[112] E/CN.4/2006/97, p. 6.

6.2.1.2 Correlating the Abuses

Considering that there is no globally consistent and impartial set of information on corporations and their human rights record, it is difficult to offer a systematic overview of globalization and its contribution to corporate human rights abuses. Generally, it is believed that economic development in combination with the rule of law is an ideal guarantee for human rights.[113] There are, nonetheless, reasons to believe that globalization can also increase the involvement of transnational corporations in human rights violations.[114] This is in part due to the sheer number of corporations in existence today: 70,000 transnational corporations with 700,000 subsidiaries and millions of suppliers span the globe.[115] In addition, the features of transnational corporations make them vulnerable to challenges: a globally operating corporation inevitably needs to operate in networks and networks, by nature, require the diverging of direct control.[116] Although this permits corporations to be efficient, it also leads to greater difficulty when managing the global value chain.[117] Not even considering acts of bad judgment or malpractice, the institutional features of corporations, if unattended, may increase the possibility of corporate shortcomings.[118]

According to initial research, it is the extractive sector,[119] which is most prone to human rights abuses with two thirds of all abuses.[120] The extractive industries also account for the worst human rights violations, including allegations of crimes against humanity.[121] The accusations typically involve acts committed by public and private security forces protecting the company assets, while other allegations include corruption, violations of labor rights and abuses of indigenous people and their land.[122] Violence usually occurs in a political context of low income countries with unstable governments having just emerged from conflict.[123]

With regard to the necessary responses, the UN Special Representative argues that there are differences between the various industries with regard the magnitude of the human rights challenges because of the unique characteristics of each industry. The extraction industry is again special in this regard because of its enormously intrusive nature.[124] Operations take place in communities where

[113] E/CN.4/2006/97, p. 7.
[114] E/CN.4/2006/97, p. 7.
[115] E/CN.4/2006/97, p. 7.
[116] E/CN.4/2006/97, p. 7.
[117] E/CN.4/2006/97, p. 7.
[118] E/CN.4/2006/97, p. 7.
[119] Oil, Gas and Mining Industry.
[120] E/CN.4/2006/97, p. 8.
[121] E/CN.4/2006/97, p. 8.
[122] E/CN.4/2006/97, p. 8.
[123] E/CN.4/2006/97, p. 8.
[124] E/CN.4/2006/97, p. 8.

basic public institutions are not present or do not function properly, forcing corporations to perform *de facto* governmental roles for which they are usually ill equipped.[125] It is this power vacuum that can lead to corporations taking advantage of the freedoms of the power asymmetry. [126] In addition, there is a negative correlation between the corporate human rights violations and the host countries economic situation. Low income, conflict exposure and corrupt or weak governments pose a direct threat to the established international human rights regime and require specific attention by all parties involved.[127]

6.2.1.3 The Existing Responses

Imposing effective responses to human rights violations has been on the agenda of many international organizations and governments.

The largest corporate social responsibility initiative is the UN Global Compact with over 2300 participating corporations.[128] The Global Compact imposes ten different universal principles, which the subscribing corporations have to abide by.[129] It is essentially a network where good practice is shared and is often a corporations' first international encounter with corporate responsibility.

The OECD Guidelines for multi-national enterprises as well as the ILO Tripartite declaration constitute an important normative statement for the Special Representative, even though their performance, based on their evaluation tools, can appear uneven at times.[130]

The extractive sector has seen the development of several initiatives. Problems with corruption, misallocation of public revenues or environmental disasters have undermined the rule of law and have led to the fostering of internal conflicts which often gave rise to grave human rights abuses.[131] The Extractive Industries Transparency Initiative targeting revenue transparency as well as the Kimberly Process Certification Scheme targeting conflict diamonds have been a first step in the direction of targeting the rise of conflict and the thus resulting human rights abuses.[132]

Despite the promising emergence of human rights initiatives both at the international and at sectorial level, the apparent weaknesses of the exiting initiatives is concerning.[133] Most initiatives chose their own definition and standard of human

[125] E/CN.4/2006/97, p. 9.
[126] E/CN.4/2006/97, p. 9.
[127] E/CN.4/2006/97, p. 9.
[128] E/CN.4/2006/97, p. 10. See Sect. 6.1.
[129] E/CN.4/2006/97, p. 10.
[130] E/CN.4/2006/97, p. 10. See Sects. 5.1 and 5.2.
[131] E/CN.4/2006/97, p. 12.
[132] E/CN.4/2006/97, p. 12.
[133] E/CN.4/2006/97, p. 13.

rights and, even though they are mostly influenced by international standards, they are often more politically acceptable than they are objective towards human rights needs.[134] Additionally, they leave many aspects of the human rights protection uncovered, especially in the poorer regions.[135] The real challenge thus lays in the global and uniform protection and implementation of consistent human rights standards.[136]

6.2.1.4 The Failure of the Norms on the Responsibilities of Transnational Corporations

The difficulty of imposing new strategies to strengthen human rights obligations of corporations lies in the stalemate between corporations and human rights defenders following the drafting of the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" in 2004.

The primary concern of the Norms on corporate responsibility was in their doctrinal excess.[137] The exaggerated legal claims, coupled with the conceptual ambiguities about their legal authority and their principle of allocating human rights obligations to states and corporations, effectively eradicated any possibility of ever giving the Norms legal value.[138]

First and foremost, the Norms claimed to base themselves on the existing legal principles of international law. At the same time, they claimed to be the first initiative being non-voluntary and thus binding in nature.[139] Combined, however, these statements cannot be correct. If the Norms were to be binding on corporations, then they cannot claim to be restating the existing legal principles because all currently existing legal initiatives targeting corporate human rights conduct are voluntary.[140] Even though emerging customary international law suggests that corporations may be held liable for violating human rights by being complicit in international crimes, international human rights law has not yet been so transformed as to attach direct legally binding obligations to corporations.[141] There is a legitimate argument for those who view it as desirable for corporations to have some sort of direct human rights obligations in specific circumstances, especially where the local Governments cannot or will not respect their obligations.[142]

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[134] E/CN.4/2006/97, p. 14.
[135] E/CN.4/2006/97, p. 14.
[136] E/CN.4/2006/97, p. 14.
[137] E/CN.4/2006/97, p. 15, para. 59.
[138] E/CN.4/2006/97, p. 15, para. 59.
[139] E/CN.4/2006/97, p. 15, para. 60.
[140] E/CN.4/2006/97, p. 15, para. 61.
[141] E/CN.4/2006/97, p. 16, para. 64. See also Sect. 4.3.2.
[142] E/CN.4/2006/97, p. 16, para. 65.

Furthermore, there are no barriers for states deciding to hold corporations liable by extending their national law to their national firms operating abroad.[143] Yet none of these are propositions established by international law, they are normative commitments requiring state action to become effective.[144]

The second major default of the Norms was that they failed to adequately allocate human rights obligations to states and corporations.[145] Corporations, by their nature, do not have a generalized role in society like states; the role of corporations is more specialized. The problem of the Norms in this regard was that they imposed larger obligations on corporations than they did on states.[146] Additionally, the allocation of responsibilities under the norms hinged solely on the capacities of states and corporations; this meant that in circumstances where a state cannot or will not fulfill its legal obligations, corporations were expected to fill in.[147] Corporations are not democratic public institutions and imposing on them equal human rights obligations to states can undermine the building of indigenous social capacities.[148]

In the conclusion of the Interim Report of 2006, it is noted that conceptual clarity is needed with regard to the specific legal obligations of states and corporations in the realm of human rights.[149] Corporations are not only bound by legal standards, but also by moral and social considerations. Therefore, it must be established what companies must do and what their stakeholders expect of them.[150] This gives rise to three fields of study:

(1) The possible extension of home state jurisdiction to the behavior of their national companies abroad, (2) the development of the various company policies and their human rights standards and (3) the role of the state in ensuring compliance with human rights standards by corporations in their jurisdiction.

The UN mandate thus consists in a "*commitment to the principle of strengthening the promotion and protection of human rights (. . .) coupled with a pragmatic attachment to what works best in creating change where it matters most*."[151]

[143] E/CN.4/2006/97, p. 16, para. 65.
[144] E/CN.4/2006/97, p. 16, para. 65.
[145] E/CN.4/2006/97, p. 17, para. 66.
[146] E/CN.4/2006/97, p. 17, para. 66.
[147] E/CN.4/2006/97, p. 17, para. 68.
[148] E/CN.4/2006/97, p. 17, para. 68.
[149] E/CN.4/2006/97, p. 18, para. 70.
[150] E/CN.4/2006/97, p. 18, para. 70.
[151] E/CN.4/2006/97, p. 20, para. 81.

6.2.2 *UN Survey on the Human Rights Policies and Management Practices of Fortune Global 500 Firms*

In order to establish a baseline for future strategies targeting corporate human rights conduct, Ruggie and his team conducted a survey of the 500 largest and most influential corporations with regard to their human rights standards, policies and management practices in 2006.[152] The results would then be used to develop a UN human rights strategy for corporations. This survey used online tools with the input of 102 companies from the extractive, financial, food and beverage, retail, industrial and pharmaceutical sector.[153]

6.2.2.1 Policy Results

Most of the survey respondents reported having an explicit set of human rights principles and management practices in place, while less than half of the companies in question had themselves experienced human rights difficulties.[154] This suggests that corporations engage in human rights management primarily for diversification and policy innovation rather than immediate necessity.[155] Corporations in the textile and extractive industry are also active in taking human rights into consideration for project risk assessments with regard to sourcing issues of their proposed operations and the effects on the community.[156]

Although companies across the board have shown the existence of human rights policies in their corporate codes of conduct, North-American companies are less likely than European companies to include human rights schemes in their codes of conduct, despite the fact that they were more likely, proportionately, to have experienced human rights issues of a significant nature.[157] In addition, companies from the extractive sector state to have suffered from significant human rights issues even though every respondent in this sector has implemented human rights policies.[158]

There are two possible explanations for this phenomenon: either the extractive industry has only just reacted to their problematic human rights record by implementing human rights policies or human rights policies have always been in place but have not been observed. The explanation for this discrepancy matters

[152] Fortune Global 500 Survey, p. 2.
[153] Fortune Global 500 Survey, p. 3.
[154] Fortune Global 500 Survey, p. 3.
[155] Fortune Global 500 Survey, p. 3.
[156] Fortune Global 500 Survey, p. 4.
[157] Fortune Global 500 Survey, p. 4.
[158] Fortune Global 500 Survey, p. 4.

little, but it underlines that fact that simply having a corporate human rights code does not automatically pre-empt a corporation from suffering with human rights issues.[159]

6.2.2.2 The Rights Concerned

All the responding corporations included the freedom from discrimination in their corporate codes, meaning hiring and promotion was to be done based on merit and not on sex, race or religion.[160] Freedom of association, freedom of compulsory or child labor as well as the right to life follow suit. Primarily European companies include the right to life in their corporate codes, even though US corporations have frequently been accused of violating the right to life in ATS suits.[161]

From the rights endorsed by the corporations, it can be deduced that the main focal group for corporate human rights policies remain the employees, the suppliers and the communities in which the company operates.[162] Customers, shareholders and investors are targeted least.[163] This target pattern holds across the various sectors investigated, although the extractive industry places a slightly higher focus on the communities in which they operate.[164] This divergence can be explained by the fact that the operations of the extractive industry tend to have a higher impact on the local communities than the operations of the financial industry. Furthermore, the intense focus of the extractive industry on the people affected by their operations is a result of the growing number of lawsuits.[165]

6.2.2.3 International Instruments Consulted

About 25 % of firms consulted indicated that they did not refer to any instrument upon drafting their code of conduct.[166] The remaining corporations indicated that their main reference tools were the ILO conventions and declarations, a tool which is in direct relation to their main target audience, the employees. Interestingly, all corporations in the extractive sector cited the Universal Declaration of Human Rights as their tool of consultation.[167] The OECD Guidelines for Multinational

[159] See Chaps. 7 and 8.

[160] Fortune Global 500 Survey, p. 4.

[161] Fortune Global 500 Survey, p. 4.

[162] Fortune Global 500 Survey, p. 5.

[163] Only 23 % of the corporations questioned mentioned shareholders and investors as their targets for human rights policies, while employees were referred to 99 % and communities at 71 %.

[164] Fortune Global 500 Survey, p. 5.

[165] Fortune Global 500 Survey, p. 5.

[166] Fortune Global 500 Survey, p. 5.

[167] Fortune Global 500 Survey, p. 5.

Enterprises and the UN Global Compact were also cited but they had more importance in the Europe than in the North America.[168]

Finally, several corporations noted that while they did not adopt any of the international tools as such, they nevertheless used them as inspiration, even if their policies themselves did not explicitly reference them.[169]

6.2.2.4 Stakeholder Engagement

Over 80 % of corporations questioned indicated that they worked together with external stakeholders to devise a human rights strategy, although European companies seemed to engage in this practice more often than North American corporations.[170] NGOs and industrial associations appear to be the most frequent partners solicited for their input.[171]

6.2.2.5 Accountability

The final set of questions of the Fortune Global 500 Survey focused on the compliance systems of the corporations. Nine in ten corporations have internal reporting and compliance systems in place targeting their accountability.[172] Three quarters of the respondents also engaged in a form of external report procedure, such as an exterior publication or information on their website. Impact assessments of future ventures has also been an emerging practice by business, effectively preempting potential human rights problems. Nonetheless, it must be noted that very few effective and dedicated human rights impact tools have been developed by corporations and standard tools are only just being conceived.[173] Assessment of future business operations is most common in the extractive sector, presumably because their business activities have the largest physical impact on the ground.[174]

6.2.2.6 Conclusion

The emerging patterns from the Fortune Global 500 Survey are quite encouraging from a human rights perspective. Already in 2006, many corporations had begun implementing human rights policies based on existing human rights tools, such as

[168] Fortune Global 500 Survey, p. 5.
[169] Fortune Global 500 Survey, p. 5.
[170] Fortune Global 500 Survey, p. 6.
[171] Fortune Global 500 Survey, p. 6.
[172] Fortune Global 500 Survey, p. 6.
[173] Fortune Global 500 Survey, p. 6.
[174] Fortune Global 500 Survey, p. 7.

the Universal Declaration of Human Rights or the UN Global Compact. This is a positive indicator, as TNCs seem to have accepted their moral duty with regard to human rights implementations. However, such a survey cannot assess the effectiveness of the policies implemented.

Although corporations have begun to realize their obligations with regard to human rights, there are two areas of concern nonetheless. The human rights standards used by the corporations are approached in a policy-type way, which leads to variations in the rights the business is protecting.[175] Rather than taking human rights and adapting their policies to fit the rights, some corporations tend to make the rights fit their business ventures. Instead of adapting the rights to fit their policies, corporations must create clear and commonly accepted standards when defining how they will be respecting human rights generally.[176]

The second issue is the actual lack of accountability. Although most corporations target their human rights record through internal reporting measures, this method does not foster transparency. It would be desirable to have information readily available, across the board, as well as having proof of the truthful reflection of reality of the information.[177]

Ultimately, the Fortune Global 500 Survey indicated that steps are being taken in the direction of creating corporate human rights policies and accountability for human rights violations, even if some areas still require improvement.

6.2.3 The "Protect, Respect and Remedy" Framework

The "Protect, Respect and Remedy" framework identifies and clarifies the policy dimensions of the business and human rights agenda.[178] The root cause of the tensions in the business sector lies in the lack of governance created by globalization.[179] The scope of economic forces and the impact of economic actors have strained the capacity of society to manage their adverse consequences.[180] Thus there is need for the creation of a framework combatting this lack of authoritative focal point.[181]

The "Protect, Respect and Remedy" framework rests on differentiated but complementary obligations tailored to fit each stakeholder group.[182] The state is under the duty to *protect* against human rights violations because this is the very

[175] Fortune Global 500 Survey, p. 7.
[176] Fortune Global 500 Survey, p. 8.
[177] Fortune Global 500 Survey, p. 8.
[178] A/HRC/8/5, p. 3, para. 4. Martens (2014), p. 14.
[179] A/HRC/8/5, p. 3, para. 3.
[180] A/HRC/8/5, p. 3, para. 3.
[181] A/HRC/8/5, p. 4, para. 5. Murphy and Vives (2013), p. 784.
[182] A/HRC/8/5, p. 4, para. 9.

core of the human rights regime.[183] Corporations have the responsibility to *respect* because this is essentially the main expectation that society has of the business community and lastly, the need for *remedy* because any effort to prevent abuse has no footing if no effective remedies exist.[184] The three principles are a complementary whole where each supports the other to create a sustainable, logic process.[185]

6.2.3.1 "Protect, Respect and Remedy"

The business and human rights agenda remains so complex because the various duties and responsibilities have not yet been adequately addressed and defined. The focus of any effective policy targeting human rights obligations of businesses must thus be a reduction of the existing governance gaps.[186] The "Protect, Respect and Remedy" Framework attempts to close these gaps by creating simple steps for governments, companies and society to address the misalignment of human rights and business ventures.[187]

6.2.3.2 The State Duty to Protect

The duty of a state to protect is well established and documented in international law. Governments are uniquely placed to foster a corporate culture accepting that respect for human rights is an integral part of business.[188] Existing examples include the UK Companies Act, requiring business directors to take into consideration how the company's operations impact the community and the environment, while Sweden requires independent sustainability reports using the Global Report Initiative.[189] Achieving a rights-respecting culture of corporations is generally considered to be simpler in companies owned by the state as the senior management is usually appointed by a State entity.[190] This is especially true in cases where the state could potentially be held liable for human rights violations because the corporations is considered a *de facto* organ of the state.[191] Thus, the state itself

[183] A/HRC/8/5, p. 4, para. 9.

[184] A/HRC/8/5, p. 5, para. 9.

[185] A/HRC/8/5, p. 5, para. 9.

[186] A/HRC/8/5, p. 5, para. 11.

[187] A/HRC/8/5, p. 6, para. 17. Bilchitz and Deva (2013), pp. 10–11.

[188] A/HRC/8/5, p. 10, para. 29. Kaufmann et al. (2013), p. 34. Leisinger (2010), p. 109.

[189] Sweden requires independent sustainability reports of state-owned companies using the Global Reporting Initiative. Guidelines for External Reporting by State-owned Companies, http://www.government.se/content/1/c6/09/41/20/dd8dadf3.pdf.

The UK Companies Act 2006 Section 172 (1) requires directors to have regard to the impact of the company's operations on the community and the environment.

See Pinto and Evans (2013), pp. 263 et seq. for a detailed discussion of the UK Companies Act.

[190] A/HRC/8/5, p. 11, para. 32.

[191] A/HRC/8/5, p. 11, para. 32. See Sect. 7.4.4.3.3.

has a considerable interest in creating corporate culture where human rights are protected, as a lack of policy could reflect badly on the home state too.

Another issue is the discrepancy between the effective discharge of host states human rights obligations and the interests of the foreign investors.[192] To attract foreign investment, states will offer bilateral investment treaties promising fair and equal treatment of investors. However, the protection of investors might have increased, while the duty to protect of the state has remained static, creating an unequal balance.[193] As a result of this inequality, it can be difficult for host States to address social and environmental standards for fear of driving away foreign investors.[194] Sometimes, investors even demand of a state to "freeze" their existing regulatory regime for the duration of the investment project, effectively halting any developments in the social or human rights sector, sometimes for many years.[195] This development is especially questionable with regard to developing states, as it they who require an expansion of their social and human rights policies.[196]

At the international level, it would be required that effective guidance and support would be offered on a state-to-state basis.[197] Human Rights treaty bodies can give recommendations as to the implementation of human rights obligations of states while peer learning would be increased if states included business information in their reports for universal review.[198] When states lack technical or financial resources to effectively address business and human rights challenges, states with the relevant knowledge should assist in order to strengthen the human rights regime.[199] These partnerships are especially fruitful in cases where states are already engaged in extensive trade and investment deals.[200] It remains unclear how such cooperation is best undertaken without infringing national sovereignty.

An issue of considerable magnitude is the obligation to protect of states in a situation of conflict. Some of the most devastating human rights violations have occurred in situations of conflict with government breakdown, violence and absence of the rule of law.[201] State policies in these situations are limited and effective prevention of corporate human rights violations is nearly impossible. The use of Security Council sanctions targeting certain mining corporations in the Congo, Sierra Leone and Liberia have proven somewhat effective and the

[192] A/HRC/8/5, p. 12, para. 38.
[193] A/HRC/8/5, p. 11, para. 34.
[194] A/HRC/8/5, p. 11, para. 34.
[195] A/HRC/8/5, p. 11, para. 34.
[196] A/HRC/8/5, p. 12, para. 36.
[197] A/HRC/8/5, p. 13, para. 43.
[198] A/HRC/8/5, p. 13, para. 44.
[199] A/HRC/8/5, p. 13, para. 45.
[200] A/HRC/8/5, p. 13, para. 45.
[201] A/HRC/8/5, p. 13, para. 47.

Secretary-General has recommended that the use of this tool be continued and improved.[202] Nonetheless, there remains a need for more proactive tools of prevention in order to foster a conflict sensitive practice in the business sector.[203] A possible solution, according to the report, is the identification of trigger alerts for corporations in conflict zones.[204] These trigger alerts shall be used to inform business of the heightening risks when operating in a conflict zone and to permit them to better address these issues and adequately deal with the local population.[205]

Ultimately, the duty to protect is a founding principle of human rights law and a core principle of any human rights framework meeting the challenges of human rights in business.[206]

6.2.3.3 The Corporate Responsibility to Respect

The main focus of the framework has been identifying a set of rights for which corporations may bear responsibility.[207] It was important to establish specific responsibilities for corporations with regard to human rights rather than defining a limited set of rights with "*imprecise and expansive*" responsibilities.[208] The problem with defining specific rights for corporations to adhere to is that there are few if any rights that business cannot impact.[209]

The most important question is consequently what responsibilities corporations have with regard to human rights. While corporations are organs of society, their function is so specialized that their responsibilities cannot mirror those of the State.[210] In addition to complying with national laws, corporations must respect human rights in their business ventures. Failure to do so can subject the companies to trials in courts of law and courts of public opinion.[211] While the responsibility to respect human rights has a clear legal aspect, it also has a social element, as its broader scope is defined by social expectations.[212]

Corporate responsibility to respect human rights is independent of the duties of a State, thus removing the primary and secondary responsibility debate initiated by the Draft Norms.[213] As this responsibility is considered the baseline, a corporation

[202] S/2008/18, paras. 16–18.
[203] S/2008/18, para. 20.
[204] A/HRC/8/5, p. 14, para. 49.
[205] A/HRC/8/5, p. 14, para. 49.
[206] A/HRC/8/5, p. 14, para. 49.
[207] A/HRC/8/5, p. 14. See generally Mares (2010), pp. 34 et seq.
[208] A/HRC/8/5, p. 14. Leisinger (2010), p. 109.
[209] A/HRC/8/5, p. 15.
[210] A/HRC/8/5, p. 15. This was the main argument against the UN Draft Norms.
[211] A/HRC/8/5, p. 16.
[212] A/HRC/8/5, p. 17. See also Chap. 7.
[213] A/HRC/8/5, p. 17.

cannot redeem itself for human rights violations by performing charitably elsewhere.[214] Finally, *doing no harm* is not only a passive requirement, as it may also oblige corporations to take active steps in preventing abuses.[215]

6.2.3.3.1 The Sphere of Influence

The concept of *sphere of influence* originated in the UN Global Compact, where it described corporate responsibility in terms of concentric circles from company operations to the community and beyond, assuming that responsibility declines from one circle to the next.[216] Even though the idea of sphere of influence remains a useful concept for corporation when assessing their human rights impact, recent developments have shown that this concept needs to be investigated more rigorously.[217]

The sphere of influence of a corporation can be understood in two ways: on the one hand it is the impact of corporate activity causing human rights violations. On the other, it is the leverage a corporation may have over the actors causing human rights violations.[218] The impact of corporate activity on human rights falls fully within the responsibility to respect, while the leverage of a corporation over third actors only does so in limited circumstances.[219]

The problem with imposing responsibility on corporations for any individual whom they may have some influence over is that this would include instances where the corporation was not a causal agent, be it direct or indirect, of the violation.[220] Imposing human rights responsibility on the sole basis of the possibility of having influence is not desirable nor is it feasible because the concept itself would be too vague, as influence needs to be defined in relation to something or someone.[221] The sphere of influence model combines too many different dimensions to serve as a basis for defining and clarifying corporate responsibility for human rights violations.[222]

The emphasis on proximity in the sphere of influence model is also misleading: companies need to be concerned with all aspects of their business and its impact and not just those closest to it. The corporate responsibility to respect human rights

[214] A/HRC/8/5, p. 17.

[215] Ruggie names anti-discrimination policies in the workplace as an example of active mechanisms falling under the "*doing no harm*" requirement. Leisinger (2010), p. 109.

[216] A/HRC/8/5, p. 19. Leisinger et al. (2010), p. 32. Van der Heijden (2012), p. 33. Leisinger (2010), p. 110.

[217] A/HRC/8/5, p. 19, para. 67.

[218] A/HRC/8/5, p. 19. See Sect. 2.2.

[219] A/HRC/8/5, p. 19.

[220] A/HRC/8/5, p. 20.

[221] A/HRC/8/5, p. 20.

[222] A/HRC/8/16, p. 4.

cannot be based on proximity, but rather, must be based on the actual activities of the corporation.[223] The scope of corporate responsibility therefore is not fixed nor is it based on influence; rather, it depends on the factual and potential human rights impacts resulting from corporate activity and any relationships associated with this activity.[224]

6.2.3.3.2 Due Diligence

To fulfil the responsibility to respect, corporations have to act with due diligence. This requires companies becoming aware of adverse human rights impacts and to successfully addressing these issues.[225] Comparable practices are usually already present in corporate guidelines, in the form of risk assessment strategies. The scope of due diligence can be divided into: (1) understanding the context of corporate activities, (2) assessing corporate activities and (3) analyzing corporate relationships.[226]

6.2.3.3.2.1 Understanding the Context

Corporations doing business abroad should be aware of the human rights issues in their places of operation and what specific challenges this may pose.[227] This information can be obtained through communication with NGOs, Governments or workers in the region.[228] Any analysis of the human rights context must take into account national laws and international obligations in relation to human rights; potential gaps between these standards and actual practice must be accounted for.[229]

6.2.3.3.2.2 Analyzing the Companies Activities

Corporations should assess their impact on a regular basis. With regard to human rights, corporations should consider the probable and factual impacts of their operations on employees, the communities and the environment.[230] Any policies which could potentially or factually harm human rights must be adjusted to prevent violations.[231] Such activities include production, the products provided, labor

[223] A/HRC/8/5, p. 20.
[224] A/HRC/8/5, p. 20.
[225] A/HRC/8/5, p. 17.
[226] A/HRC/8/16. See furthermore Karp (2014), p. 83.
[227] A/HRC/8/16, p. 7.
[228] A/HRC/8/16, p. 7.
[229] A/HRC/8/16, p. 7.
[230] A/HRC/8/16, p. 7.
[231] A/HRC/8/16, p. 7.

practices, security practices and any political activities the corporations may engage in.[232]

6.2.3.3.2.3 Assessing Corporate Relationships

Corporations should ensure that they are not implicated in third party human rights abuses through association.[233] This association can occur via contracts, services or lending of equipment.[234] Corporations need to be informed of the track records of their business to prevent associating with individuals who have violated human rights.

6.2.3.3.2.4 Policy Requirements

Due diligence comprises the steps a corporation is reasonably expected to take to raise awareness of, to prevent and to address human rights violations.[235] The steps a corporation needs to undertake in order to meet these requirements will vary greatly depending on the type of industry and the operating context.[236] Corporations need to develop human rights policies offering detailed guidance for particular situations to give the commitment to due diligence effect.[237]

The human rights policy must be integrated into corporate policy, likely the biggest challenge. Having an isolated human rights concept within the company can lead to individual groups not paying attention to the requirements and thus contradicting a corporation's human rights aspirations.[238] By ensuring that the human rights policy is fully integrated into the corporation through training and leadership from the top, consistency and responsibility is fostered and appropriate responses to human rights challenges enabled.[239] Corporations will effectively address and track developments within their sphere of influence through monitoring and auditing, generating important information for risk prevention, compliance and management.[240]

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[232] A/HRC/8/16, p. 7.
[233] A/HRC/8/16, p. 7.
[234] A/HRC/8/16, p. 7.
[235] A/HRC/8/16, p. 8.
[236] A/HRC/8/16, p. 8.
[237] A/HRC/8/5, p. 18.
[238] A/HRC/8/5, p. 18.
[239] A/HRC/8/5, p. 18. See Chap. 7.
[240] A/HRC/8/5, p. 18.

6.2.3.3.3 Complicity

Complicity refers to any indirect involvement by corporations in human rights violations committed by third parties.[241] Complicity therefore is knowingly providing assistance or encouragement that has a substantial effect on the commission of a crime by a third party.[242] From a non-legal standpoint, complicity is also problematic as it can incur reputational costs and divestment.[243] Any corporate responsibility to respect human rights must accordingly avoid complicity.[244]

International criminal law does not require knowledge of the specific abuse or infer any desire for the abuse to occur; as long as there was knowledge of the contribution, complicity can be established.[245] It is irrelevant if a corporation was merely conducting its normal business activities—if these activities contributed to the abuse, the corporation knew or should have been aware of this fact then it is a contribution to the abuse and may incur liability for complicity.[246] *Having knowledge* refers to the companies' ability to know that its contribution could be used to commit human rights violations.[247] Knowledge can be inferred from the circumstances, as what can be reasonably expected from a corporation in a given situation under the circumstances.[248]

6.2.3.3.3.1 Act or Omission Having a Substantial Effect

Even though the jurisdiction of the ICTY, ICTR and ICC do not extend to corporations, their findings on the matter of complicity are important considerations, as these were the first tribunals to fully address the issue of complicity.[249] The holdings of these tribunals are instructive when discerning how corporate complicity in human rights violations is to be understood[250]:

> The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[251]

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[241] A/HRC/8/5, p. 20. See also Leisinger et al. (2010), p. 32. Leisinger (2010), p. 111.

[242] A/HRC/4/35, paras. 22–32.

[243] A/HRC/8/5, p. 21. The Norwegian Government pension fund has divested from corporations such as Walmart and GenCorp for their complicity in human rights violations. See also Chesterman (2008), pp. 577 et seq.

[244] A/HRC/8/5, p. 20.

[245] A/HRC/8/5, p. 21.

[246] A/HRC/8/5, p. 21.

[247] A/HRC/8/5, p. 21.

[248] A/HRC/8/5, p. 21.

[249] A/HRC/8/16, p. 10.

[250] *Simić* Appeal Judgment, para. 85; *Blaškić* Appeal Judgment, paras. 45, 46; *Vasiljević* Appeal Judgment, para. 102; *Ntagerura et al.* Appeal Judgement, para. 370. See also Sect. 3.2.1.

[251] *Blagojević* Appeal Judgment, para. 127.

The assistance may occur before, during or after the commission of the crime and does not need to occur within geographic proximity of the primary crime.[252] As the *Blaskic* Appeals Judgement confirms:

> In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the actus reus of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the actus reus takes place may be removed from the location of the principal crime.[253]

With regard to the type of aid required for a complicity charge, the International Law Commission Code states that the accomplice must provide the sort of assistance that contributes directly and substantially to the commission of the crime.[254] The assistance must thus facilitate the commission of the crime in some significant fashion.[255]

The main issue has often been whether a mere corporate presence in a region of occurring human rights violation suffices in order to hold them liable for complicity[256]:

> Presence alone at the scene of the crime is not conclusive of aiding or abetting, unless it is shown to have a significant legitimizing or encouraging effect on the principal. Presence, particularly when coupled with a position of authority, is therefore a probative, but not determinative, indication that an accused encouraged or supported the perpetrators of the crime.[257]

If a corporation has offices in a region does not suffice to bring them within the realm of complicity. The presence in a country, the paying of taxes or remaining silent while violations occur outside of their scope of influence, are unlikely to bring corporations within the realm of complicity.[258] Additionally, deriving a profit from the occurrence of a human rights violation may not result in a complicity lawsuit, yet it will likely have negative implications on public perception.[259]

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[252] *Blaskic* Trial Judgment, para. 285, citing *Furundžija* Trial Judgment, para. 233 and *Aleksovski* Trial Judgment, para. 61.

[253] *Blaškić* Appeal Judgment, para. 48.

[254] Yearbook of the International Law Commission 1996, Vol. 2, p. 21.

[255] A/HRC/8/16, p. 11.

[256] A/HRC/8/16, p. 1.

[257] *Kvocka* Trial Judgment, para. 257, citing *Aleksovski* Trial Chamber Judgement, para. 65 and *Akayesu* Trial Chamber Judgement, para. 693.

[258] A/HRC/8/5, p. 21. Compare to Wettstein in Sect. 4.5.

[259] A/HRC/8/5, p. 21.

6.2.3.3.3.2 Knowledge of the Intentions of the Principal Perpetrator

Past ICTY cases have required that the accused knew of the intentions of the primary perpetrator and that their own actions provided substantial assistance to the commission of said crime.[260] Despite this intent to offer assistance, the accomplice did not need to have the same criminal intent as the perpetrator:

> (ii)It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal (. . .) The Trial Chamber had earlier stated the conclusion that it is not necessary to show that the aider and abettor shared the mens rea of the principal, but it must be shown that the aider and abettor was aware of the relevant mens rea on the part of the principal. It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.[261]

It is unnecessary to show that the accused knew of the precise crime which was to be committed; rather, it needs to be shown that he knew of the possible crimes to be committed.[262] Knowledge can be inferred from the direct and indirect circumstances surrounding the actual incident.

What does this mean for corporations being charged with complicity? In *Presbyterian Church of Sudan v. Talisman Energy*,[263] the District Court for the Southern District of New York discussed the question of the aiding and abetting quality for corporations and specifically the knowledge requirement.

> To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show (. . .) that the defendant acted with the intent to assist that violation, that is, the defendant specially directed his acts to assist in the specific violation (. . .) and that the defendant was aware that the acts assisted the specific violation.[264]

For corporations, this means that there had to be actual or implied knowledge that the corporation's contribution would be used in the violation of human rights.[265] This *should have known* standard is derived from what could reasonably be expected from a corporation in the given circumstances.[266] In order to demonstrate that a corporation had constructive knowledge of a crime, thus, the surrounding circumstances must be evaluated.[267]

In the non-legal context, corporate complicity has become an important benchmark by which corporations are being judged.[268] Investors and advocacy organizations evaluate companies based on their involvement in human rights abuses, and

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[260] A/HRC/8/16, p. 13.

[261] *Aleksovski* Appeal Judgment, para. 162.

[262] A/HRC/8/16, p. 13.

[263] See Sect. 3.2.1.

[264] *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 633 at 634.

[265] A/HRC/8/5, p. 21.

[266] A/HRC/8/5, p. 21.

[267] A/HRC/8/16, pp. 13–14.

[268] A/HRC/8/16, p. 16.

corporations themselves have realized that complicity in any such violations can be very costly.[269]

As a result, if a corporation knowingly provides a substantial contribution to human rights violations this can lead to the company being held responsible; both legally and publicly.[270] Operating in countries and contexts where human rights violations occur and benefitting from the occurrence of these should serve as red flags for corporations and should motivate them to ensure that their operations are exercised in due diligence and adapted to the field in which they operate.[271] Companies can avoid complicity by employing compliance mechanisms in their own activities as well as in the activities of those connected with them.[272]

6.2.3.4 Remedy

In order to give full effect to both the state duty to protect and the corporate duty to respect, effective grievance mechanisms need to be implemented.[273] State regulation will have little impact if no mechanisms for investigation and punishment exists to redress the abuse.[274] Likewise, the corporate responsibility to respect will have little impact if there is no way to hold TNCs responsible.[275]

Today, there exists a *Patchwork* of mechanisms[276]: judicial, non-judicial and non-state.[277] Treaty bodies increasingly expect states to sanction corporate human rights abuses and to provide redress for the victims of such abuses under their jurisdiction.[278] Non-judicial mechanisms are especially important in instances where courts are unable to provide adequate and effective remedies.[279] Additionally, non-judicial processes may also be preferable as they can provide a more immediate, affordable and accessible remedy.[280] Non-state mechanisms, such as corporate initiatives, can ensure that corporations comply with the enumerated standards and offer additional opportunities for recourse and compensation.[281]

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[269] A/HRC/8/16, p. 16.
[270] A/HRC/8/16, p. 21.
[271] A/HRC/8/16, p. 21.
[272] A/HRC/8/5, p. 21.
[273] A/HRC/8/5, p. 22. Murphy and Vives (2013), p. 784.
[274] A/HRC/8/5, p. 22.
[275] A/HRC/8/5, p. 22.
[276] See Sect. 6.2.3.4.5.
[277] A/HRC/8/5, p. 22.
[278] A/HRC/8/5, p. 22.
[279] A/HRC/8/5, p. 22. Murphy and Vives (2013), p. 784.
[280] A/HRC/8/5, p. 22.
[281] A/HRC/8/5, p. 22.

6.2.3.4.1 Judicial Mechanisms

Currently, judicial mechanisms are often ill-equipped to provide victims of corporate human rights abuse with an effective remedy as they lack general consensus and clarity. Victims face the challenge of whether to seek personal compensation or a general sanction against a corporation; the basis for finding a claim in domestic law can also be problematic.[282]

Some victims of human rights violations have sought to obtain relief abroad, yet these quests often face immense challenges such as the high costs, lack of legal standing and statutes of limitations.[283] In *Owusu v. Jackson*, the ECJ held that member states may not dismiss corporate law suits on the basis of *forum non conveniens* in cases where an individual holds the EU-based parent company liable for their own conduct with regard to its international subsidiaries:

> In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.[284]

States need to strengthen their judicial capacities to hear complaints of corporate human rights abuse while protecting against frivolous claims.[285] Any obstacles to justice need to be addressed, especially in cases of systematic human rights violations.[286]

6.2.3.4.2 Non-judicial Mechanisms

In order to be credible and effective, non-judicial mechanisms need to be legitimate, transparent, accessible, predictable as well as equitable and rights-compatible.[287] Non-judicial mechanisms must have independent governance structures ensuring adequate assistance is provided to any party seeking redress.[288] Any process must allow for fair and equitable terms and ensure that the outcomes are consistent with international human rights standards.[289] Most importantly, non-judicial grievance mechanisms need to provide sufficient transparency with

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[282] A/HRC/8/5, p. 23. See Sect. 3.3.

[283] A/HRC/8/5, p. 23. Statutory limitations can include *forum non conveniens* and foreign policy concerns.

[284] *Owusu v. Jackson*, C-281/02, EU: C: 2005 : 120, para. 46.

[285] A/HRC/8/5, p. 23.

[286] A/HRC/8/5, p. 23.

[287] A/HRC/8/5, p. 24.

[288] A/HRC/8/5, p. 24.

[289] A/HRC/8/5, p. 24.

regard to their process, especially about the reception and treatment of complaints.[290]

6.2.3.4.3 Non-state Mechanisms

To date, the main tool for holding corporations responsible are litigation and public campaigns.[291] In order to prevent the adverse effects of lawsuits and negative publicity, corporations should identify and address problem areas early before they can escalate, as part of their responsibility to respect.[292]

National human rights institutions (NHRIs) are also able to take care of issues concerning the human rights performances of corporations. Where these NHRIs are able to address human rights violations by corporations, they can provide a means to hold companies accountable.[293] The benefit of NHRIs in particular is their ability to provide for culturally appropriate and accessible solutions and even in cases where they cannot directly handle the grievance, as they can provide suggestions on possible solutions.[294]

Another effective mechanism are the National Contact Points established by the OECD Guidelines for Multinational Enterprises.[295] These NCPs, under governance of the OECD, have great potential for providing effective remedies for corporate human rights violations even though to date, they have often failed to fulfill the expectations.[296] Conflicts of interest as well as lack of resources to effectively undertake investigations of complaints however have stifled the success of the NCPs.[297] Even though the NCPs come up short when confronted with the requirements mentioned above, their potential remains immense and given the right backing by the OECD in addressing these inadequacies, the NCPs could provide incentives for corporate human rights compliance.[298]

6.2.3.4.4 Multi-Stakeholder Initiatives

Any multi-stakeholder initiative aiming to improve the track record of human rights in business must be complete with a grievance mechanism to check

[290] A/HRC/8/5, p. 24.
[291] A/HRC/8/5, p. 24.
[292] A/HRC/8/5, p. 24.
[293] A/HRC/8/5, p. 25.
[294] A/HRC/8/5, p. 25.
[295] See Sect. 5.1.2.1.
[296] A/HRC/8/5, p. 26.
[297] A/HRC/8/5, p. 26.
[298] A/HRC/8/5, p. 26.

performance.[299] The absence of an operative control mechanism can lead to the questioning of the validity of such initiatives and their effectiveness.[300] As the number of multi-stakeholder initiatives in the field of human rights increases, the Special Representative deems it important to create a collaborative model of grievance solving, to ensure universal standards and a single avenue for recourse against various corporations.[301]

6.2.3.4.5 The Patchwork Problem

There are different solutions at different levels for implementing the necessary remedies for the "Protect, Respect and Remedy" framework. The main problem with regard to these frameworks is that considerable numbers of individuals are unaware of their existence or where to look for them.[302]

There exists a gap in competence and coverage of the existing mechanisms, both intentional and unintentional.[303] In order to address this flaw, some have suggested the creation of a global watchdog, which could receive and handle these complaints.[304] For this idea to be successful, however, it would need to show results quickly, for otherwise it would be undermined swiftly.[305] If national and international groups wish to proceed with this idea, careful consideration must be paid to the criteria and whether they can be successfully implemented to address the gaps in access to human rights abuse redress tools.[306]

6.2.3.5 Conclusion

Rapid market expansion has led to gaps in the governance process between the scope of economic activities and the ability of economic institutions to handle their adverse consequences.[307] There exist a number of initiatives which seek to address this governance gap between human rights and business. The main issue lies in the fact that there are too few initiatives and none of the existing ones have reached a universally accepted scale. It is this systematic response to the existing challenges that the "Protect, Respect and Remedy" framework is intended to be.[308]

[299] A/HRC/8/5, p. 26.
[300] A/HRC/8/5, p. 26.
[301] A/HRC/8/5, p. 26.
[302] A/HRC/8/5, p. 27.
[303] A/HRC/8/5, p. 27.
[304] A/HRC/8/5, p. 27.
[305] A/HRC/8/5, p. 27.
[306] A/HRC/8/5, p. 27.
[307] A/HRC/8/5, p. 27.
[308] A/HRC/8/5, p. 28.

6.2.4 The Guiding Principles

With Resolution 8/7, the Human Rights Council welcomed the "Protect, Respect and Remedy" framework and extended the Special Representative's mandate until 2011 in order to permit him to operationalize the framework by providing practical recommendations as to the implementation of the framework.[309] This will elaborate the implications of the existing standards and practices and show where they fall short and need to be improved.[310]

6.2.4.1 The State Duty to Protect Human Rights

States must protect against human rights abuses within their jurisdiction by third parties. They should take the appropriate steps to prevent, investigate, punish and redress any violations through effective policies, legislation and adjudication.[311] The international law obligations of states require them to respect, protect and fulfill the human rights of individuals within their jurisdiction, including the duty to protect against the human rights violations by third parties.[312] This state duty is a standard of conduct, meaning that a breach of the state duty may occur when the violation by the third party can be attributed to the state or when the state fails to prevent, punish or redress the private actor's abuse.[313] Even though the states have discretion regarding the steps they take, they should consider a full range of preventative and remedial measures in order to give full effect to the rule of law and the duty to protect.[314] Any measures the state takes must be accountable, legally certain and transparent.[315] The state should set out clearly that it expects all businesses domiciled in its territory to respect human rights in all of their operations.[316] Even though, states are generally not obliged to regulate the extra-territorial activities of corporations domiciled in their country, it is recommended that they clearly communicate their expectations.[317] This is a simple policy consideration for the state to ensure coherent and consistent messages to businesses and to preserve the states own reputation.[318]

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[309] A/HRC/17/31, p. 4. Martens (2014), p. 14.

[310] A/HRC/17/31, p. 5. See also UN Interpretive Guide on the Corporate Responsibility to Respect Human Rights, http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.

[311] A/HRC/17/31, p. 6.

[312] A/HRC/17/31, p. 7.

[313] A/HRC/17/31, p. 7.

[314] A/HRC/17/31, p. 7.

[315] A/HRC/17/31, p. 7.

[316] A/HRC/17/31, p. 7.

[317] A/HRC/17/31, p. 7.

[318] A/HRC/17/31, p. 7.

6.2.4.1.1 Operational Principles

In order to meet their responsibility to protect, the state should enforce laws aimed at business respect for human rights, ensure that laws enable business respect for human rights, provide effective guidance to business enterprises and encourage businesses to communicate how they address their human rights impacts.[319] It would be inappropriate to assume that corporations prefer or profit from state inaction and thus states should implement a variety of measures to foster the relationship between business and human rights.[320] The failure to fully enforce laws regulating business respect for human rights, whether directly or indirectly is the greatest factor of concern in legal state practice.[321] States must review whether the laws targeting corporate conduct provide the necessary protection and coverage in light of constantly evolving circumstances in the corporate human rights field and, as such, provide an environment conductive for business respect for human rights.[322] Laws targeting corporations directly influence corporate behavior, thus they should reflect guidance on how enterprises should go about their human rights due diligence.[323]

Communication by businesses on how they address their human rights impacts, sharing best practices as well as state encouragement of such communication are important in fostering respect for human rights by corporations.[324] A communications requirement can be particularly useful in cases where the nature of operations or the operating context pose a significant risk to human rights.[325]

6.2.4.1.2 State-Business Nexus

States should take steps to protect against human rights abuses by businesses owned or controlled by the state, or by businesses receiving substantial support and service from the state.[326] In cases where a business is controlled by the state, receives substantial input from the state or where its acts can be directly attributed to the state, these violations can entail a violation of the state's own legal obligations under international law.[327] The closer a business is to the state, the stronger the policy rationale for the state to ensure that the company respects human rights.[328]

[319] A/HRC/17/31, p. 8.
[320] A/HRC/17/31, p. 8.
[321] A/HRC/17/31, p. 8.
[322] A/HRC/17/31, p. 8.
[323] A/HRC/17/31, p. 8.
[324] A/HRC/17/31, p. 9.
[325] A/HRC/17/31, p. 9.
[326] A/HRC/17/31, p. 9.
[327] A/HRC/17/31, p. 9.
[328] A/HRC/17/31, p. 9.

Where states own or control companies, they have the greatest means within their disposal to ensure that all relevant policies regarding human rights respect are fully implemented.[329]

Additionally, it must be underlined that states do not relinquish their human rights obligations when they privatize the delivery of services potentially impacting human rights.[330] Failure by a state to ensure that the business under their control operate in a manner consistent with the states human rights obligations can result in both legal and reputational consequences for the state itself.[331] Any contracts between the state and the business should thus entail detailed expectations regarding human rights and corporate accountability, effectively overseen by the state.[332] Through these commercial transactions between the state and the economy, the state is provided with a unique opportunity to promote the awareness and the respect for human rights by business enterprises with due regard to the states relevant obligations under international law.[333]

6.2.4.1.3 Supporting Business Respect for Human Rights in Conflict-Affected Areas

The risk of gross human rights violations is heightened in conflict-affected or conflict-prone areas.[334] As a result, states should help corporations operating in a conflict context by engaging with them to identify, prevent and mitigate risks of adverse human right effects of their business activities, provide corporations with the adequate assistance to assess and address human rights risks and deny access to public support for businesses involved with gross human rights violations.[335]

The worst human rights abuses occur in climates of conflict, issues of control over territory or weakened governance situations, where the human rights regime cannot function as intended.[336] In these difficult times, corporations will often turn to states for guidance; hence it is increasingly important that states address issues early.[337] In areas of conflict, the host state may not be able to adequately ensure human rights protection because of its lack of effective control over the area; here, the corporation's home state has the role to assist the company as well as the host state in making sure none are complicit in human rights violations.[338] In order to

[329] A/HRC/17/31, p. 9.
[330] A/HRC/17/31, p. 9.
[331] A/HRC/17/31, p. 10.
[332] A/HRC/17/31, p. 10.
[333] A/HRC/17/31, p. 10.
[334] A/HRC/17/31, p. 10.
[335] A/HRC/17/31, p. 10.
[336] A/HRC/17/31, p. 11.
[337] A/HRC/17/31, p. 11.
[338] A/HRC/17/31, p. 11.

achieve coherence and adequate assistance to business entities, the home state should foster close cooperation with its development agencies and ministries to develop early-warning indicators to alert the government and address any failures by corporations to respect human rights with the adequate consequences.[339] The state should furthermore warn the business of the heightened human rights risks and review whether the policies and legislation adequately address the heightened risk.[340]

6.2.4.1.4 Policy Coherence

States should ensure that government departments and agencies shaping business practices are aware of and observe the states human rights obligations.[341] There is no need for tension between human rights obligations and the laws shaping business practices, although there may be times where a state must make balancing decisions to meet different societal needs.[342] In order to create an appropriate balance, the state needs to take a broad approach to managing business and human rights, ensuring vertical and horizontal policy coherence.[343] Vertical policy coherence requires the state to have the necessary laws and processes in place to implement its human rights obligations, while horizontal coherence requires support and equipment of government departments and agencies to enable them to act in a manner that is consistent with the state human right obligations.[344]

States should maintain adequate policy space to meet their human rights obligations when they are pursuing business related policies.[345] Economic agreements concluded by the state create economic opportunities but they can also affect the domestic policy space of the government.[346] Thus, states must observe that they retain a sufficient amount of policy and regulatory ability to protect human rights under the terms of any economic agreement.[347] The state should consequently seek to insure that the institutions it does business with do not restrain or hinder the state in its ability to protect and respect human rights.[348] In addition, it ought to encourage those institutions to promote business respect for human rights and draw on the Guiding Principles to promote a shared understanding of the international cooperation in the management of business and human rights challenges.[349]

[339] A/HRC/17/31, p. 11.
[340] A/HRC/17/31, p. 11.
[341] A/HRC/17/31, p. 11.
[342] A/HRC/17/31, p. 11.
[343] A/HRC/17/31, p. 12.
[344] A/HRC/17/31, p. 12.
[345] A/HRC/17/31, p. 12.
[346] A/HRC/17/31, p. 12. Compare Ratner (2001–2002), p. 456.
[347] A/HRC/17/31, p. 12.
[348] A/HRC/17/31, p. 12.
[349] A/HRC/17/31, p. 12.

Capacity building and awareness-raising through these institutions can play a vital role in helping states fulfil their duty to protect by promoting consistent approaches through the sharing of best practices.[350]

6.2.4.2 The Corporate Responsibility to Respect

Business enterprises should respect human rights by avoiding infringing upon human rights and addressing their negative human rights impacts.[351] The corporate responsibility to respect human rights is a global standard of conduct expected of all businesses wherever they operate.[352] The responsibility to respect exists independently of the duty of the state and it exists above compliance with national laws and regulations protecting human rights.[353] Corporations ought to take adequate measures for the prevention, mitigation and remediation of negative human rights impacts and shall not undermine the efforts of the state to meet its human rights obligations through the weakening of the integrity of judicial processes.[354]

The responsibility of businesses to respect human rights refers to all internationally recognized human rights because business enterprises can have an impact on virtually all internationally recognized rights.[355] Even though, in practice, some rights may be more at risk than others due to the operating context or the industry, all human rights should nonetheless be subject of a periodic review.[356] The rights enshrined in the International Bill of Rights together with the principles of the eight ILO core conventions are benchmarks against which other social actors can assess the human rights impact of corporations.[357] It must be pointed out, however, that the issue of corporate human rights responsibility is distinct from the issue of legal liability and enforcement, which remain defined by national law at this time.[358]

In order to comply with the responsibility to respect, companies need to avoid causing or contributing to human rights violations through their activities and need to prevent and mitigate adverse human rights impacts that are directly linked to their operations.[359] The responsibility of business enterprises to respect human rights furthermore encompasses all corporations, regardless of size, scale of operations, operational sector, ownership or structure.[360] Despite this universal

[350] A/HRC/17/31, p. 12.
[351] A/HRC/17/31, p. 13.
[352] A/HRC/17/31, p. 13.
[353] A/HRC/17/31, p. 13.
[354] A/HRC/17/31, p. 13.
[355] A/HRC/17/31, p. 13.
[356] A/HRC/17/31, p. 13.
[357] A/HRC/17/31, p. 13.
[358] A/HRC/17/31, p. 14.
[359] A/HRC/17/31, p. 14.
[360] A/HRC/17/31, p. 14.

application, companies with a larger operating context will inevitably have to face a higher complexity and scale of means through which that responsibility is met.[361] Businesses ought to put into place compliance policies and processes appropriate for their size and operating context, such as a commitment to meet their human rights responsibility, human rights due diligence processes and a remediation process to redress any violations.[362] As a basis for embedding human rights responsibility, business enterprises should express their dedication through a statement of commitment that is approved at the most senior level of the firm, is informed by the relevant internal or external expertise, stipulates the human rights expectations of the personnel, business partner and other parties directly linked to its services and operations.[363] The statement of commitment should be publicly communicated.[364] Business enterprises need to strive for coherence between their responsibility to respect human rights and the policies governing their business relationships.[365]

6.2.4.2.1 Human Rights Due Diligence

Corporations must carry out due diligence to identify and mitigate adverse human rights impacts.[366] This includes assessing the actual and potential human rights impacts of the business operations as well as integrating the results, tracking responses and communicating how impacts are addressed.[367] Human rights due diligence covers adverse human rights impacts the company may cause or contribute to through it activities and will vary depending on the size and complexity of the business operation.[368]

Engaging in due diligence will help business minimize the risk of litigation by demonstrating that they took every reasonable step to avoid involvement in human rights abuses.[369] It remains important to note nonetheless that due diligence itself will not automatically fully absolve corporations from liability for causing or contributing to human rights violations.[370] To prevent human rights issues, companies should identify and assess the potential human rights impacts, which they may be involved in directly or indirectly through their business relationships.[371]

[361] A/HRC/17/31, p. 14.
[362] A/HRC/17/31, p. 14.
[363] A/HRC/17/31, p. 14.
[364] A/HRC/17/31, p. 14.
[365] A/HRC/17/31, p. 16.
[366] A/HRC/17/31, p. 16.
[367] A/HRC/17/31, p. 16.
[368] A/HRC/17/31, p. 16.
[369] A/HRC/17/31, p. 17.
[370] A/HRC/17/31, p. 17.
[371] A/HRC/17/31, p. 17.

The initial assessment of the potential human rights issues is fundamental to a complete due diligence approach as it helps to understand the specific impacts on specific people in a given operating context.[372] Ideally, this step will be undertaken before a company engages in business ventures, alongside the risk assessment and environmental assessment of the company.[373]

Due to the fact that the human rights situation is a dynamic one, due diligence pertaining to human rights should be undertaken at regular intervals and prior to major changes in the operating context.[374] In order for this consultation process to be fully effective, business enterprises should seek to include the concerns of the potentially or actually affected stakeholders; where such consultation is impossible, credible and independent expert resources should be consulted.[375]

The prevention and mitigation of negative impacts requires businesses to integrate their findings from the impact assessment into the relevant internal functions and processes.[376] Responsibility to address any impacts must be assigned to the appropriate level and function within the business while internal decision-making processes should enable effective responses.[377] The appropriateness of the reaction will depend on whether the enterprise caused or contributed to the violations as well as its leverage in addressing the adverse impacts.[378]

The more complex the situation and the thus resulting implications for human right are, the stronger the case will be for the company to draw on independent expert advice in deciding how to respond.[379] Where a relationship causing human rights violations is crucial to a business entity, ending it can incur further challenges: a relationship is crucial to a business if it provides a product or service that is essential to the enterprises business and for which no alternative source exists.[380] In such contexts, it is important to consider the severity of the human rights impact: the severer a human rights violation, the quicker a change needs to happen for a corporations to continue its business ventures.[381] As long as the abuses are ongoing, the company ought to demonstrate its efforts to alleviate the impact and it must also be prepared to accept any consequences, be they reputational, financial or legal, that the continued connection may bring.[382]

When verifying how adverse human rights impacts are being addressed, companies should seek to track the effectiveness of their response through qualitative

[372] A/HRC/17/31, p. 17.
[373] A/HRC/17/31, p. 17.
[374] A/HRC/17/31, p. 17.
[375] A/HRC/17/31, p. 17.
[376] A/HRC/17/31, p. 18.
[377] A/HRC/17/31, p. 18.
[378] A/HRC/17/31, p. 18.
[379] A/HRC/17/31, p. 19.
[380] A/HRC/17/31, p. 19.
[381] A/HRC/17/31, p. 19.
[382] A/HRC/17/31, p. 19.

and quantitative indicators as well as drawing on feedback from internal and external sources including the affected stakeholders.[383] Such tracking is necessary to discern whether human rights policies are being implemented effectively and if the identified impacts have been addressed successfully.[384] Tracking is to be integrated into the relevant internal reporting processes, including performance reviews, audits and operational-level grievance mechanisms.[385]

To account for their human rights due diligence and how they address negative impacts, companies should prepare external communication, especially in cases where concerns are raised by affected stakeholders.[386] Communication is to be in a form and frequency that provides sufficient information to evaluate the adequacy of the companies' responses and does not pose a risk to commercial confidentiality.[387] In cases where business operating contexts pose risks of severe human rights violations, companies should report formally on how these potential impacts are addressed.[388] The reporting in high-risk cases should cover all topics and indicators dealing with how the company identifies and alleviates any adverse impacts and should be verifying independently for increased credibility.[389]

6.2.4.2.2 Remediation

If a company identifies instances where it has caused or contributed to human rights violations, they ought to provide for remediation through legitimate processes.[390] Even when a corporation has an excellent human rights record, it can cause or contribute to violations it could not have foreseen or prevented.[391] In such instances, the responsibility to respect requires the enterprise to actively engage in a remediation process, targeting the most severe violations first.[392] While businesses should address all their negative impacts, this may not be possible simultaneously and thus prioritization needs to take place, all the while recognizing that ultimately all negative impacts will need to be remedied.[393] Particular countries and operating contexts can increase a company's risk of incurring human rights violations, and thus businesses should treat this risk as a compliance issue, given the

[383] A/HRC/17/31, p. 19.
[384] A/HRC/17/31, p. 19.
[385] A/HRC/17/31, p. 19.
[386] A/HRC/17/31, p. 20.
[387] A/HRC/17/31, p. 20.
[388] A/HRC/17/31, p. 20.
[389] A/HRC/17/31, p. 20.
[390] A/HRC/17/31, p. 20.
[391] A/HRC/17/31, p. 20.
[392] A/HRC/17/31, p. 21.
[393] A/HRC/17/31, p. 21.

ever-expanding web of potential litigation and corporate liability arising from extraterritorial claims.[394]

6.2.4.3 Access to Remedy

As part of the state's duty to protect, states must take the appropriate steps to ensure that effective remedy is provided through judicial, administrative or legislative means.[395] Any procedure for remediation should be impartial, protected from corruption and free from political influence.[396] When creating remedies for human rights violations, the state must ensure that these remedies are made publicly aware and that access and financial support are facilitated.[397]

6.2.4.3.1 State-Based Judicial Mechanisms

Effective judicial mechanisms targeting human rights violations are the core to ensure access to remedy.[398] The success of the judicial mechanism depends on its impartiality, its integrity and its ability to accord due process while ensuring that no barriers are erected to prevent legitimate cases from being brought before a court, especially in situations where no alternative sources of remedy exist or are unavailable.[399] Such barriers include high costs of bringing claims, inability to secure legal representation, lack of adequate resources of the prosecutors, unequal attribution of legal responsibility, denial of justice or the exclusion of particular groups from legal protection.[400] Many of these barriers to justice are a direct result of the imbalance between the parties to business related human rights litigation, such as financial resources and access to expertise.[401] In addition, whether intentionally or as a by-product of judicial organization, certain individuals or groups have a higher risk of marginalization through cultural or social impediments to accessing or benefitting from judicial protection.[402] As a result, these vulnerable groups need to receive particular attention throughout all stages of the judicial proceedings.

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[394] A/HRC/17/31, p. 21.
[395] A/HRC/17/31, p. 22.
[396] A/HRC/17/31, p. 22.
[397] A/HRC/17/31, p. 22.
[398] A/HRC/17/31, p. 23. Schniederjahn (2013), p. 112.
[399] A/HRC/17/31, p. 23.
[400] A/HRC/17/31, p. 23.
[401] A/HRC/17/31, p. 23.
[402] A/HRC/17/31, p. 24.

6.2.4.3.2 State-Based Non-judicial Mechanisms

Additionally to the judicial mechanisms, states should ensure that non-judicial grievance mechanisms are provided as part of the state-based system of remedy for corporate human rights violations supplementing the judicial mechanisms.[403] Even if the judicial mechanisms are effective, they cannot address all alleged abuses and so gaps in the provisions for remedy can be covered by non-judicial approaches.[404] These can be mediation, adjudicative or culturally-based approaches depending on the issues at stake and the public interest involved.[405]

6.2.4.3.3 Non-state Based Mechanisms

Non-state mechanisms perform two key functions in redressing human rights violations: they support the identification of adverse human rights impacts as part of the company's due diligence procedure by allowing for those directly concerned reaching the entity directly and so identified risks can be addressed and remediated quickly preventing further harm and escalation.[406] Through this approach, legitimate concerns can be addressed and further disputes prevented.[407] In order for any such procedure to be effective, it needs to fulfil the requirements of legitimacy, accessibility, predictability, equity and transparency.[408]

States should consider ways to facilitate access to the effective non-state grievance mechanisms dealing with corporate human rights violations.[409] These mechanisms should be business-administered mechanisms, whether alone or through multi-stakeholder processes and human rights body based, using adjudicative or dialogue-based processes.[410] This approach can offer particular benefits including speedy access and remediation, low costs and transnational reach.[411] In order for issues to be addressed early and directly, corporations should establish operational-level mechanisms for individuals and groups who are affected by business operations.[412] These grievance mechanisms are directly accessible to individuals and are administered by the company itself.[413]

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[403] A/HRC/17/31, p. 24. Schniederjahn (2013), p. 113.
[404] A/HRC/17/31, p. 24.
[405] A/HRC/17/31, p. 24.
[406] A/HRC/17/31, p. 25. Schniederjahn (2013), p. 113.
[407] A/HRC/17/31, p. 25.
[408] A/HRC/17/31, p. 27.
[409] A/HRC/17/31, p. 24.
[410] A/HRC/17/31, p. 24.
[411] A/HRC/17/31, p. 24.
[412] A/HRC/17/31, p. 25.
[413] A/HRC/17/31, p. 25.

Human rights standards are increasingly included in the commitments of companies through codes of conduct, performance standards, framework agreements and voluntary initiative targeting corporate conduct.[414] These initiatives must ensure availability of effective mechanisms through which affected parties can raise concerns, otherwise endangering the legitimacy of such approaches.[415]

6.2.5 *Efficiency of the UN Guiding Principles in Addressing Corporate Human Rights Concerns*

The Human Right Council welcomed the principles as a touchstone for the interaction between business and human rights and the EU noted that they were an important reference for the EU's renewed policy on corporate social responsibility.[416] In addition to governmental support, various corporations have endorsed the Guiding Principles for clarifying the distinct roles of the state and of business as well as for helping to operationalize respective approaches to human rights in the business context.[417]

Human Rights organizations, however, were far less thrilled with the Framework. The International Federation for Human Rights (FIDH) found that the road towards accountability was still long because the *Ruggie Principles* failed to ensure the right to an effective remedy and did not provide for a tool to help States prevent abuses by their companies abroad.[418] Human Rights Watch echoed the critique by FIDH when it criticized the Principles for refusing to establish a global standard for corporate responsibility and allowing instead for a sliding scale based on business size and geographic location.[419]

Finally, Amnesty International highlighted the Principles failure to adequately address key issues in corporate accountability and requested that rather than only recommending a due diligence approach, Ruggie should have mandated one which

[414] A/HRC/17/31, p. 26. See Sect. 7.4.3.

[415] A/HRC/17/31, p. 26.

[416] Blitt (2012–2013), p. 51. See also *B*usiness and Human Rights: New United Nations Guidelines, European Commission, June 17th 2011. Additionally: Human Rights Council Resolution 17/4, Human Rights and Transnational Corporations and other Business Enterprises, 17th Session, June 16th 2011. Federal Council Position Paper (2015), p. 28.

[417] Melish and Meidinger (2012), p. 303. Blitt (2012–2013), p. 51. Bob Corcoran, VP of General Electric, Richard Wong, VP of Flextronics and Edward E. Potter, Workplace Rights at Coca-Cola have all written to John Ruggie commending his effort. See Blitt (2012–2013), Footnote 113, p. 52.

[418] "UN human Rights Council adopts Guiding Principles on Business Conduct, yet Victims still waiting for effective Remedies", Fédération Internationale des Droits de l'Homme, http://www.fidh.org/en/globalization-esc-rights/business-and-human-rights/UN-Human-Rights-Council-adopts.

[419] UN Human Rights Council: Weak Stance on Business Standards, Human Rights Watch, http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

could effectively prevent and punish extraterritorial human rights violations.[420] From a human rights standpoint, the key obstacle of the Guiding Principles remains convincing states and corporations that there exists a need for legally binding legislation regulating business conduct when human rights issues arise.[421]

The Guiding Principles' *principled pragmatism* has set the threshold of corporate human rights obligations at a very low level.[422] A different reading of principles pragmatism would have led to the creation of strong human rights standards with a road map for the growth of these corporate obligations.[423] Basing corporate human rights responsibilities on the pragmatism of social expectations is problematic, as this approach fails to recognize the limitations of soft law instruments and the business case for human rights—human rights do not give rise to optional responsibilities.[424]

What is more, critics argue that Ruggie followed "*an unstated principle throughout his mandate, that is, to bypass contentious issues or not take any clear stand on them*."[425] There is no clear catalogue of human rights obligations for companies, that there has been no attempt to remove legal barriers for victims of human rights abuse and that there are no environmental norms or special standards protecting minorities.[426]

The "Protect, Respect and Remedy" framework would have been more effective had the drafters taken a "*new governance or new accountability approach*".[427] The explicit inclusion of participatory roles and responsibilities of civil society organizations would have created a stronger conceptual policy and a better opportunity for enforcement.[428] The new governance approach ensures legitimacy and operational effectiveness for public programs and allows governance and compliance gaps to be identified and addressed.[429] As a result, an effective human rights protection from corporate intervention cannot be construed without the participation of those whose human rights are effectively at stake.[430]

From a more abstract viewpoint, the "Protect, Respect and Remedy" framework creates a system in which national legal orders incorporate and implement both

[420] United Nations: A Call for Action to better Protect the Rights of Those Affected by Business-Related Human Rights Abuses, Amnesty International, http://www.amnesty.org/en/library/info/IOR40/009/2011/en. See also Karp, p. 153.

[421] Blitt (2012–2013), p. 54. Ruggie recognizes the problem but contends that at this moment in time, business and states are opposed to creating such binding obligations. Ruggie (2011), pp. 117 et seq.

[422] Bilchitz and Deva (2013), p. 12.

[423] Bilchitz and Deva (2013), p. 12.

[424] Bilchitz (2008), pp. 760–761. Compare Martens (2014), p. 11.

[425] Bilchitz and Deva (2013), pp. 16–17.

[426] Bilchitz and Deva (2013), p. 17.

[427] Melish and Meidinger (2012), p. 304.

[428] Melish and Meidinger (2012), p. 305.

[429] Melish and Meidinger (2012), p. 335.

[430] Melish and Meidinger (2012), p. 336.

national and international human rights as corporations simultaneously implement their autonomous systems of institutionalized norms, where both state and corporation provide remedy mechanisms for breaches.[431] As a result, this creates polycentricism in governance, substantially advancing the quest for an autonomous regulatory basis for transnational corporate governance.[432] The innovative aspect of the framework then, is its attempt to build a public and private governance system and coordinating their operations while, at the same time, retaining their respective autonomy.[433]

What makes the implementation of this framework noteworthy is the fact that it acknowledges the specific characteristics inherent to states and non-state actors and attempts to create an operational and remedial system in accordance with these.[434] State regulate though the law and legal instruments while corporations govern through soft mechanisms—so any successful human rights approach must take into account these ideological and governance-based differences.[435] Within the totality of governance power, the "Protect, Respect and Remedy" framework with its three pillars divides that power along the lines of the structural characteristics of the various entities, limiting their power through enforced communication between them.[436]

For the state, this new approach to the duty to protect means that they are expected to give effect to the provisions of their constitution and to vindicate these constitutional rights.[437] What is more, the approach underlines the importance of the constitution as a safeguard of basic rights and the necessity of creating a coherent body of international human rights law as a foundation for the creation of customary international law, which is critical to the second pillar of corporate responsibility to respect human rights.[438] The major impediment to the effective realization of the state duty to protect is the incoherence in state policies targeting human rights. On the one hand there is the vertical incoherence where the state has human rights obligations but fails to give full effect to them. On the other hand there is horizontal incoherence where the state simply does not sign onto the existing human rights treaties or signs onto them with such extensive reservations that the actual aim of the framework is undermined.[439]

From a corporate perspective, the corporate duty to respect is the most innovate part of the UN framework.[440] It is grounded in the social license of corporations,

[431] Cata Backer (2010), p. 3.
[432] Cata Backer (2010), p. 3.
[433] Cata Backer (2010), p. 3.
[434] Cata Backer (2010), p. 37.
[435] Cata Backer (2010), p. 38.
[436] Cata Backer (2010), p. 38.
[437] Cata Backer (2010), p. 41.
[438] Cata Backer (2010), p. 42.
[439] Cata Backer (2010), p. 43.
[440] Cata Backer (2010), p. 43.

underlined by reference to international norms.[441] Corporations are legitimized by complying with the law applicable and this legitimation provides the corporation with rights under domestic law such as legal personality and limited liability.[442] A corporation cannot exist in the absence of legal or social validation and the expectations of stakeholders, society and state bind corporations both legally and economically.[443] Human rights obligations for corporations touch on the relationship of the company with the shareholders in the context of their social license to operate.[444]

Yet, while compliance with state norms is straight forward, compliance with social norms and expectations is much more difficult. There is no government guideline to follow and stakeholders have only social-economic powers, meaning the will to cease investing in the company. However, this social-economic power may be enough: the responsibility to respect can be understood as shifting responsibility from the corporation to the stakeholder—only those who are willing to ensure corporate compliance with social norms may benefit from its imposition.[445]

It is exactly this feature of the framework, which could set it up on a collision course in practice: reliance on the raw force of social norms is justified but insufficient because the reference to soft law and non-legal complicity are not helpful.[446] Although the approach of principled pragmatism was predominantly orientated toward the collective problem-solving approach, the participatory design remained ad hoc and stopped short of meeting the capacity constraints of specific groups who were unable to take part in the consultations.[447]

The work done by Ruggie should be seen as "*a necessary interim step in the right direction*."[448] Effectively, Ruggie created a compromise through sneaking past C.S. Lewis' "*watchful dragons*": conveying the Guiding Principles as an idea is much more successful than explicitly stating it in expository form.[449] Ruggie's aspirational principles together with his reconciling attitude are a much more effective way of bringing businesses to the table than imposing upon them a top-to-bottom accountability structure.[450] Ruggie was appointed to address a specific problem, namely to create a common ground for TNC's and states to come together to discuss human rights, and to that end, the Guiding Principles are amongst the

[441] Cata Backer (2010), p. 45.
[442] Cata Backer (2010), p. 45.
[443] Cata Backer (2010), p. 45.
[444] Cata Backer (2010), p. 45.
[445] Cata Backer (2010), p. 45.
[446] Mares (2012), p. 81.
[447] Bijlmakers (2013), p. 298.
[448] Amerson (2012), p. 933.
[449] Amerson (2012), p. 933. See also Lewis (2002).
[450] Amerson (2012), p. 934.

most important milestones in the corporate responsibility debate.[451] It is now up to the UN Working Group to further the thrust of the framework and Guiding Principles and aid in their implementation.

Ruggie himself recognizes that the Guiding Principles are not an international treaty but rather a tool kit, with components to be "*taken out and plugged in*."[452] The Guiding Principles are a normative platform and high-level policy prescriptions intended to strengthen the protection of human rights.[453] The Principles embrace the moral value and intrinsic power of human rights, yet recognize at the same time the context of the global economy.[454] As a result, they go beyond the stalemate induced by the voluntary vs. mandatory debate and reaffirm the state duty to protect and frame corporate responsibility in terms of the familiar risk-based due diligence.[455]

The "Protect, Respect and Remedy" framework is the first comprehensive and complete international framework that is universally accepted by the human rights world and the industry. The main area of concern with regard to the Guiding Principles is that the framework cannot fully address every issue corporations will run into on a daily basis, as it is more a corporate human rights constitution than it is an actual rule of law.[456] Corporations should see the framework as being the international affirmation of their own human rights compliance strategy, but it cannot and should not be misinterpreted as compensating for the lack of a human rights strategy at corporate level. The Protect, Respect and Remedy framework is built on the understanding that TNCs have implemented a complete and effective human rights strategy, preventing adverse human rights impacts. If this strategy does not exist, the framework is reduced to a paper tiger.

Following the end of Ruggie's mandate as UN Special Representative on Business and Human Rights, the UN established a Working Group on the issue of human rights and transnational corporations and other business enterprises, made up of five independent experts for a period of 3 years.[457] In 2014, the mandate of the Working Group was renewed for another 3 years.[458] The duty of the working group is to promote the effective implementation of the Guiding Principles, to identify, exchange and promote good practices, to support the promotion of capacity-building, to conduct country visits and to respond promptly to invitations from

[451] Amerson (2012), p. 935. See also Murninghan, Human Rights: A Moral and Material Business Concern, The Murninghan Post, http://murninghanpost.com/2011/06/30/human-rights-a-moral-and-material-business-concern/.

[452] Ruggie (2013), p. 124.

[453] Ruggie (2013), p. 124.

[454] Ruggie (2013), p. 124.

[455] Ruggie (2013), p. 124.

[456] Larry Cata Backer's comment at the UN Panel on Human Rights and Business in Geneva in December 2013.

[457] A/HRC/17/4.

[458] Human Rights Council Resolution 26/22.

states and finally to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities.[459] The Working Group also reports to the Human Rights Council and the UN General Assembly on its progress and findings. To date, the Working Group has been involved in overseeing the creation of national action plans (NAP's) by the states, implementing the "Protect, Respect and Remedy" framework and the Guiding Principles.[460] It has recently launched a guide on what substance elements are to be included in the NAP's and organizes regular conferences on business and human rights, namely the UN Forum on Business and Human Rights regularly held in Geneva since 2012.[461] Essentially, the creation of the Working Group should be seen as the extension and consolidation of the original mandate of the Special Representative and is a great leap forwards in ensuring UN guidance of the creation of a binding, uniform framework on business and human rights.

6.3 The Ruggie-Deva-Bilchitz Reflection: The Yellow Brick Road to Accountability?

Following the publication of the UN "Protect, Respect and Remedy" Framework and the UN Guiding Principles and the issuing of their book reviewing these, an intense debate developed between John G. Ruggie and Surya Deva/David Bilchitz about the value of the initiative for the corporate human rights debate.

In response to the publication of "*Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*" John Ruggie issued a statement regarding his concerns with the chapters written by Deva/Bilchitz.[462] Ruggie concedes that it is "*perfectly fine*" to disagree on foundational issues as this contributes to the general debate. What proves to be a greater concern to Ruggie are the attempts of Deva/Bilchitz to "*undermine the normative legitimacy*" of the Guiding Principles. Ruggie argues that the tone of the introduction and the respective chapters present him in a negative light, lacking understanding of human rights issues and making nefarious choices in the adoption process of the principles and guidelines. To Ruggie, his work represents the only authoritative guidance the

[459] Working Group on the issue of human rights and transnational corporations and other business enterprises, http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

[460] See also Sect. 7.5.

[461] State National Action Plans, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx. UN Forum on Business and Human Rights, http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx.

[462] John Ruggie responds to Bilchitz/Deva, Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, http://business-humanrights.org/sites/default/files/media/ruggie-comment-surya-deva-david-bilchitz.pdf.

Human Rights Council has ever adopted and is to be understood as a guidance policy on how to make global governance work from a practical aspect. Although legal instruments will play a role in the evolution of the Guiding Principles, they should be used as precision tools to close specific governance gaps.

Following Ruggie's article, Surya Deva and David Bilchitz took it upon themselves to respond to his allegations "*in the spirit of robust discussion and debate*."[463] For the authors, the key issues of concern are the process and methodology adopted the sources and justifications for human rights obligations of business, the nature and extent of these obligations and lastly the implementation of enforcement of the Guiding Principles. The authors question whether the Guiding Principles and the Framework itself are really adequate to address the challenges of corporate human rights compliance because human rights should bind all centers of power. The governance process, argue Deva/Bilchitz, must work in a normative desirable way in accordance with the principles of human rights law. Thus, one must devote to human rights as the underlying normative foundation of the world order. The problem with the UN Framework is the extensive compromise which was necessary in the process of adoption. Human Rights law defines the ends which must be met through the accountability of corporate actions. The suffering of the victims of corporate human rights violations did not translate into sufficiently robust responses for redress, which is reflected in the weak language of the framework. Additionally, Deva/Bilchitz complain of the excessive focus of Ruggie on achieving consensus which resulted in the initiative not being a fully adequate response to the human rights challenges in international business today. Deva/Bilchitz thus call for the creation of a stronger human rights regime for business with a better clarification of TNC obligations.

The Ruggie-Deva-Bilchitz dispute is not only an excellent example of an academic sword fight; it also highlights the reoccurring problem between human rights advocates and business leaders: both sides are lost in translation. While the issue Deva/Bilchitz have regarding the adaptation process of the UN Framework is plausible, had Ruggie refrained from trying to achieve a cross sector consensus, the "Protect, Respect and Remedy" framework would have failed just as the UN Norms did. Bringing together various stakeholders and involving business in the process gives the framework greater legitimacy and publicity. It appears that Deva/Bilchitz were both hoping, like much of the human rights community, that Ruggie's work would culminate in the creation of a treaty on business and human rights, which is reflected in their comments on implementation and enforceability.

The creation of a treaty on the matter would presuppose that the international community of states, politicians and business had reached a consensus on what constitute the obligations of business in the human rights field. As this research has

[463] Response of Surya Deva and David Bilchitz to Comments of Professor John Ruggie, Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*?*, http://business-humanrights.org/sites/default/files/media/documents/surya-deva-david-bilchitz-re-ruggie-15-01-14.pdf.

shown, such an agreement is still far from concrete. Ruggie's work should be seen as a first step towards achieving a universal understanding for the nexus between human rights and business, which is precisely the reason why consensus was so fundamentally necessary. The UN Framework is best understood as a business and human rights constitution laying down the fundamental principles.

The main concern voiced by Deva/Bilchitz regarding enforcement and implementation remains highly valid and is the crucial point of the ongoing business and human rights debate. Better ways of enforcement and implementation need to be found for human rights obligations of business entities. The uptake of the Principles by the UN, governments and workers has been encouraging. However, due to the lack of concrete enforcement elements, compliance with the framework and the Guiding Principles cannot be ensured or monitored. Businesses and states need to develop means and methods to ensure that human rights are respected throughout business operations in every sphere of influence.

As the *top to bottom* approach has currently arrived at an impasse, as illustrated by judicial decisions such as *Kiobel* and the reluctance of the international community to draft a binding agreement on business and human rights, a new, *bottom to top* approach needs to be implemented. Human rights advocates demand greater accountability for corporations who violate human rights while the business community seeks to increase their profit in an ever competitive market. Both aims can be achieved simultaneously, for mutual benefit, through the translation of human rights concerns into an enforceable business strategy. Such a *bottom to top* strategy will not only further the business and human rights agenda by creating binding and enforceable human rights obligations for corporate actors, it will also lead to a reduction of corporate human rights violations as companies will realize that human rights compliance is effectively *good for business*.

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Chapter 7
Translating Human Rights into an Enforceable Business Compliance Strategy

Abstract With the existing human rights initiatives for businesses all falling short in some respect, a new system of human rights compliance for companies needs to be implemented. It will be shown that human rights violations are costly for corporations, as their reputation and brand image suffers and litigation costs can considerably dull profit. Through the creation of an effective human rights compliance strategy, corporations will not only boost consumer and shareholder goodwill, in the long run, they will increase their profit and brand value. The biggest value and benefit of such a strategy, however, is the safeguard of human rights worldwide.

Keywords Compliance • Human rights • Code of conduct • CSR • ISO

7.1 Why Corporate Social Irresponsibility Harms Businesses and Human Rights Equally

The theory of corporate social irresponsibility (CSI) reasons that negative business behavior is condemned by stakeholders and tends to have serious adverse consequences for business entities.[1] CSI can be divided into two subcategories: illegal activity of a corporation, *prima facie* socially irresponsible.[2] The law is a manifestation of the wishes and expectations of society and thus, prohibitions are to be understood as the governments' enactment of the will of society. The second subcategory of CSI is the deliberate exploitation of weaknesses in the law by corporations: the so-called socially irresponsible behavior by a corporation.[3] Thus, CSI exists in two forms: illegal and legal but severely unsustainable, both socially unacceptable behaviors.[4]

CSI can be observed when a company amasses gain at the expense of society through the exploitation of negative externalities. Externalities are defined as the impact of an economic agent's actions on the well-being of a bystander and can be

[1] Amunjo et al. (2012), p. 267. See generally Thauer (2014), pp. 42 et seq.

[2] Clark and Grantham (2012), p. 28.

[3] Clark and Grantham (2012), p. 29.

[4] Tench et al. (2012), p. 9.

J.R.-M. Wetzel, *Human Rights in Transnational Business*,
DOI 10.1007/978-3-319-31325-2_7

either negative or positive.[5] Negative externalities have lately become a considerable part of commercial activity where businesses transferred firm costs to unwilling or unwitting recipients, benefitting themselves at the expense of the total social system.[6] The key solution here is the concept of sustainability, where exploitative activities of vulnerable stakeholders cannot be continued indefinitely even if they are profitable in the short term.[7] Sustainability applies to the triple bottom line of economic, social and environmental contexts: businesses continuing unsustainable practices will risk losing the ability to attract employees, investors and customers.[8] Where a corporation degrades basic resources or rights in the manufacture of their product, their production and marketing constitutes unsustainable business practices and, as a result, CSI.[9] CSI harms human rights and these human rights violations, in turn, harm the company.

7.2 How Human Rights Violations Affect Corporate Reputation and Brand Image

The corporate image is the global evaluation an individual has about an organization while corporate reputation is the sum of the attributed values of a company.[10] A corporation's reputation and image will depend largely on information, experience, observable evidence and opinions and comments in the public sphere.[11] Reputation mirrors corporate heritage as a reflection of the company's past actions.[12] This is particularly important for current and future investors: reputation is a perceptual representation of a corporation's past and future actions and its overall appeal to stakeholders, especially customers.[13]

7.2.1 The Value of Corporate Image and Reputation

A company's reputation and the quality of its human capital have become their most valuable assets in international markets.[14] Corporate reputation is directly

[5] McWilliams et al. (2006), pp. 1–18.

[6] Clark and Grantham (2012), p. 29. See also Armstrong (1977), pp. 185–213.

[7] Clark and Grantham (2012), p. 29.

[8] Clark and Grantham (2012), p. 29. Also Norman and McDonald (2004), pp. 243–262.

[9] Clark and Grantham (2012), p. 29. Wieland and Schmiedeknecht (2010), p. 80.

[10] Amunjo et al. (2012), p. 268.

[11] Roth (2014), p. 27. Zimmermann (2007), p. 16.

[12] Amunjo et al. (2012), p. 269.

[13] Amunjo et al. (2012), p. 269. Zimmermann (2007), p. 16.

[14] Amis et al. (2005), p. 4.

linked to share prices which is why companies have a strong desire to avoid scandals affecting their reputation.[15]

A good reputation attracts customers, investors, human capital and suppliers, while a study from Great Britain has suggested that customer boycott of firms with poor reputation has cost corporations around 2.6 billion British Pounds.[16] It is much easier to gain new customers with a positive reputation and these customers may even be willing to pay more to be associated with this positive reputation.[17] Furthermore, a positive reputation will lead to a better position in a competitive market, opening new markets more easily.[18] Companies today live off and invest in their positive reputation because it is precisely this reputation bringing in business.[19] A good reputation is a strategically essential factor as the general interest in economic affairs has grown considerably and the information availability has drastically increased due to social media and smartphones. Additionally, control and auditing standards have risen considerably due to heightened expectations of regulators and economic associations.[20]

7.2.2 *How Corporate Social Irresponsibility Influences Corporate Reputation*

Actual or potential damage to a company's reputation is considered a key mechanism for ensuring corporate human rights compliance.[21] A company violating fundamental human rights will receive reputational drawbacks, such as performance deficiencies because consumers and stakeholders change their attitude towards the brand.[22] This change in attitude results in the loss of consumer goodwill, business partners and business opportunities and the inability to attract or keep highly skilled workers.[23] "*Lose money for the firm and I will be understanding; lose a shred of reputation for the firm, and I will be ruthless.*"[24] Addi-

[15] Forstmoser (2008), p. 204. Leisinger (2010), p. 127.

[16] Study according to The Independent in March 2005. See also Amis et al. (2005), p. 4. Leisinger (2010), p. 128.

[17] Forstmoser (2008), p. 203. Leisinger (2010), p. 128.

[18] Forstmoser (2008), p. 203.

[19] Bretschger (2010), p. 55. Von der Crone (2000), p. 271. Reich (2007), p. 178.

[20] Forstmoser (2008), p. 205.

[21] Campbell (2007), pp. 946–967.

[22] Firestein (2006), pp. 25–30. See also De Blasio and Veale (2009), pp. 75–83.

[23] Bontis et al. (2007), pp. 1426–1445. See also Houston (2003), pp. 330–342. Furthermore Jones (1996), pp. 269–294. Leisinger (2010), p. 128.

[24] Forstmoser (2008), p. 209.

tionally, studies by Karpoff and Lott and Engelen have shown that the stock market penalizes corporate misconduct much more severely than judicial means or fines.[25]

For a corporation to become the victim of reputational damages due to its misconduct abroad, it must first be established that the situation is, in fact, socially undesirable. Corporate irresponsibility and reputation are perceptual, meaning upon first learning of the event, consumers and stakeholders make their first assessment as to its undesirability.[26] The consumer assesses how personally threatening the event is, or in cases where there is no direct personal danger, how badly the event conflicts with their social perceptions and moral understandings.[27] This moral conflict then provides the backdrop for critical assessment of corporations involved in the event.

The mere existence of corporate misconduct however is not enough to tarnish reputation; rather, the consumer must learn of this misconduct in order to formulate an opinion on the matter, which can then impact corporate reputation.[28] The media plays a particularly important role in this context: a majority of consumers and stakeholders do not experience corporate misconduct first hand as it tends to occur abroad, so they rely on the information provided by media, internet and social media. As the media has the liberty to choose which events it wishes to cover, it has considerable power to influence consumer and stakeholder perception.[29] An example of this phenomenon is the BP oil spill in the Gulf of Mexico and the Jebel al-Zayt oil spill near Egypt's coast, where the BP spill received considerably more media attention than Jebel al-Zayt.[30] As Parkinson points out, in order for a business to be punished by the consumer, said consumer must be fully informed about the ongoing situation in order to make an informed decision.[31] Yet, not all information is made public because corporations do not tend to release information that could have a self-disparaging effect.[32]

"*The crisis cannot be separated from the viewpoint of the one who is undergoing it*".[33] In order for social evaluations to affect corporate reputation, a number of stakeholders must link corporate misconduct to the event. This happens in three steps[34]: (1) The stakeholder or consumer must deem the event to personally threatening or threatening to his moral and social convictions. (2) A company

[25] Karpoff and Lott (1993), pp. 757–802. Engelen (2010), pp. 1–24. See furthermore a study by the ETH Zurich and the Center for Corporate Responsibility and Sustainability which analysed the effect of corporate misconduct on share prices: Kappel et al. (2009), http://www.eea-esem.com/files/papers/EEA-ESEM/2009/854/wp.pdf.

[26] See generally Appiah (2009). Furthermore Leisinger (2010).

[27] See generally Donaldson and Dunfee (1999).

[28] Clapham and Jerbi (2001), p. 197. Keller (2008), p. 274.

[29] Kendall et al. (2007), p. 244.

[30] BP's oil spill in the Gulf of Mexico delivers 15,200,000 hits on Google while Jebel al-Zayt only has 93,800.

[31] Parkinson (1999), p. 49.

[32] Deva (2006), p. 142.

[33] Habermas (1975), p. 58.

[34] Appiah (2009).

must be considered responsible for said event through its actions or inactions. (3) Stakeholders assess the degree of complicity of the company in the event, meaning that the greater the control of a company with regard to the event, the greater the responsibility attributed will be.

These events do not exist in isolation: social evaluations of a firm do not occur in a vacuum because prior knowledge and perceptions of the company will play into the final evaluation a stakeholder will make about an event. These beliefs and resulting biases will shape the evaluation an individual makes about a company in light of the preluding beliefs and convictions.[35] This means that a positive reputation and social performance will act as reputational insurance because the company will be given the benefit of the doubt based on its positive performances in the past.[36] Likewise, if a company has a poor record of socially unacceptable behavior, this negative image will influence consumers to more readily accept negative press about said corporations conduct.

In addition to a loss of consumer goodwill, corporate misconduct can have a detriment effect on the company's real value, resulting in poor stock performance.[37] A study demonstrated, using the Event Study Approach, that public announcements concerning human rights abuses are indeed punished by investors.[38] This is especially evident in the United States and United Kingdom yet Swiss and German investors also react adversely to corporate misconduct, especially in cases of discrimination.[39]

7.2.3 How Corporate Social Irresponsibility Impacted Multinational Oil Corporations in Nigeria

The prime objective of the 2012 study conducted by Amunjo, Laninhun, Otubanjo and Ajala was to investigate the impact on stakeholder perception of corporate reputations of oil corporations operating in the Niger Delta.[40] In their study, the authors employed the qualitative interview method to provide an understanding of human perceptions, experiences and intentions based on a naturalistic interpretation of a subject and its contextual setting.[41] The study consists of direct quotations from the respondents' answers about their experiences, opinions and feelings about corporate misconduct in Nigeria; the questionnaire was handed out to individuals

[35] For a general evaluation of biases, see Kahnenman (2011).

[36] Brammer and Pavelin (2005), pp. 39–51. See also Minor and Morgan (2011), pp. 40–59.

[37] Kappel et al. (2009), p. 1.

[38] Kappel et al. (2009), p. 13.

[39] Kappel et al. (2009), pp. 12–14.

[40] Amunjo et al. (2012), p. 271.

[41] Amunjo et al. (2012), p. 269.

of both sexes between the ages of 25 and 56, cutting across all stakeholder groups who had been following the developments in the Nigerian oil industry.[42]

The study participants could easily identify corporate behavior of the oil corporations operating in Nigeria they deemed to be irresponsible.[43] The terms used by participants included "*Irresponsible*", "*Unethical*", "*Inhuman*" and "*Exploitative*", indicating a clear awareness of the unethical operational activities of some oil firms.[44] Respondents of the study were furthermore able to name a considerable number of firms who had been implicated in corporate misbehavior in Nigeria, including Shell Royal Dutch Petroleum (mentioned 54x), Chevron Texaco (mentioned 44x) and ExxonMobil (mentioned 33x).[45] When comparing the number of times the companies were mentioned by the respondents with the frequency in which they had been named in media reports, it was discovered that all three firms had been mentioned equally, indicating that some corporate misconduct was perceived as graver than other.[46]

Among the misconduct mentioned by respondents as to what unethical corporate behavior of multinationals operating in Nigeria they could name was the underdevelopment of the oil communities, the poor handling of oil spills and gas flaring, the environmental pollution, the arming and funding of military and police forces to kill and maim protesters as well as tax evasion.[47]

The study furthermore discovered the absence of strong corporate governance in Nigeria, making it possible for oil company officials to circumvent the law through corruption and bribery in order to secure oil contracts in Nigeria.[48] Weak corporate governance, lack of ethical and business standards as well as the absence of monitoring or compliance mechanisms lead to abuses of shareholder's rights all over Nigeria.[49]

7.3 Why Corporations Should Behave Socially Responsible

Dependence on self-regulation is no longer sufficient to ensure corporate respect for human rights, as the reliance on moral obligations cannot, on its own, ensure corporate human rights compliance.[50] Many economic actors still rely solely on

[42] Amunjo et al. (2012), p. 270.

[43] Amunjo et al. (2012), p. 284.

[44] Amunjo et al. (2012), p. 280, Table 3.

[45] Amunjo et al. (2012), p. 273, Table 2.

[46] On 21.04.2015, Google has 384,000 hits for Shell's misconduct, 155,000 for Chevron's and 202,000 for Exxon's.

[47] Amunjo et al. (2012), p. 272.

[48] Amunjo et al. (2012), p. 284.

[49] Amunjo et al. (2012), p. 284.

[50] Roth (2014), p. 19.

the legal dimension, disregarding anything outside its scope. Ultimately, the absence of institutional protection of moral values, especially in the realm of human rights, will endanger both society and the economy.[51]

The idea of corporate social responsibility (CSR) originated from the political idea of what companies should do according to the demands of society.[52] It is essentially the answer to the question whether corporations have social responsibilities.[53] Principally, social, environmental and financial success have the same baseline: an enforceable, sustainable strategy.[54] The Triple-Bottom-Line standard therefore expects a company to (1) serve stakeholder desires, such as gain optimization (2) to serve society through responsible, sustainable investment and (3) to serve the environment by ecologically sustainable business practices.[55]

Today, CSR has been defined in various ways: some argue that it is the social responsibility of business to use its resources and engage in activities designed to increase profits so long as they stay within the game, while others claim that companies should obey the law, be profitable, be ethical and be a good corporate citizen.[56] Generally, however, all theories of CSR require corporate actor to be good corporate citizens.[57] As such, it has become an obligation of an economic organization to act in a way that serves not only its own interests but also those of the external stakeholders.[58]

Essentially, CSR and corporate governance (CG) are intended to better adjust companies to public, social and environmental needs through ethical management.[59] CSR and CG are closely linked to the socio-economic process and can act as considerable drivers for the development of frameworks through which a company can demonstrate its responsibility towards society through its performance.[60] CG thus helps to apply CSR in companies through corporate self-regulation and management demonstrating responsibility towards the community and the environment.[61] GC should be seen as the translator from why companies should behave socially responsible to how they can become socially responsible.[62]

Corporate Social Responsibility leads to gain optimization for investors, socially responsible behavior of corporations benefitting society and sustainable

[51] Roth (2014), p. 19. See also Sect. 4.5.

[52] Thauer (2014), p. 40.

[53] Roth (2014), p. 15.

[54] Forstmoser (2008), pp. 200 et seq. Also known as the Triple-Bottom-Line Standard.

[55] Roth (2014), p. 16.

[56] Kasum (2014), p. 262. See furthermore Whitehouse (2006), pp. 279–296.

[57] Kasum (2014), p. 262. Federal Council Position Paper (2015), p. 5. Addo (1999), p. 187.

[58] Kasum (2014), p. 262. The Swiss Federal Council has expressly accepted this notion, Federal Council Position Paper (2015), p. 5. Different opinion Velasquez (1992), pp. 28 et seq.

[59] Rahim (2014), p. 94.

[60] Rahim (2014), p. 100. Federal Council Position Paper (2015), p. 6.

[61] Rahim (2014), pp. 100–101.

[62] Rahim (2014), p. 108.

management of natural resources.[63] CSR is best understood to be a way of bringing together capitalism and social values: "*CSR demands attention to social concerns while retaining the capitalist frame of predominantly profit-seeking organizations*."[64]

Effective CSR means that a firm goes beyond simple compliance mechanisms and engages in actions furthering the social good beyond the immediate company interest or what is strictly required by law.[65] This social responsibility encompasses economic, legal, ethical and discretionary expectations society has of all organizations at a given moment.[66] Making a contribution to the society it operates in is a sound social investment and helps a corporation gain a social license to operate.[67]

> CSR has emerged out of the expectation that socially acceptable outcomes are often at odds with shareholder supremacy, and while the convergence of the ethical and business cases for various good practices is to be hoped for, this does not undermine the finding that CSR often demands choices between maximal profitability and maximal prosocial outcomes.[68]

CSR should be taken as a "*discourses of corporate citizenship, corporate social responsibility, and corporate sustainability as ideological discourses that are intended to legitimize the power of large corporations*."[69] CSR thus should be viewed as a step beyond the self-interest of shareholders and towards a wider social circle.[70]

Corporate compliance with human rights is necessary for the "*bottom line*".[71] If a company adheres to human rights standards, this will increase their profit because the consumer will view the company with goodwill, improving their reputation[72] and will give them reasonable advantage. Companies operate in a competitive market and if the company's reputation suffers because it is not doing what it is supposed to be doing, then consumers and investors will go elsewhere.[73] A study conducted in Turkey found that a company's perceived CSR attributes were a contributing factor towards product purchases.[74] It furthermore suggests that companies coveting to increase their consumer circle or volume should engage in CSR efforts.[75]

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[63] Roth (2014), p. 16. Hardtke and Kleinfeld (2010), p. 14.

[64] Sabadoz (2011), p. 78. See also Roth (2014), p. 15.

[65] Amunjo et al. (2012), p. 266. See also McWilliams et al. (2006), pp. 1–18.

[66] Amunjo et al. (2012), p. 266. Also Carroll (1979), pp. 497–505.

[67] Forstmoser (2008), p. 200. Amunjo et al. (2012), p. 266. Furthermore Howard-Grenville et al. (2008). Federal Council Position Paper (2015), p. 7.

[68] Sabadoz (2011), p. 84.

[69] Sabadoz (2011), p. 80.

[70] Massoud (2013), p. 42.

[71] Deva (2006), p. 139. Roth (2014), p. 16.

[72] See Sect. 7.2.1

[73] Kasum (2014), p. 262. Also Whitehouse (2006), pp. 279–296.

[74] Ekmekci (2014), p. 69.

[75] Ekmekci (2014), p. 70.

7.4 How Human Rights Can Be Translated into an Effective Business Strategy Targeting Corporate Human Rights Compliance

A human rights policy gives companies a framework within which they can target the inevitable human rights problems of internationally operating companies as soon as they arise.[76] Even though the primary obligation to tend to human rights considerations still lies with the states, an increasing number of corporations has realized that they also must conduct their business abroad in a way that is sustainable and in accordance with the law.[77]

Corporate codes of conduct are essentially the written clarification of how operational success is to be achieved and what conduct is to be prevented.[78] They are ethical guidelines of which values are to be respected in business operations even if their violation would increase the profit margin of the business.[79] Codes of conduct provide a means of orientation in situations of moral dilemma, concretizing corporate values, providing the operative basis for expected conduct and sensibilising employees to potentially or factually harmful conduct.[80] Corporate codes of conduct can only function properly if they establish and implement mechanisms for monitoring, enforcement and review.[81]

7.4.1 Why a Human Rights Strategy Is Necessary

Those corporations who have not yet implemented a human rights strategy argue that doing so would only result in costing the company money and would not contribute to the business effort, as the only purpose of business is business. In today's business climate however, where customers and stakeholders expect sustainable corporate behavior, a successful business can no longer afford to ignore the human rights question.[82]

Implementing a human rights policy is necessary for businesses because it grants them an economical advantage *vis-à-vis* their competitors.[83] Corporations who recognize and accept that human rights form an integral part of the social and environmental agenda develop practical knowledge and experience when dealing

[76] Amis et al. (2005), p. 4. Federal Council Position Paper (2015), p. 9.
[77] Buntenbroich (2007), p. 67.
[78] Thielemann and Ulrich (2009), p. 43. Wawryk (2003), p. 53.
[79] Roth (2014), p. 86. Thielemann and Ulrich (2009), p. 43.
[80] Roth (2014), p. 87.
[81] Wawryk (2003), p. 53.
[82] See Chap. 4.
[83] Wawryk (2003), p. 61.

with human rights issues. This experience will grant them a competitive advantage in new markets where similar human rights issues prevail, compared to those corporations who have not implemented a human rights strategy.[84] There is considerable evidence demonstrating that consumers are being influence by positive corporate behavior. In 2004, UK consumers spent 140 million of Fairtrade products, which presents a year-to-year increase of 53 %.[85] Additionally, ethical consumption from mainstream goods produced by corporations acting in accordance with ethical standards has reached an estimated worth of 20 billion British Pounds a year in 2005.[86] The benefits of a human rights policy will go beyond reputation and assurance processes, fostering business growth and commercial opportunities by granting access to new markets, new suppliers and, most importantly, new consumers.[87]

Brand reputation will be positively influenced through the implementation of a corporate human rights strategy.[88] Being implicated in human rights scandals, as were Shell, Nike and Coca-Cola, jeopardizes customer loyalty and undermines the corporate license to operate. Even though, customers did not use go out of their way to find products produced according to ethical standards, this approach has begun to change in modern society, which places sustainability and ethics at the top of the agenda.[89] When given the choice today, customers and consumers will chose a product or service that has a clean reputation and track record. This has also begun to translate into company and state relationships, where many governmental and commercial contracts now require suitable human rights conduct by the corporations. Failure will lead to termination of contracts, losing companies considerable amounts of money and future business opportunities.[90] Human Rights respect is a sign of good corporate culture and citizenship as it helps to win the fight for talent and is an important factor for attracting and retaining employees. A good corporate human rights reputation will furthermore increase the appeal of a corporation as an investment choice.

Recruitment will benefit from a positive human rights conduct. Competing for highly skilled employees is a major challenge for businesses in today's market. Businesses thus need to use all possible strategies to attract and keep those

[84] Amis et al. (2005), p. 4.

[85] Amis et al. (2005), p. 4.

[86] The Independant, May 2005. See also Amis et al. (2005), p. 5.

[87] Neil Makin from Cadbury Schweppes.

[88] Wawryk (2003), p. 61.

[89] Boulstridge and Carrigan (2000), pp. 355–368. See also Mohr et al. (2001), pp. 70–71.

[90] Prime example is the Norwegian Pension Fund, which has been known to remove companies from their investment list for poor human rights or environmental conduct, including DRD Gold. Belgian KBC Bank dropped Rheinmetall from their investment list following allegations of involvement in the creation of cluster bombs. See: Facing Finance 2007, http://www.facing-finance.org/database/cases/production-of-cluster-munitions-by-rheinmetall/. See also Facing Finance 2012: http://www.facing-finance.org/de/2012/07/frontal-21-geschaefte-mit-geaechteten-waffen-deutsche-ruestungskonzerne-unter-verdacht/.

individuals who will boost the company's future performances. Firms that have a reputation for engaging in superior work practices and who respect human rights reportedly receive 45 % more unsolicited job applications than those who do not, granting them an undeniable competitive advantage when trying to obtain top-level employees.[91] An independent study conducted in 2007 found that of 800 full-time U.S. workers, aged 18 and older, "*94 % of the respondents said it was either 'critical' or 'important' that they work for an ethical company. Further, 82 percent of respondents said they would prefer to be paid less and work for a company with ethical business practices than receive higher pay at a company with questionable ethics*."[92]

Creating and implementing a strong human rights policy will reinforce a company's value as an employer because it sends out a strong message as to what the company stands for. Ethical workplace cultures make it easier for employees to do the right thing, while making it harder for them not to.[93] Companies should thus hire people with an ethical mindset and train them to obtain the skills necessary, as it is much harder to change a mindset than a skillset.[94] After all, ethical employees make ethical companies.

Employees working for businesses they believe to be highly ethical tend to display their loyalty not only within the company but also in their immediate surroundings, making them valuable brand ambassadors and an invaluable asset for recruitment.[95] Not only will a human rights policy improve employee identification with the company, it will also provide employees operating in challenging locations with a framework, building staff confidence and morale. Additionally, rankings such as *Ethisphere's Most Ethical Companies* underline the importance of ethical companies for employees.[96] In 2015, Ethisphere ranked companies such as Gap, H&M, Coca-Cola, Google, Henkel and Kellogg's as companies with particular ethical commitment.[97] Interestingly, Google and Coca-Cola also rank among the top 25 of Global Companies for employees, according to Fortune.[98]

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[91] Hewitt Associates Press Release, January 3rd 2005 in. Amis et al. (2005), p. 5.

[92] News and Notes, Worldatwork Work Span 03/07, http://www.worldatwork.org/workspan/Pubs/News_and_Notes_Employees_Prefer_Ethical_Company_to_Higher_Pay.pdf.

[93] Creating an Ethical Workplace Culture: Hire for Character, Train for Skills, Business and Ethics Leadership, http://josephsoninstitute.org/business/blog/2010/11/creating-an-ethical-workplace-culture/.

[94] Creating an Ethical Workplace Culture: Hire for Character, Train for Skills, Business and Ethics Leadership, http://josephsoninstitute.org/business/blog/2010/11/creating-an-ethical-workplace-culture/.

[95] Amis et al. (2005), p. 5.

[96] World's Most Ethical Companies, Ethisphere, http://ethisphere.com/worlds-most-ethical/wme-honorees/.

[97] World's Most Ethical Companies, Ethisphere, http://ethisphere.com/worlds-most-ethical/wme-honorees/.

[98] The 25 Best Global Companies to Work For, Fortune, http://fortune.com/2014/10/23/global-best-companies/.

Through the implementation of a human rights strategy, stakeholder and consumer concerns will be addressed, fostering goodwill from both focus groups. Building trust and confidence will ensure security and effectiveness in the long-term. A transparent and responsible commitment to human rights enhances the brand relationship with consumers and will function as a reputational insurance, granting the company a greater margin of error in cases where the business runs danger of being linked to human rights violations.[99] On the other hand, poor relations with stakeholders and consumers can lead to resentment and suspicion and a loss of corporate credibility. Mistrust of corporations can even lead to false accusations being circulated about the business, potentially endangering corporate reputation and profit.[100]

Investment practices today also pay close consideration to a company's human rights record when supporting their business. In the highly competitive investment sector, a poor human rights record constitutes a business risk that fewer investors are willing to take. The rationale is that understanding the risks a business faces in the area it operates will reflect on the impact of those risks on productivity and performance. A management that is aware of risks and that takes steps to mitigate these indicates a greater quality of management, making it a good investor choice.[101] Investors are increasingly concerned about investing in companies operating abroad in unstable conditions because they might become implicated in gross human rights violations. Businesses that have implemented a human rights policy will minimize the risks of such negative implications, making them a better investment choice and building investor confidence, increasing corporate value. Practical examples of this include the FTSE4 Good Global Index and Dow Jones Sustainability Indices, which demand strict human rights criteria by companies prior to including them in their indices.[102]

Cost is a last, fundamental factor, of a company's activities positively affected by an effective human rights strategy. Not only will recruitment, production interruption and crisis management costs be reduced, more importantly, litigation expenditures will be considerably lowered. Businesses want to avoid lawsuits as much as possible, because their reputational and financial damages are beyond control, going well within million dollars.[103] Human rights litigation has become too expensive to ignore for corporations, even with the ATS no longer being a

[99] Amis et al. (2005), p. 9. See also Sects. 7.1 and 7.2.

[100] See Sects. 4.3.4 and 7.2.2.

[101] Amis et al. (2005), p. 9.

[102] FTSE4 Good Global Index, http://www.ftse.com/products/indices/FTSE4Good. Dow Jones Sustainability Index, http://www.sustainability-indices.com/.

[103] Texaco and Home Depot Inc. have both had to pay over 100 million USD to settle discrimination suits in domestic courts. Coca Cola setteled a racial discrimination case for 192.5 million dollars, Shell paid Ken Saro-Wiwa's wife 15.5 million USD to settle her ATS claims and Nike settled their case with Kasky for 1.5 million USD.

For further settlement cases, see http://www.lawyersandsettlements.com/settlements/civil-human-rights-settlements/.

possibility for litigation. Countries like Switzerland, in its criminal code provision 102 StGB *Verantwortlichkeit des Unternehmens*, allow for corporate responsibility, and cases pertaining to extraterritorial human rights violations have also been filed in the UK, Canada, Belgium and Australia, yet international human rights law has not caught up with these developments yet.[104] Winning back customers and investors after highly publicized lawsuits will also incur considerable expenses, as companies will find the need to invest in social projects to rebuild the trust of the affected communities and, in turn, consumers and stakeholders. These unnecessary costs can be avoided with practices and policies aimed at recognizing and mitigating human rights challenges adequately and proactively.[105]

Corporate codes of conduct, through their harmonization with international standards and human rights declaration, have led to the creation of a corporate consensus on acceptable corporate behavior.[106] These codes have opened the door to cross-sector dialogue on human rights concerns and have thus created a greater acceptance for human rights standards as being an integral part of sustainable business. The most important contribution of this acceptance of corporate codes to human rights accountability is the voluntary adherence to them.[107] Corporations now adhere to the values enshrined within their corporate codes without further enforcement mechanisms because they themselves have developed the understanding that human rights are good for business.

As a matter of fact, one can no longer argue that corporate human rights codes are purely voluntary. [108] For employees, suppliers, subcontractors and CEOs, the provisions of the codes have become binding, for failure to comply leads to sanctions. Some corporations have made their codes binding by allowing enforcement monitoring and auditing from the outside.[109] Due to this convergence between corporate codes and human rights standards, minimum standards are created.[110] Thus, although a centralized system with binding standards is currently still missing, a hybrid system of various initiatives has been created, fostering corporate human rights compliance within the legal system.[111]

Codes of conduct are an essential tool to creating and ensuring complete responsibility of corporate actors.[112] The submission to rules and standards of operations results in the creation of a sustainable and viable corporate culture.

[104] Ward (2003). See also Amis et al. (2005), p. 8.
[105] Amis et al. (2005), pp. 8–9.
[106] Buntenbroich (2007), p. 135.
[107] OECD (2001).
[108] Buntenbroich (2007), p. 135.
[109] Corporate Social Responsibility Practice (2003), p. 15.
[110] Buntenbroich (2007), pp. 17–92.
[111] Horn (1980), p. 59. Buntenbroich (2007), p. 137.
[112] Roth (2014), p. 89.

7.4.2 *Building an Operative Human Rights Compliance Policy*

Companies should create an operative human rights policy because good market conduct is driven by respectable behavior inspired by a code of conduct and not only abstract rules and regulations.[113] Companies adopting human rights policies can publicly affirm their commitment and proactively manage impacts internally.[114] Successful companies should focus on responsibility rather than power, as this will lead to long-term success and societal reputation rather than constantly running on short term results.[115] Human rights questions need to be addressed not only out of moral responsibility but because good managers realize that a first class company cannot operate with a second class human rights record.[116]

The baseline for any corporation establishing an operative human rights policy is to operate in accordance with the law at all times. Even though technically self-explanatory, corporations sometimes have difficulty when operating in blurred legal circumstances. Where the legal situation is unclear, where the home state fails to adequately fulfil its obligations or where there exists doubt as to the extent of corporate duties, corporations must not only comply with existing scripted laws but also in accordance with generally accepted principles of law such as good faith. If a corporation is unwilling or unable to comply with its legal obligations, any human rights strategy, no matter how effective, will fail to prevent abuses.[117]

7.4.2.1 Identification of Key Human Rights Concerns

Before creating a successful operative strategy, key human rights concerns and expectations must be identified.[118] The activities of the company, which are most likely going to be of concern, should be recognized, also taking into account the concerns of the relevant stakeholders. Companies should pay attention to past criticism to ensure that these issues will be mitigated in future. Any consultation procedures as to concerns of employees, management and other stakeholders should be transparent and must be adapted constantly to ensure that developing concerns are incorporated quickly and effectively.

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[113] Carlson Tong, Chairman of the Securities and Futures Commission of Hong Kong, EY (2014), p. 8. Wawryk (2003), p. 61. Jungk (1999) p. 175. See generally Thorsen (1999), pp. 197 et seq.

[114] Leisinger et al. (2010), p. 35.

[115] Drucker (1993), p. 97.

[116] Drucker (1993), pp. 97–101. Leisinger et al. (2010), p. 34. Leisinger (2010), p. 116.

[117] Herrmann (2004), p. 216.

[118] Jungk (1999), p. 175. Herrmann (2004), p. 216.

7.4.2.2 Existing and Potential Human Rights Risks

Once concerns have been identified, a next step must be the discovery of existing or potential risks of the company's operating procedure.[119] How human rights issues can impact the company's activities, the risk they pose to operations and the reputational damage must be acknowledged. Current company performance should be evaluated against competitors in the sector as well as against industry standards. Key human rights concerns must be prioritized, setting clear parameters for the action required to meet these. These parameters must be communicated in a clear fashion not only internally but also externally. Corporations need to recognize in this respect that modern information technology makes it impossible to keep failure secret, thus potential shortcomings need to be communicated to internal and external stakeholders; in fact, open communication should be used as a tool to gain support from stakeholders and consumers in addressing and resolving problems. Past human rights challenges should serve as motivation for future challenges, creating a corporate experience that influences future corporate behavior.[120]

7.4.2.3 Managing Human Rights Risks and Impacts

Assessing risks and impacts of corporate operations is the next step. The company must recognize which human rights issues lie within the core business activities, those that arise between the company and the community in which it operates and those that occur in the relationship between the business and the national government of the host state.[121] The company must determine its sphere of influence, especially in cases where the company is a significant employer, taxpayer or consumer of natural resources because recognizing and assessing potential human rights risks is of particular importance in these constellations.[122] Companies whose operations will significantly impact the environment or that will leave a heavy social footprint must ensure that human rights considerations are being taken into account.[123] Of particular relevance to companies should be the Human Rights Compliance Assessment Tool (HRCA) of the Danish Institute on Human Rights.[124] The HRCA is an online tool designed to detect human rights risks in company operations, based on 195 questions and 947 indicators, measuring the implementation of human rights in company policies and procedures. It also incorporates the Universal Declaration of Human Rights and over 80 human rights treaties and ILO conventions. Companies answer the relevant HRCA questions and obtain a final

[119] Jungk (1999), p. 177.
[120] Herrmann (2004), p. 218.
[121] Leisinger et al. (2010), p. 36.
[122] Jungk (1999), p. 179, Figure 3.
[123] Haasz (2013), p. 169.
[124] Danish Human Rights Institute, https://hrca2.humanrightsbusiness.org.

report identifying areas of compliance and non-compliance in their operations. Scoring allows companies to track yearly performances.[125]

7.4.2.4 Binding Human Rights Responsibilities

The creation of binding responsibilities must follow corporate human rights risk assessment. Only if a strategy is formulated in a compulsory manner will it ensure corporate human rights respect and compliance. As a matter of fact, the failure to enforce codes of conduct can even be harmful for a corporation. [126]

Senior level management needs to be assigned responsibility for the implementation and overseeing of the policy must be published both internally and externally.[127] Through this approach, the human rights policy becomes a vehicle for the executive support of human rights, facilitating ownership, and buy-in from the corporate leadership.[128] Clear procedures on the implementation, monitoring, reporting and sanctioning need to be put into place and adequate training needs to be supplied.[129]

Continuous supervision of the policy will ensure that any shortcomings will be dealt with immediately. Procedures need to be created that will process and analyze the corporation's human rights performance against the human rights goals it has set for itself, much like profit or sales analyses.[130] Monitoring and evaluation tools should be used as a tool to raise awareness for the quest of the business to operate in a sustainable, human rights obedient manner.[131] Furthermore, any such tools must protect those who report malpractice within the organization. Corporations should consider hiring third parties to conduct this monitoring process.[132] The assessment and review of a third, neutral party, will help the company to keep track of shortcomings and ways to improve their human rights accountability.

7.4.2.5 Sanctioning Mechanisms

Most importantly, any failures to implement or observe the company's human rights policies must be sanctioned immediately. The maxim "*what gets measured get done*" finds particular application here.[133] Only through sanctions can the

[125] The HRCA, https://hrca2.humanrightsbusiness.org/.

[126] Forstmoser (2008), p. 206. See Sects. 7.1 and 7.2.

[127] Thorsen (1999), p. 197.

[128] Leisinger et al. (2010), pp. 35–36.

[129] Haasz (2013), p. 170.

[130] Thorsen (1999), p. 199.

[131] Jungk (1999), p. 184.

[132] See Sect. 5.4.6.1. BP hired Ernst & Young to review their human rights commitment

[133] Forstmoser (2008), p. 208.

company's dedication to human rights be underlined and exemplify that breaches of policy will not be tolerated. This will not only send a clear message to employees and business partners, it will also positively resonate with buyers, investors and customers. Relying solely on declaratory statements such as "*We respect human rights*", "*We adhere to the UN Global Compact*" or any internal human resource policies are insufficient to ensure corporate compliance with human rights standards and do not compensate for corporate failure abroad nor will they protect a business and its reputation in case of human rights violations. Statements of intent are a decent starting point for businesses wishing to create a human rights policy, but on their own remain inadequate in addressing the modern challenges of human rights in transnational business operations.

7.4.3 How Human Rights Have Been Translated into Business Policies in Practice

Although many corporations have initiated human rights statements and policies,[134] there are four major business players who have begun to create successful business policies targeting their human rights issues. Although such codes of ethics or codes of conduct have somewhat become the norm, the discrepancy between the various codes is large.[135] Codes of conduct have become more than just good business cards; they embody moral, cooperation, communication and performance values.[136] Corporate codes of conduct are the company's public response to claims for ethical and sustainable business practices.[137] Essentially, the investigated codes of conducts give the corporation its identity, differentiating them from the competition.[138]

7.4.3.1 Yahoo: Winning with Integrity

Yahoo's Code of Ethics, entitled *Winning with Integrity*, applies to all "Yahoos", as the employees are called, and is directed at the relationships between employees as well as at the users, the stockholders, customers, partners and suppliers. Yahoo believes that the conduct of those employed by it or affiliated with it must always reflect Yahoo's values, its ethical leadership and must uphold Yahoo's reputation

[134] Koeltz (2010), p. 198. Wawryk (2003), p. 73.

[135] Wieland and Schmiedeknecht (2010), p. 94.

[136] Wieland and Schmiedeknecht (2010), p. 94.

[137] Ratner (2001–2002), p. 531. Furthermore Gordon and Miyake (2000) Deciphering Codes of Corporate Conduct, OECD Directorate for Fin., Fiscal & Enter. Affairs Working Paper on International Investment No. 1999/2.

[138] Wieland and Schmiedeknecht (2010), p. 95. Ratner (2001–2002), p. 531.

for integrity.[139] Yahoo considers that the values it enumerates in its code not only shape its corporate culture, but they also define the character of the company: they are at the heart of what Yahoo is and does.[140] All of Yahoo's business must be conducted with honesty and integrity while individuals must refrain from doing anything that could or would harm Yahoo's reputation. Employees and management are thus asked to conduct their business activities using *Good Judgment Questions*: "*Is it ethical? Is it legal?*"[141]

Yahoo strives to make the communities in which it operates better places to live and work, a quest which is underlined in their human rights commitment: Yahoo supports the idea that every user should enjoy human rights such as freedom of expression and human dignity. The company believes that these values can be protected and promoted through thoughtful and responsible business decisions and processes and by vigorously applying all laws safeguarding these rights. To further their commitment to the human rights agenda, Yahoo has created the "*Yahoo Business and Human Rights Program*", an initiative that integrates human rights issues into the way Yahoo makes business decisions and promotes innovate solutions to human rights challenges.[142]

What is innovative about Yahoo's Code of Conduct is that it is enforced through various tools and channels, overseen by Yahoo's Ethics Compliance Officer, ECO. The ECO administers and oversees the code and its application and provides all Yahoos with guidance as to the implementation and furthering of the code.[143] The ECO can be reached by telephone, email, through a reporting website or by mail. Those who wish to report ethics violations anonymously can do so using the 24-hour IntegrityLine or the Online Ethics Reporting Tool.[144] All reported violations will be investigated and those who fail to comply with the requirements set out by Yahoo's code will be subjected to disciplinary action up to and including termination of employment, civil legal action or criminal prosecution. What makes the "Discipline" Section of Yahoo's Code of Conduct so revolutionary, however, is its final provision:

> In addition, subject to applicable law, disciplinary action up to and including termination of employment may be taken against anyone who directs or approves infractions or has knowledge of them and does not promptly report them in accordance with our policies.[145]

In practice, Yahoo conducts Human Rights Impact Assessments (HRIA) to identify circumstances when freedom of expression or privacy may be jeopardized or advanced, as they are the rights most impacted by Yahoo's business. The HRIA

[139] Yahoo's Code of Ethics, p. 1.
[140] Yahoo's Code of Ethics, p. 3.
[141] Yahoo's Code of Ethics, p. 6.
[142] Yahoo Business and Human Rights Program, http://yahoobhrp.tumblr.com.
[143] Yahoo's Code of Ethics, p. 43.
[144] Yahoo's Code of Ethics, p. 44.
[145] Yahoo's Code of Ethics, p. 46.

is the starting point for Yahoo's ongoing review of the human rights agenda and its business plans. An HRIA review consists of the international legal and moral foundations for the rights concerned, the general human rights issues in the country of operations with a particular focus on rule of law and local laws as well as Yahoo's business and product plans for entry into the market.[146]

HRIA are undertaken when Yahoo enters into new markets, launches new products or services, when it reviews and revises internal procedures for government demands, when making data storage decisions or when it reviews the policies, procedures and activities of partners, suppliers and investors.[147] The company conducts short-form HRIAs for specific, targeted questions. Where Yahoo identifies significant risks to users' human rights, however, it undertakes a long assessment. This provides a comprehensive background on the business plans, human rights issues, potential risk mitigation strategies, and other relevant information.[148]

Based upon what results the investigation produces, the company identifies potential human rights risks and formulates risk scenarios based on the products and operations available. Recommendations are then issued to avoid the risks and to promote human rights. As part of this process, Yahoo consults with a variety of experts including Amnesty International, the Economist Intelligence Unit, Human Rights Watch or the University of Minnesota Human Rights Library and the US Department of State.[149]

Yahoo insists on high ethical standards and aims to preserve its legacy through governance that is principled and legal. The challenges facing the company as well as the expectations of the stockholders, employees, business partners and stakeholders can only be met by embracing a Code of Conduct that is clear and unrelenting. Nonetheless, it remains to be seen how effectively and thoroughly the implementation procedures are carried out.

7.4.3.2 Coca-Cola: Acting with Integrity

In the opening remarks to the Coca-Cola Code of Business Conduct, Coca-Cola CEO Muhtar Kent underlines that Coca-Colas business is built on trust and a positive reputation. However, to Kent, acting with integrity is about more than corporate image and reputation; it is about sustaining a place of employment where everyone is proud to work.[150] Coca-Cola views integrity as a fundamental value of the company and a pillar for growth. As a result, its code of conduct addresses the responsibilities of the employees to the company, to each other and to customers, suppliers and consumers as well as to governments. Coca-Cola employees must

[146] Yahoo Human Rights Impact Assessments

[147] Yahoo Human Rights Impact Assessments.

[148] Yahoo Human Rights Impact Assessments.

[149] Yahoo Human Rights Impact Assessments.

[150] Coca Cola Code of Business Conduct, Introduction.

follow the law at all times, act with integrity and honesty and be accountable for their actions.[151]

Coca-Cola expects all employees to comply with the code and the relevant legal provisions wherever they operate. Good judgment must be practiced and improper behavior avoided. In order to aid employees in determining what conduct is in accordance with the code, the document offers five guiding questions: "*(1) Is it consistent with the code? (2) Is it ethical? (3) Is it legal? (4) Will it reflect well on me and the company? (5) Would I want to read about it in the newspapers?*" If the answer to any of these guiding questions is "*no*", then employees are to refrain from engaging in the activities in question.

Coca-Colas Code of Business is supplemented with a Human Rights Statement directed specifically at its performances. In the statement, the company underlines that it is committed to conduct its business ventures responsibly and ethically and that it respects the relevant human rights principles as enumerated by the UN Declaration on Human Rights and the ILO Principles. It furthermore adheres to the UN Global Compact.[152] Coca-Cola acknowledges that these international principles are consistent with its approach of creating an enriching workplace, preserving the environment and strengthening the communities in which it operates.[153]

The firm is convinced that a serious commitment to human rights is essential for the way it conducts its business operations. This commitment to human rights is underlined by Coca-Cola's Code of Business Conduct, their Workplace Rights Policy and the governance and management systems.[154] The principles enumerated in these documents apply to Coca-Cola and all the entities in which it holds a majority interest while the company also aims at upholding these values with regard to its independent partners.[155] The true measure of a successful business is not only financial success but also how this success is achieved; as a result of its transnational operations, Coca-Cola recognizes that it is not enough to be profitable but that it must furthermore operate responsibly.[156]

The Business Code foresees various methods of enforcement. Primarily, it places responsibility on managing staff, demanding that mangers should model appropriate conduct at all times. Employees must understand their responsibilities and the code should be discussed and its values reinforced. Managers must create an environment that allows employees to voice their concerns with regard to the code and they must refrain from directing employees to reach business results at the expense of ethical conduct.[157]

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[151] Coca Cola Code of Business Conduct, p. 3.

[152] See Sect. 6.1.

[153] Coca Cola Human Rights Statement, p. 1.

[154] Coca Cola Human Rights Statement, p. 1.

[155] Coca Cola Human Rights Statement, p. 1.

[156] Coca Cola Human Rights Statement, p. 2.

[157] Coca Cola Code of Business Conduct, p. 5.

The enforcement mechanism of Coca-Cola's Business Code is the Ethics and Compliance Office and the Ethics Lines established to oversee compliance with the provisions of the code.[158] The Ethics and Compliance Office is overseen by the Chief Financial Officer, General Counsel and Audit Committee and is comprised of senior governance functionaries and operations representatives.[159] Any alleged violations are investigated by the Audit, Finance, Legal or Strategic Security department, who report back to the Ethics and Compliance Office. The office will then make all relevant decisions about disciplinary measures to rectify the offense. The measures will depend on the nature and the gravity of the violation, ranging from letters of reprimand to suspension without pay, loss or reduction of merit increase, loss of bonus or stock options or, as a last resort, termination of employment.[160]

In a statement on its website, Coca-Cola underlines that it expects the company itself as well as bottling partners and suppliers to avoid causing or contributing to adverse human rights impacts as a result of its business operations.[161] Coca-Cola has undertaken much work to bring its business system in line with these human rights policies: it has worked together with John Ruggie during the creation of the "Protect, Respect and Remedy" Framework, which it now views as one of its touchstones when developing new programs and practices.[162] In 2011, Coca-Cola was included in Calvert Investments Inc. Social Index for meeting its "*environmental, social and governance criteria*" as a result of great progress in labor and human rights standards.[163]

Coca-Cola has managed to use the experience from its past failures in Colombia to create a Code of Business Conduct that is both comprehensive and enforceable. The company has realized the great reputational danger that corporate human rights violations entail and has been able to use this knowledge to create a functioning code aimed at changing the way the company does business. The company's cooperation with John Ruggie on the UN Framework demonstrates its seriousness as to the commitment it has undertaken and the leadership role it takes on the issue. Arguably, an issue of concern with regard to the implementation of the code is the control of the Ethics and Compliance Office by the CFO and the General Counsel. In order to ensure independence and thorough application of the Code, Coca-Cola should envision auditing not only from within but also from external parties.[164]

[158] Coca Cola Code of Business Conduct, p. 8.

[159] Coca Cola Code of Business Conduct, p. 39.

[160] Coca Cola Code of Business Conduct, p. 40.

[161] Coca Cola Workplace Rights.

[162] Coca Cola Workplace Rights. See also Sect. 6.2.

[163] Coca Cola Workplace Rights. See also the Calvert Index, http://www.calvert.com/sri-index.html.

[164] See Sect. 7.4.4.1.

7.4.3.3 The Body Shop: Striving To Be a Force for Good

The Body Shop has long been known for its corporate tradition *to do good* because it has been one of the first businesses to operate according to ethical standards.[165] The Body Shop operates on a set of five values known as The *Body Shop Value Chain*: (1) defend human rights, (2) support community fair trade, (3) protect the planet, (4) against animal testing and (5) activate self-esteem.[166]

The Body Shop believes that it is about more than just shared responsibilities, the company engages in a shared commitment to be a business that is a force for good and a business with ethics.[167] The company goes beyond corporate social responsibility by engaging in widespread campaigns against human trafficking and fostering a positive engagement approach such as its Community Fair Trade program. The company aims to develop products that are not only effective but also produced according to ethical standards, for example refraining from using whale blubber by-products.[168]

The Body Shop has rigorous criteria about the development of their products, sourcing and producing them as responsibly and sustainably as possible.[169] Any supplier that joins The Body Shop network is required to pass the ethical, social and quality criteria and will be subjected to financial and legal tests.[170] It furthermore develops quality fair trade ingredients in association with various local groups such as the Juan Francisco Paz Silva Co-operative, the Tungteiya Women's Shea Butter Association or the CADO Co-operative; together with them, The Body Shop has built countless schools, collaborated on clean water projects and helped grant children in these areas access to education.[171]

The Body Shop campaigns for ethical trade, assessing not only its own employees but also all direct suppliers against its code of conduct which is based on the Ethical Trading Initiative.[172] Anyone operating with The Body Shop must first self-assess their procedures, followed up by various auditing procedures and site visits to ensure that the standards of the code of conduct are in fact followed.[173] The Body Shop believes in using trade as a lever for change, thus working with a supplier to improve their practices rather than simply walking away has been the company's method of choice. However, if a discontinuation of the business partnership is the only alternative, the company will not hesitate to terminate contracts with disobedient suppliers.[174]

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[165] See generally Fabig (1999), pp. 312 et seq. The Body Shop Values Report, p. 6.
[166] The Body Shop Values Report, p. 5.
[167] The Body Shop Values Report, p. 5.
[168] The Body Shop Values Report, p. 11.
[169] The Body Shop Values Report, p. 14.
[170] The Body Shop Values Report, p. 16.
[171] The Body Shop Values Report, pp. 19–22.
[172] Ethical Trade Initiative, http://www.ethicaltrade.org.
[173] The Body Shop Values Report, p. 26.
[174] The Body Shop Values Report, p. 27.

What makes The Body Shop such as successful venture is that it has embraced human rights and sustainability issues from the day of its creation, making them an integral part of business operations. This approach has granted it a competitive advantage over other brands in the same sector because it is deemed a first responder in the field of corporate human rights compliance. The Body Shop was awarded the UN Business Leaders Award in 2010 for its fight against human trafficking, again underlining its undisputed leadership in the ethical approach to business. Some have criticized The Body Shop for selling an image that is "*too good to be true*",[175] yet it cannot be denied that compared to other companies, The Body Shop has a far superior approach to sustainable business development.

7.4.3.4 Shell: Honesty, Integrity, Respect

Shell has used its negative experience from the Nigerian disaster to create and build a better brand culture and a better awareness for what is acceptable corporate human rights behavior.[176]

Shell's code of conduct is intended to be both a collection of general business principles and an enumeration of its core values. The rules and guidelines of the code are the boundaries within which every Shell employee and affiliate must operate to avoid damaging themselves or Shell. The code is aimed at every employee, director and officer of every wholly-owned Shell company and joint venture company under Shell. Any contractors or consultants working on behalf of Shell or who use the Shell name are also expected to act consistently with the values enshrined in the document.[177]

The code itself clarifies that it is more than a set of rules: the provisions of the code must be viewed as an essential guide covering universal values: honesty, integrity and respect for people.[178] As former Shell CEO Peter Voser writes in his introductory remarks to the code, Shell strives to improve performance in a fast-changing competitive world while remaining true to its core values. Good relations with business partners, customers, governments and stakeholders are the key to a company's success and these healthy relationships will be built by behaving honestly, with integrity and with respect. Failure to act according to these principles will erode trust and undermine the foundations the company builds its business on. Shell's business principles apply to all transactions and activities because it recognizes that the company will be judged by how it acts: Shell's reputation can only be upheld if it acts in accordance with the law and its core values.[179] It is the

[175] NPR, Roddick's Body Shop: An Empire Built on a Ruse? http://www.npr.org/templates/story/story.php?storyId = 14442261. Fabig, p. 321.

[176] For a detailed discussion of Shell's involvement in the UN "Protect, Respect and Remedy" Framework and its success, see Lambooy et al. (2013).

[177] Shell Code of Conduct, Introduction.

[178] Shell Code of Conduct, p. 2.

[179] See generally Sect. 7.4.4.

responsibility of the management to lead by example and in accordance with the spirit of the code.

Regarding human rights standards, Shell aims to conduct its activities in a manner that respects human rights as set out in the UN Declaration of Human Rights and the core conventions of the ILO.[180] Shell's approach to human rights consists in adherence to corporate policies on the subject of human rights, compliance with all applicable laws and regulations, regular stakeholder dialogue and contributing to the welfare of the communities in which the company operates. Additionally, Shell seeks out business partners and suppliers who share and support similar standards. All Shell employees must understand the human rights issues of their place of operation and comply with Shell's commitments, standards and policies on the issue.

The company has established a group-wide Business Integrity Program directed by the Chief Ethics and Compliance Officer. This program is intended to ensure that all behavior and decisions are fully in line with Shell's values and principles.[181] Legal specialists monitor the legal and regulatory developments while the Ethics and Compliance Officer is responsible for the support and monitoring of the program.[182] Executives are expected to lead the way with their own behavior, undertaking all activities in a responsible, safe and code compliant manner. All employees must complete the Code of Conduct Awareness training and additional training will be assigned on a mandatory basis. Violations of the code can be reported via the Shell Global Helpline and will be investigated by internal specialists unless external specialists are required.[183] Any individual violating the code of conduct will be subject to disciplinary action, legal proceedings or imprisonment. Any failures to comply with the code will be communicated to the Audit Committee of the Board of Royal Dutch Shell plc. In 2013, 181 violations were reported to the Ethics and Compliance Officer and 63 contracts with employees and contractors were terminated.[184]

Shell has created a clear code of conduct with a strict set of rules pertaining to its values as a business entity, as a result of years of failures and shortcoming in the 1990s. Shell's code is significant in so far as that it demonstrates the understanding of the company itself that conduct which violates human rights will not only bring the company within the realm of litigation but also will cost the company in terms of reputation and consumer goodwill.[185] The company's code of conduct is a complete one, albeit showing one flaw: the fact that internal specialists review violations of the code and external partners are only brought in if necessary. All

[180] Similarly to Coca Cola, above Sect. 7.4.3.2.

[181] Shell's Business Integrity.

[182] Shell's Business Integrity.

[183] Shell's Business Integrity.

[184] Shell's Business Integrity.

[185] See Sect. 7.2.

violations of the code should be independently assessed by internal and external specialists to highlight shortcomings of the company or the code of conduct.

7.4.4 *Improving the Existing Initiatives Through Accountability and Implementation Mechanisms*

"*While it matters a great deal if a company has a strong code of conduct (...) it is equally important how vigorously and effectively it is being implemented.*"[186] The biggest issue of corporate human rights compliance today is the inability to enforce human rights obligations or code of conduct violations independently and effectively.[187] Although some companies have put into place effective codes of conduct with internal complaint mechanisms, these attempts nonetheless fall short of being an impartial remedy.[188] Inadequate due diligence and compliance can allow violations to continue, potentially harming a business's profitability, reputation and possibly incurring civil and criminal liability.[189]

In order to combat the lack of enforceable grievance tools at international level, three solutions can be proposed: (1) Certifiable Human Rights Quality Management, (2) Global Arbitration Panel for Corporate Human Rights Abuses and (3) Indirect State Responsibility for Corporate Human Rights Violations.

7.4.4.1 Certifiable Human Rights Quality Management

Standards, norms and management processes are aimed at making products and service effective, safe and customer friendly.[190] They are the backbone of today's industry, as they facilitate trade through the spreading of knowledge, sharing of technological advances and management practices.[191] These standards are monitored by the International Standards Organization (ISO), which has published more than 19500 standards for all industries.[192] ISO is an international, non-governmental body whose mandate consists in promoting standards in international trade, communication and manufacturing.[193] The aim of ISO's activity is to harmonize international standards and hence contribute to global welfare.[194] ISO

[186] Cobus de Swardt, Managing Director of Transparency International, EY (2014), p. 18.

[187] See Sect. 6.3. Zimmermann (2007), p. 36. Cernic (2010), p. 264. Haasz (2013), p. 166. Wieland and Schmiedeknecht (2010), p. 94.

[188] Zimmermann (2007), p. 36. Cernic (2010), p. 265. Haasz (2013), p. 178.

[189] Department of Justice, SEC FCPA Resource Guide (2012), EY, p. 19.

[190] ISO and the consumer, http://www.iso.org/iso/home/about/iso-and-the-consumer.htm.

[191] Balzarova and Castka (2012), p. 265.

[192] Wieland and Schmiedeknecht (2010), p. 84.

[193] Ward (2012), p. 10.

[194] Clougherty and Grajek (2014), p. 71.

standards improve corporate relationships and management practices by increasingly being used as a measure of their overall performance. ISO's international reputation and significant reach mean that its standards have the potential to create substantial force on corporations and their market behavior.[195]

7.4.4.1.1 ISO 9000

Corporations implement quality management (QM) as part of ISO 9000, the leading global quality management standard. [196] In order for ethics and compliance to be effectively addressed by corporations, quality management needs to be adapted and improved constantly.

The ISO 9000 standard series addresses various aspects of quality management, providing guidance and tools for companies and organizations wanting to ensure that their products and services consistently meet customer's requirements and steadily improving quality. ISO 9000 certification is introduced as part of a continuous, long-term improvement philosophy for companies, acting as a catalyst for process innovation.[197]

There are sets of criteria for a quality management system that can be used by any organization, large or small, regardless of its field of activity.[198] Presently, ISO 9000 is implemented by over one million companies and organizations in more than 170 countries.[199] This standard is based on a number of quality management principles including (1) customer focus, (2) leadership, (3) involvement of people, (4) process approach, (5) system approach to management, (6) continual improvement, (7) factual approach to decision making and (8) mutually beneficial supplier relationships.[200] Furthermore, ISO 9000 is certified by the leading national certification agencies such as SGS in Switzerland, DQS in Germany, BSI in Great Britain and AFNOR in France.[201]

Using ISO 9000 standards helps ensure that customers get consistently good quality products and services, bringing many business benefits. Organizations should understand customer needs, meet customer requirements and exceed customer expectations. Business leaders should establish a unity of purpose and set the direction the organization should take. Leaders should create an environment that encourages people to achieve the organization's objectives.[202] As a matter of fact,

[195] Ward (2012), p. 6.

[196] About ISO, http://www.iso.org/iso/home/about.htm.

[197] Terizovski and Guerrero (2014), p. 205.

[198] Clougherty and Grajek (2014), p. 71.

[199] Clougherty and Grajek (2014), p. 71.

[200] ISO Quality Management Principles, http://www.iso.org/iso/qmp_2012.pdf.

[201] Certification, http://www.iso.org/iso/home/standards/certification.htm.

[202] *ISO 9000*, http://www.iso.org/iso/iso_9000.

seeking certification of ISO 9000 has been a major factor for organizations worldwide.[203]

Checking that the system functions is a vital part of ISO 9000. An organization must perform internal audits to check how its quality management system is performing. The company should also decide to invite an independent certification body to verify that it is in conformity with the standard (certification to management system standards).[204] ISO 9000 has considerably improved internal processes and should be a regularly used tool to check internal performance and codes of conduct.[205] Additionally, studies have shown that ISO 9000 positively affects attention to detail and is productive for stable environments.[206]

7.4.4.1.2 ISO 26000

The social responsibility of corporations is governed by ISO 26000, aiming to ensure social responsibility of corporations.[207] The standard is intended to "*provide guidance on how businesses and organizations can operate in a socially responsible way. This means acting in an ethical and transparent way that contributes to the health and welfare of society*."[208]

ISO 26000 is envisioned to contribute directly to sustainable development and to make sustainable development the prime goal of social responsibility.[209] ISO 26000 offers guidance across various themes including human rights, and has the ability to generate significant impacts on the practice of social responsibility in local and global markets.[210] In addition, it is a market governance mechanism with considerable influence on public policy and global governance.[211]

Contrary to ISO 9000 standards, ISO 26000 provides only guidance and cannot be certified.[212] Instead, it clarifies what social responsibility is, aiding businesses and organizations to translate principles into effective actions and sharing best practices relating to social responsibility globally. The core subjects of ISO 26000 are organizational governance, human rights, labor practices, environmental impacts, fair operating practices, consumer issues and community involvement and development. ISO 26000 is aimed at all types of organizations regardless of their activity, size or location.

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[203] Terizovski and Guerrero (2014), p. 197.

[204] Certification, http://www.iso.org/iso/home/standards/certification.htm.

[205] Terizovski and Guerrero (2014), p. 197.

[206] Terizovski and Guerrero (2014), p. 197.

[207] ISO 26000. Hardtke and Kleinfeld (2010), p. 13. Wieland and Schmiedeknecht (2010), p. 84.

[208] ISO 26000.

[209] Ward (2012), p. 6.

[210] Ward (2012), p. 6. Federal Council Position Paper (2015), p. 21.

[211] Ward (2012), p. 6.

[212] Atler (2011), I.

The standard was launched in 2010 following a negotiation period of five years between various stakeholders.[213] Representatives from government, NGOs, industry, consumer groups and labor organizations around the world were involved, representing an international consensus.[214] The UN Guiding Principles contributed greatly to the establishment of ISO 26000 as the baseline responsibility, introducing due diligence as the method for corporations to demonstrate their human rights commitment.[215] The standard is not intended to address any questions better left to the political institutions nor is it intended as a substitute for the exercise of state responsibilities.[216] Rather, ISO 26000 considers human rights to be a core value of CSR, meaning corporations acting socially responsible must consider them.[217] The standard clarifies that corporations should respect civil and political rights as well as economic, social and cultural rights:

> To respect these, an organization should exercise due diligence to ensure that it does not engage in activities that infringe, obstruct or impede the enjoyment of such rights.[218]

This standard could bring several benefits, including a common understanding of social responsibility, influencing public policy, encouraging engagement of stakeholders, regional networking and becoming a stepping stone for sustainable development.

A survey conducted by the ISO Post Publication Organization in 2014 showed that at least 60 countries have adopted the standard already, and 20 more are in the process of reviewing for adoption.[219] 93 % of the ISO member states have approved ISO 26000, including China.[220] The ISO standards have met with particular success in the Asia because of the Asian emphasis on quality management and compliance from a historical perspective.[221] Another benefit of the ISO standard is that it enjoys the support of a large number of consulting firms that advise corporations on compliance matters.[222] There is, however, one major aspect of ISO 26000 that has not jet addressed in a satisfactory fashion: the issue of certification. Originally, the drafting process had foreseen a certification scheme for ISO 26000, yet due to controversial views of the stakeholders regarding certification, the attempt was dropped for a pure guiding standard.[223] This is ISO 26000's biggest flaw.

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[213] Ward (2012), p. 6. Balzarova and Castka (2012), p. 268.

[214] Balzarova and Castka (2012), p. 267.

[215] Atler (2011), 2B.

[216] ISO 26000:2010, E, para. 3.4, p. 10, http://www.iso.org/iso/catalogue_detail?csnumber = 42546.

[217] Atler, IA.

[218] ISO 26000:2010, section 6.3.9, pp. 30–31.

[219] International forum revisits the road travelled, http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1691.

[220] Ruggie (2013), p. 121.

[221] Ruggie (2013), pp. 121, 161.

[222] Ruggie (2013), p. 161.

[223] Balzarova and Castka (2012), p. 267.

Although the policy elaborated by ISO is based on the UN Principles,[224] ISO 26000 it is still only a guiding standard, leaving a certification gap.[225] The implementation of ISO 9000 has demonstrated the usefulness of norms to businesses and customer satisfaction, so the next logical step with regards to social responsibility and human rights compliance must be the certification of ISO 26000. The ISO should take all necessary steps to ensure that respectful human rights conduct across all sectors is implemented. It is advisable that ISO position its human rights standards in such a way that they mirror the verifiable requirements of other ISO policies. If ISO 26000 becomes certifiable, this can lead to greater accountability of corporations without the drawbacks of top to bottom state intervention procedures.[226]

Additionally, considering ISO 26000 is founded on the UN "Protect, Respect and Remedy" framework, making it obligatory on a global scale will strengthen coherence and further the attempts to create a uniform international policy regarding the human rights and business agenda.

7.4.4.1.3 Why Human Rights Quality Management Works

Quality Management and certification of products and services are integral parts of corporate management. By turning human rights compliance into a corporate management process, human rights concerns can effectively be translated into business considerations. Human rights compliance, as an enforceable and verifiable standard of business conduct, ensures sustainable development of business practices, improving corporate reputation and brand value. ISO 26000 is the ideal tool for this endeavor.

The Drafting Process of ISO 26000 is the largest and most diverse in the history of the ISO, with 78 ISO Member states, 392 Experts and 132 observers taking part.[227] Thielemann and Ulrich argue that certification through the use of independent auditors using ISO 26000 as their main standard is a good opportunity for both corporations and their suppliers.[228] To date, corporate suppliers are visited by auditors from various firms, all trying to assess supplier compliance with various codes and schemes. Enabling certification of ISO 26000 as *the* standard for corporate conduct would create a uniform basis for auditor investigation and would facilitate internal compliance procedures for corporations and their suppliers alike.[229]

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[224] See Sect. 6.2 of this research.

[225] ISO 26000, http://www.iso.org/iso/home/standards/iso26000.htm.

[226] Staatlicher Appell an soziale Verantwortung, 20.04.15, Neue Zürcher Zeitung, http://beta.nzz.ch/meinung/staatlicher-appell-an-soziale-verantwortung-1.18525598.

[227] Thielemann and Ulrich (2009), p. 179.

[228] Thielemann and Ulrich (2009), p. 182.

[229] Thielemann and Ulrich (2009), p. 183.

In the meantime, rather than waiting for an international consensus to develop that ISO 26000 should be certifiable, the leading certification networks, such as DQS, SGS, BSI and AFNOR should take the initiative and offer to certify ISO 26000 for corporations on a voluntary basis. This would animate firms already operating sustainably to be certified by their national body as well. In turn, this can result in a global movement of companies seeking to obtain ISO 26000 certification, for it will improve their competitive position and their credibility on the market.

The resulting competition will animate corporations with less pristine human rights records to review their management policies and seek ISO certification as well. As a result, this can create a global certification scheme on a voluntary basis comparable to ISO 9000 for corporate human rights compliance. As a matter of fact, some countries have already begun to explore methods and means of certifying ISO 26000.[230] ISO 26000 has integrated international expertise on social responsibility and is a powerful tool to aid corporations to go from good intentions to good actions; certification of the standard would further underline and concretize this commitment.[231]

7.4.4.2 Global Arbitration Panel

Following the Supreme Court's holding in *Kiobel*, Lawyers for Better Business (L4BB) sought a way of offering victims of corporate human rights violations access to justice when the judicial apparatus was either unavailable or defective.[232] L4BB proposed the solution of creating a global arbitration panel to address corporate human rights violations at international level.[233]

7.4.4.2.1 Operative Principles

The court L4BB are proposing would be modelled after existing international civil tribunals, taking on disputes arising out of corporate human rights abuses. Victims of abuses could choose whether to have their claims resolved through mediation or a decision by a panel of arbitrators who are experts in the fields. The tribunal would operate under national laws but would also implement international law in an indirect way.[234]

This implementation of the proposed panel would be twofold: Primarily, one would require the existence of a cause of action under international law, be it a tort

[230] Ward (2012), p. 21. Furthermore Leipziger (2010).

[231] ISO, ISO 26000 Project Overview, 2010.

[232] Cronstedt (2014b), p. 1.

[233] Cernic (2010), p. 267. Cernic argues for the creation of an Ombudsman.

[234] Cronstedt (2014b), p. 2.

or a delict. Secondly, the alleged violation must also be a violation of accepted international human rights law. The Tribunal would enforce the UN Guiding principles by offering a non-judicial source of justice which is legitimate, accessible, and predictable and a source of continued learning. For this purpose, L4BB suggest that at the outset, the tribunal decide only cases pertaining to the most serious abuses so as to establish valuable precedent.[235]

The tribunal would operate on a universal basis, meaning that any dispute may be brought before it, with compensation and relief being enforceable under the New York Convention of 1985.[236]

7.4.4.2.2 Effectiveness of the Global Arbitration Panel

A single interpretative source for the application of business and human rights standards would provide a method of developing international coherence which would provide a much needed resource for business hoping to shape their behavior and would also serve a source for national courts applying the UN Guiding Principles.[237] The main area of concern for such a tribunal is the application of human rights standards, both from a procedural and implementation standpoint. From a procedural perspective, any arbitrational tribunal for human rights must ensure that the procedural guarantees of the Right to a Fair Trial enshrined in Art. 14 ICCPR are protected and implemented. The guarantees expressed should provide a minimum standard which all parties are to respect at all times. Furthermore, which rights would be implemented and how must be clarified, using existing human rights declarations and treaties.

There appears to be concern as to whether this tribunal would be used by the parties.[238] There are certain advantages to the use of arbitration procedures as opposed to classic litigation: for the victims, such a tribunal would likely provide the only available means of remedy, as most judicial mechanisms are either unavailable or too expensive. For the business community, the rapid timeframe for resolution should be sufficient motivation to access the panel. Many corporate lawyers have complained of the inability to address accusations of corporate misconduct efficiently and timely, especially in view of the rapid broadcasting of such allegations through social media outlets. The tribunal could thus prove to be a rapid way of addressing grievances efficiently, without the media backlash of a public trial.[239]

As a matter of fact, the benefit of arbitrational procedures are numerous: the parties can each select a decision-maker whom they trust most of the panel of

[235] Cronstedt (2014b), p. 2.
[236] Cronstedt (2014b), p. 2.
[237] Cata Backer (2014a)
[238] Aba (2014), p. 2.
[239] Cronstedt (2014b), p. 2.

proposed experts, as opposed to judges with little or no training for corporate human rights cases.[240] The parties can be heard quickly, in accordance with their schedules, without interruption making arbitrational procedures not only convenient but also highly cost effective.[241] Furthermore, the arbitrational decision can be made binding in accordance between the parties, preventing ongoing trials and delays.[242]

An arbitrational tribunal however, raises the question of transparency: Businesses prefer confidential procedures while NGO's prefer to litigate in open court using the media as a tool for publicity. Additionally, some victims of human rights violations may feel that secretive arbitrational procedures are an incorrect reaction to their harm suffered.[243] A middle way thus needs to be found to take into account the needs of both parties to ensure a smooth arbitration process.[244]

Additionally, the non-binding nature of certain issues is of concern. Some issues, especially pertaining to human rights, may be subject to review by the courts.[245] It may sometimes be difficult to enforce the arbitrational decisions, especially for individuals against large corporate actors.[246] The value of the arbitrational panel would be lessened if its decisions could not be made enforceable through national jurisdictions.[247] These concerns, however, can be mitigated through the use of the New York Arbitration Convention. The Convention holds in Art. III that the contracting parties are under the obligation to recognize and enforce existing arbitral awards in accordance with the rules laid down in the convention. The ECtHR has also recognized that an efficient and existing arbitral award constitutes a patrimonial position which falls under the protection of Art. 1 of the First Protocol of the ECHR.[248] Thus, the decisions of the panel could be enforced through reliance on Art. 1 First Protocol of the ECHR, provided that the proceedings of the panel comply with the minimum requirements set forth in the Convention.[249]

The arbitrators sitting on the arbitrational tribunal are a further consideration. Who will sit on the panel and how to guarantee their impartiality are chief concerns.

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[240] Koritzinsky et al. (1991–1992), p. 45.

[241] Koritzinsky et al. (1991–1992), p. 46.

[242] Koritzinsky et al. (1991–1992), p. 46.

[243] Stephens (2000–2001), p. 412.

[244] Cronstedt (2014b), p. 3.

[245] Koritzinsky et al. (1991–1992), p. 46.

[246] Koritzinsky et al. (1991–1992), p. 46.

[247] Jaksic (2002), p. 320.

[248] Jaksic (2002), p. 320. "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[249] Jaksic (2002), p. 321. On the ban of unrestricted enforcement of arbitrational decisions, see generally Jaksic (2002), pp. 321 et seq.

The optimal qualifications for a mediator are business expertise, human rights expertise and sensitivity to cultural issues. Although these demands seem complex, examples such as Jeff Immelt, CEO of GE who came out of the Healthcare Business and Jim Yong Kim, a doctor who became the President of the World Bank show that professionals can acquire diverse knowledge on various subjects. In order to alleviate the concern of the identity of the arbitrators, the author suggests modeling the panel or arbitrators along the lines of those used by the Court for Arbitration of Sports, CAS.[250]

CAS provides the parties who have submitted to the arbitration procedures with a closed list of arbitrators to choose from, all experts in their field.[251] The parties may then choose the arbitrator they have most faith in to handle their grievance adequately.[252] As a result, it can be ensured that those rendering a decision on sports matters have profound knowledge and are independent from national sporting federations. This approach by the CAS can be translated for a human rights arbitration panel. By drafting a list of experts on human rights and business, the parties will have access to independent professionals who will decide matters in accordance with existing international standards and norms. Such arbitrators will be more qualified to assess business and human rights than most national judges, making the arbitrational tribunal a more adequate solution than national jurisdictions. [253]

A pressing question is the laws the tribunal will enforce. The tribunal would fundamentally have to enforce the laws as they stand at the moment of dispute in accordance with internationally accepted principles and frameworks, including corporate failure to fully implemented human rights due diligence.[254] Again, an analogy can be draw from the CAS procedural rules:

> The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.[255]

Accordingly, although all arbitration proceedings are to be based on the UN Protect, Respect and Remedy framework and the ensuing Guiding Principles, the author suggests that the arbitrators of the panel can and should draw guidance from existing international human rights law and standards as well. This will enable a

[250] Court of Arbitration for Sports, http://www.tas-cas.org/en/general-information/addresses-and-contacts.html.

[251] CAS List of Arbitrators, http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html.

[252] CAS Procedural Rules, R. 40.

[253] Cronstedt (2014b), p. 4.

[254] Cronstedt (2014b), p. 4.

[255] CAS Procedural Rules, R58 Law Applicable to the merits.

coherent interpretation of human rights standards and supplement the UN Documents where necessary with existing treaties as case law.

Given the increasing importance of human rights law in international investment, arbitrators will increasingly be confronted with them.[256] The existence of an arbitration tribunal could lead to great accountability for corporations as it will be neutrally placed to rule on matters spanning corporate processes and human rights law. Such a tribunal could be a great possibility to advance the quest for accountability for human rights violations because it could offer a fair access to justice for the victims in a business-friendly environment.[257]

7.4.4.3 State Responsibility for Human Rights Compliance of Corporate Entities Within Their Jurisdiction

A third measure of holding corporations accountable for their human rights violations is state responsibility for human rights abuses committed by third parties, including corporate entities, within their jurisdiction or territory, as suggested by the first pillar of the UN Guiding Principles, the Swiss Constitution and ECtHR case law pertaining to Art. 8 ECHR.[258] These three documents are particularly instructive as the UN Guiding Principles are the first internationally accepted document concerning state obligations in cases of corporate human rights abuses, because the ECHR is a beacon for human rights protection not only in Europe but has international reconnaissance and because the Swiss Constitution expressly addresses state responsibility for private actions within its territory of application.

7.4.4.3.1 The UN Model

As the UN Guiding Principles have already suggested, the first pillar duty is the state responsibility to protect against human rights abuse within their territory and or jurisdiction by third parties including business enterprises, as a result of their duty to protect, respect and fulfil human rights.[259] The first pillar establishes that the basis for the protection of human rights lies in the focus of the political and administrative architecture of the state and whether this permits it to respect the existing legal obligations and policy objectives with regard to human rights.[260] Cata Backer argues that some seem to misunderstand pillar 1 to be a reinforcement of the

[256] Dupuy (2009), p. 61.

[257] Cronstedt (2014a), p. 2.

[258] *Guerra and Others v. Italy* (116/1996/735/932), *Lopez Ostra v. Spain* (16798/90), *Hatton and Others v. The United Kingdom* (36022/97), *Dubetska and Others v. Ukraine* (30499/03). See furthermore Ratner (2001–2002), pp. 470 et seq.

[259] For a detailed discussion of the Guiding Principles, see Sect. 6.2.4.

[260] Cata Backer (2014b), p. 10.

obligations of pillar 2, when the fundamental question is: How states have a duty to oblige a company to respect human rights?[261]

The objective of pillar 1 is the expression of the duty to protect those within their territory from human rights violations by managing the state's political economy; the state must deal with the structures of their own duty to protect human rights first before they can focus their attention on regulating human rights conduct of private entities in order to prevent the privatization of the state duty itself.[262] States have different treaties they adhere to and have transposed different norms into their own legal systems, which is why pillar 1 remains largely silent on the exact definition of core human rights the state duty to protect is based on.[263] This problem of diverse interpretation of duties and applicable treaties can be solved through rigorous human rights due diligence and disclosure by the states as suggested by the Human Rights Council Working Group on Business and Human Rights and the Guiding Principles: (1) Mapping human rights sensitive law, policies and regulations in order to perform a due diligence process on the state itself, (2) determine deficiencies, (3) disclose these deficiencies and engage in dialogue with other states, (4) ensure access to all laws for citizens, (5) disclose relationship with state owned enterprises and (6) disclose plans of sovereign investment.[264]

If the state adheres to its obligations under international law and engages in due diligence as suggested by the Human Rights Council Working Group, they can prevent liability for human rights violations under pillar 1 of the UN Guiding Principles.

7.4.4.3.2 The Swiss Model

Art. 35 of the Swiss Constitution holds:

> Realization of Fundamental Rights
> (1) Fundamental rights have to be effectuated throughout the entire legal system.
> (2) Whoever exercises a state function is bound to the fundamental rights and obliged to contribute to their implementation.
> (3) The authorities ensure that fundamental rights, as far as they are suitable, also become effective among private parties.

The Swiss Constitution ensures that fundamental rights are observed by all state employees, as well as between private entities where possible. This means that human rights are to be observed throughout the Swiss Legal order,[265] that any private entity fulfilling state duties is bound by human rights[266] and that the state

[261] See Ayoub (1998–1999). Furthermore Cata Backer (2014b), p. 10.
[262] Cata Backer (2014b), p. 11.
[263] Cata Backer (2014b), p. 19.
[264] Cata Backer (2014b), p. 19.
[265] Kiener and Kälin (2013), p. 42.
[266] Kiener and Kälin (2013), p. 45.

has to ensure that private entities observe human rights wherever applicable.[267] This has been known as the third party effect of fundamental rights.[268] One distinguishes between direct and indirect third party effects, where the direct third party effect theory states that fundamental rights can be directly enforced between private parties and the indirect third party theory argues that there can be instances where the failure of the state to ensure basic rights between private entities can be adjudicated.[269] Here, the primary concern is the indirect third party effect.

Critics argue that human rights should only bind the state and its organs because it is only the state that holds the power monopoly, not private entities.[270] This view, however, fails to recognize not only the immense power and influence of private entities in today's world order but also the fact that third party effects concern the state's failure to act when private entities within its jurisdiction violate human rights.[271]

Art. 35 para. 3 BV is directed not at private parties but at the state organs and represents a state focused understanding of indirect third party effects.[272] This means that state authorities are under the obligation to ensure that human rights are observed in the relationship between private parties, especially in cases where private and criminal law provide insufficient means of redress, as is the case in corporate human rights cases.[273]

In its 2015 position paper on the role of corporations, the Swiss Federal Council has expressly accepted that it has the duty to include CSR principles in its operations and that it must also lead by example through information and sensibilisation of corporate actors to the need for ethical behavior.[274] The state thus has the obligation to create framework terms and conditions such as the OECD Guidelines or the UN frameworks to further the business and human rights agenda and ensure compliance with national laws.[275]

7.4.4.3.3 The ECHR Model

The Swiss and UN approaches are echoed in the European Convention on Human Rights:

[267] Kiener and Kälin (2013), p. 51.

[268] Kees (2008), p. 150.

[269] Kiener and Kälin (2013), p. 53.

[270] See Bucher (1987) Drittwirkung der Grundrechte? SJZ, pp. 37 et seq.

[271] Kiener and Kälin (2013), p. 52. See also Sects. 4.4 and 4.5.

[272] Kiener and Kälin (2013), p. 52.

[273] Kiener and Kälin (2013), p. 53.

[274] Federal Council Position Paper (2015), pp. 10 et seq. See also the enclosed action plan, proposed measure B.3, p. 35.

[275] Federal Council Position Paper (2015), p. 10.

ARTICLE 1
Obligation to respect Human Rights
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

The EU Parliamentary Assembly has already recognized the existing gaps in the way corporate human rights abuses are tackled at EU level in Resolution 1757 (2010):

3. The Assembly notes that many of the alleged human rights abuses by businesses occur in third countries, especially outside Europe, and that it is currently difficult to bring extra-territorial abuses by companies before national courts or the European Court of Human Rights (the Court).
4. The Assembly is also concerned about the existing imbalance in the scope of human rights protection between individuals and businesses. While a company may bring a case before the Court claiming a violation by a state authority of its rights protected under the European Convention on Human Rights (ETS No. 5, the Convention), an individual alleging a violation of his or her rights by a private company cannot effectively raise his or her claims before this jurisdiction. [276]

The issue of ECHR applicability can be solved in two ways: (1) state-owned corporations and (2) non-state owned corporations. State-owned corporations or corporations fulfilling state duties operating abroad are bound by the human rights of their home state.[277] Thus, violations of human rights in third countries can be attributed to the state because they fulfilled state duties or were state owned and their behavior is directly attributable to the state.

With regard to non-state owned businesses, the approach is a little different. Parent corporations often externalize liability risks through the creation of subsidiaries, even though they obtain profit from that same risk prone behavior.[278] The danger of becoming a victim of tort liability has become considerable, forcing companies to reorganize themselves to limit or avoid having to pay for their violations.[279] In fact, subsidiarization became fashionable after the asbestos litigation, especially for the tobacco industry to avoid lawsuits for tobacco-induced illnesses.[280]

A fundamental aspect of corporate law is limited liability, insulating the corporation's shareholders from the debts of the company beyond the amount of their investment.[281] The theory of piercing the corporate veil breaks limited liability in cases where the parent company and the subsidiary share a common interest and where, absent of piercing, some injustice will result.[282] It was this concept of

[276] EU Parliamentary Assembly Resolution 1757, http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1757.htm.

[277] See generally Kees (2008), pp. 35 et seq.

[278] Dearborn (2009), p. 197.

[279] Hansmann and Kraakman (1991), p. 1881.

[280] Roe (1986), p. 39. Hansmann and Kraakman (1991), p. 1881.

[281] Berle (1947), p. 343.

[282] Associated Vendors v. Oakland Meat Co., California District Court of Appeals, 1963. Dearborn, p. 197. Addo, pp. 191–192.

limited liability that broke the back of the Unocal litigation in the State Court of California, where the court held that the corporate veil could not be pierced because the plaintiffs could not prove such a unity of interest between the corporate entities that they were functionally the same.[283]

Although, traditionally, parent companies have not been deemed responsible for the behavior of their subsidiaries, there is a powerful economic, social and moral factor to be taken into account: no parent company should allow its subsidiaries to have lower moral standards than its own.[284]Considering the problem of using the veil piercing theory to enable lawsuits against parent companies for the actions of their subsidiaries, Adolf Berle developed a new theory on corporate liability, known as enterprise liability.[285]

Berle argued that a corporate enterprise, as a conglomerate of affiliated corporations including parent and subsidiary operating for a common purpose, did not adhere to the rationale for separate corporate personhood because the companies had unified as one from an economic perspective.[286] The fiction of corporate personhood thus becomes legal formalism forcing society to pay for the harm caused by risky subsidiary behavior.[287]

To solve the problem, enterprise liability imposes liability on the parent for the hazardous behavior of the subsidiary that profits the enterprise as a whole.[288] Hence, if a parent company directly profits from the harmful behavior of the subsidiary, it must also be considered liable for them.[289] As a result, enterprise liability seeks to unite legal and economic realities:

> The economic entity does not have any corporate charter. It is an economic choice of management. It ties in legal entities for operation in a common endeavor or enterprise. The idea behind economic entity is joinder or merger in activity – unity of life – in the goal of the common undertaking or enterprise. In an economic entity, each legal entity had dedicated itself and its property to the success of the common undertaking.[290]

Since the subsidiaries act for the benefit of the whole corporation, enterprise theory follows the trail of profit and holds the actors in the corporate network accountable.[291] Nonetheless, enterprise liability applies only in a limited set of cases, namely in cases of parent-subsidiary relationships or within the corporate family—not in cases of shareholder misconduct.[292] Enterprise liability intends to

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[283] *Doe v. Unocal*, Superior Court of the State of California, Los Angeles County, BC 237980 & BC 237679, p. 31. See also Hailer (2006), p. 284. Lincoln (2010), p. 605.

[284] Loomis (1999), p. 145.

[285] Berle (1947), p. 344. Ratner (2001–2002), p. 497.

[286] Dearborn (2009), p. 199. Ratner (2001–2002), p. 518.

[287] Dearborn (2009), p. 200.

[288] Berle (1947), p. 344

[289] Mendelson (2002), p. 1252.

[290] Dix (1953), p. 255.

[291] Strasser (2005), p. 638.

[292] Dearborn (2009), p. 211.

prevent risk externalization in cases of human rights or environmental violations, as these represent the most troubling instances of the public's absorption of the cost of doing business.[293] Enterprise liability better addresses the issue of tort creditors because it reallocates risks and forces parent companies to internalize the risks of their subsidiaries which they had previously sought to externalize.[294]

Using the idea of enterprise liability, one can extend the actions of the subsidiaries to the parent company and the states they are headquartered in. Parent companies cannot externalize the risk of doing business by using subsidiaries, especially when they profit from their conduct abroad. Corporate strategy decisions are not taken by the individuals on the ground in Africa or Asia, rather, they are taken by upper-level management in the corporate headquarters. In situations of subsidiary decisions to violate basic rights, rather than trying to pierce the corporate veil, creating considerable problems of corporate law, this type of situation should lead to enterprise liability of the mother organization if the latter has failed to adhere to its duty of care.[295]

The decisions to disrespect human rights in the territory of application of the ECHR has become relevant for the states because corporate decision-making is part of corporate conduct and, as such, needs to be taken into consideration by the state. The decision of a European company to violate human rights within the jurisdiction of a state adhering to the ECHR must be made attributable to the state for failure to adequately protect against violations within its territory and jurisdiction.[296]

The benefit of engaging state responsibility for private actors within their jurisdiction through the ECHR is the beacon function this will entail for other human rights instruments at international level. The ECHR is a human rights instrument of considerable magnitude and the decisions by the ECtHR have value even beyond the borders of Europe. Should the court decide to bring states to justice for their failure to adequately secure the rights enshrined within the Convention for corporate misconduct, states will pressure their corporations to act according to ethical and human rights standards.[297] This, in turn, can motivate other courts to proceed along the same route, creating international precedents and motivating states to pay close attention to the behavior of their corporations abroad.

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[293] Dearborn (2009), p. 212.

[294] Dearborn (2009), p. 212.

[295] Massoud (2013), p. 52. Cernic (2010), p. 265.

[296] Kees (2008), p. 151. See Sect. 5.3.1.2.

[297] The Swiss Federal Council published a position paper on April 1st 2015, urging all companies to respect human rights even beyond the Swiss borders. Staatlicher Appell an soziale Verantwortung, Neue Zürcher Zeitung 20.04.15, http://beta.nzz.ch/meinung/staatlicher-appell-an-soziale-verantwortung-1.18525598.

7.4.4.3.4 Why a State Responsibility Solution Is Necessary

State responsibility as a solution for corporate misconduct is necessary because states are still the primary guardians of human rights. Although corporate influence is steadily increasing, states remain the primary custodian of obligations pertaining to human rights, as the UN "Protect, Respect and Remedy" framework recognized. By holding states responsible for the conduct of private entities within their jurisdiction, the values enshrined in the various human rights treaties and initiatives can be fully implemented. Holding states responsible is an expression of their inherent duty to protect and fulfil and a necessary means to ensure that human rights can no longer be violated by corporate entities with impunity. Additionally, holding governments responsible can create incentives for them to prevent infringements by private actors.[298] As a matter of fact, both the Inter American Commission on Human Rights and the Inter-American Court of Human Rights have explored the State's role in preventing corporate-related abuse in a range of industries and in relation to a variety of rights. Furthermore General Comment 31 from the UN Human Rights Committee provides that "*there may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties for failing to take appropriate measures to prevent or punish the harm caused by private persons or entities*." State responsibility for human rights abuses of private actors within their jurisdiction is therefore a fundamental part of any accountability solution.[299]

7.4.4.4 The Need for a Polycentric Approach to Enforcement

Economic globalization has resulted in international efforts to develop and improve regulatory tools targeting corporate human rights conduct. Considering that transnational corporations, with their considerable economic and political power, are increasingly difficult to regulate, this creates new challenges.[300] The domestic legal systems are inadequately organized and placed to handle the issue on their own, thus requiring international oversight and domestic coordination.[301]

Considering the magnitude of enforcing human rights standards for business entities, there cannot be one solution to fit all. Many elements of an efficient enforcement strategy of corporate human rights obligations lie outside of the strictly legal sphere.[302] The problems arising from corporate conduct vary depending on the sector, the location, the magnitude of corporate activity and the parties involved. Based on these premises, a polycentric solution needs to be

[298] Ratner (2001–2002), p. 470.
[299] Ratner (2001–2002), p. 472.
[300] Stephens (2000–2001), p. 401.
[301] Stephens (2000–2001), p. 401.
[302] Cernic (2010), p. 267.

implemented to address all angles of the matter. Confronting the issue of corporate human rights violations from three angles will result in a complete resolution of the issue while taking into account the specific needs of all parties involved.[303]

Realizing corporate quality management through certifiable licenses will result in effective implementation of corporate codes of conduct and aid in the creation of a uniform standard of corporate human rights compliance. As a result, corporate activity can be monitored, evaluated and considerably improved.

Through the creation of a Global Arbitration Panel, grievances pertaining to human rights misconduct of companies can be addressed swiftly, discretely and removed from state jurisdiction. An independent panel of arbitration will bypass the problem of inaccessibility of domestic courts for victims of human rights violation and will take into consideration the need for privacy and discretion of corporate entities. Complaints can consequently be addressed quicker and more effectively, saving money and enforcing relevant human rights standards.

Holding states responsible for violations of human rights within their jurisdiction is an expression of their duty to protect and fulfil human rights and enables adjudication of cases where both quality management and arbitration have failed. States are the primary guardian of human rights and must therefore be part of the solution of corporate human rights violations. States should also require all companies within their jurisdiction to implement a functioning code of conduct certified under ISO 26000. Failure to do so should be punished by higher taxation, the loss of benefits or fines like those imposed on banks following the too big to fail scandal in 2008. This approach closes enforcement trifecta circle.

7.5 Bridging the Gap Between Business and Human Rights

The long-term future of the human rights agenda for businesses as for states is still somewhat unclear. Some organizations and state parties have begun taking steps in the right direction but a uniform, binding approach is still lacking. *Kiobel's* contribution is undoubtedly great, as its outcome helped highlight the existing problems of human rights compliance by business entities. Time will tell what measures are best suited to combat the human rights problem for business entities. The creation of a human rights treaty for business entities should be the ultimate goal.

[303] As Ruggie stated at the 3rd annual UN Forum on Business and Human Rights: "Implementing the Guiding Principles will require a smart mix of measures, voluntary as well as mandatory, which are capable of generating cumulative change and achieving transformational scale." http://lcbackerblog.blogspot.hu/2014/12/blog-post.html.

7.5.1 The Treaty Option

The ultimate goal for the business and human rights agenda should be the creation of an internationally binding human rights treaty for business entities. In order for this to become possible, several points need to be observed.[304]

7.5.1.1 Drafting and Implementing Treaties

A treaty is an international agreement between states in written form and governed by international law.[305] Treaties can be concluded on any topic as long as the parties consents to be bound by a common goal. Today, treaty making is an indispensable part of state sovereignty and a cornerstone of- interstate relationships.[306]

Private parties have the capacity to conclude agreements under international law in modern arbitration law; however, with regard to international law, further authorization of the states would be required, making agreements between states and private parties the exception.[307]

Treaty-making occurs four stages: negotiations, conclusion of text, express consent to be bound and entry into force.[308] Treaties are usually negotiated through diplomatic channels or through meetings and international conferences.[309] The treaty is concluded once the text has been established and the negotiating parties have expressed their agreement with the final version through their signature.[310] The state parties to a treaty furthermore need to give their consent to be bound by the treaty, usually through a signature as an expression of consent or through the ratification of the treaty.[311] The consent to be bound by a treaty is the most significant aspect of any treaty, as it can only enter into force once the party has consented to be bound by it.[312]

Once a treaty enters into force, it binds all the parties which have consented to be bound by it.[313] Treaties can enter into force through the ratification by all states party to it, through the ratification of the minimum number of state parties required or through other methods expressed in the treaty itself.[314]

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[304] See generally Bayefsky (2001).

[305] Art. 2 VCLT. Compare to a Memorandum of Understanding, which is not governed by international law and which operates as a political commitment. Aust, p. 28.

[306] Aust (2013), p. 14. Korontzis (2012), p. 177.

[307] Grant (2012), p. 144.

[308] Korontzis (2012), p. 177.

[309] Yearbook of the International Law Commission, Vol. II, p. 166.

[310] Korontzis (2012), p. 184.

[311] Korontzis (2012), p. 196.

[312] Aust (2013), p. 87.

[313] Aust (2013), p. 145.

[314] See generally Aust (2013), pp. 145 et seq.

As soon as the parties have entered into a treaty, Art. 26 VCLT obliges the parties to perform their treaty obligations in good faith. The treaty has become legally binding and must be implemented by the parties as *pacta sunt servanda*.[315] Should disputes arise as to the interpretation and implementation of the treaty provisions, the parties shall first and foremost try to resolve these through negotiations and consultations.[316] In the rare cases where these negotiations prove to be fruitless, the parties can turn to arbitration or judicial means of resolution.[317]

7.5.1.2 The Potential Business and Human Rights Treaty

As John Ruggie noted in his initial assessment report on the drafting of the UN Norms, the international community was opposed to creating a binding treaty on the topic of human rights and business. This concern was echoed by H.E. Luis Gallegos Chiriboga[318] in 2013, when he noted that the creation of such a treaty was, unfortunately, still far in the future. Nonetheless, such an international treaty regarding human rights obligations of business enterprises should be a long-term goal for the international community:

> National jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses (...) Greater legal clarity is needed for victims and business entities alike.[319]

Voluntary codes rely solely on the willingness of the corporate body to implement them, whereas legal regimes place particular emphasis on accountability and redress.[320] As such, legal regimes would be better suited to provide a fair basis for consistent judgments on the matter of human rights and corporate misconduct.[321] Any treaty on business and human rights must be complete with a monitoring body, where the UN Working Group on the issue of human rights and transnational corporations and other business enterprises could come in.[322]

International law and policy have slowly been catching up with the human rights developments in the corporate sector.[323] If courts are going to start adjudicating matters of corporate human rights compliance, the legal framework creating such liability needs to be clarified or newly established. Some have proposed to draft a treaty on business and human rights under the umbrella of the WTO; yet,

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[315] Aust (2013), p. 160.

[316] Aust (2013), p. 308.

[317] Aust (2013), pp. 310–313.

[318] Permanent Representative of Ecuador to the United Nations in Geneva.

[319] Ruggie (2013), p. 200.

[320] Pegg (2003), p. 15.

[321] Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies—Summary, International Council on Human Rights Policy, p. 5.

[322] Ratner (2001–2002), p. 539. See furthermore Alston and Crawford (2000).

[323] Karp (2014), p. 152. Meyer (2003), p. 41, argues for leadership by the WTO.

considering that the relationship between CSR and the WTO is still at a very early stage, the consequences of such a partnership are still too unexplored.[324] The original understanding that the WTO has no bearing for human rights is increasingly being challenged by the convergence between human rights and trade law.[325] As a result, new interpretative approaches need to be developed before one can reasonably claim that the legal instruments of the WTO can apply to corporate codes of conduct and the business and human rights agenda.[326] Since the creation of the UN Guiding Principles, much of the liability discussion has been funneled through UN channels and the possibility of creating a treaty at UN level should not be ignored.[327] The UN is uniquely and ideally placed to host such a treaty, as the "Protect, Respect and Remedy" framework originated from its midst, it has a working group in place and has paved the way for the dialogue on business and human rights for a considerable amount of time. Rather than looking beyond borders, the patronage of the UN for a future business and human rights treaty should be supported.

7.5.1.3 Benefits of a Treaty

A treaty will not only clarify the applicable legal standards, it will also ensure and implement human rights obligations at all levels. Even if to date many states still oppose the idea of binding corporations to human rights for fear of losing valuable monetary intake from companies who leave their jurisdiction for another, the creation of a universal human rights treaty will effectively pre-empt this. If all states are bound by the treaty, then companies can no longer engage in jurisdiction shopping to find areas which will let them act with most impunity.[328] Furthermore, such a treaty would also benefit corporations, as they would no longer operate in unclear circumstances and they could adapt their operational policies to the treaty provisions, making their risk assessment and preparatory procedures much simpler.

The creation of a universal treaty on business and human rights will lead to greater legal certainty and security for all parties involved and greater equality before the law. The currently existing governance gap, as already recognized by the CDDH,[329] needs to be closed by the international community to avoid discrepancies as they currently exist between European and American approaches to the issue.[330]

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[324] Vidal-Leon (2013), p. 919.

[325] Vidal-Leon (2013), p. 920.

[326] Vidal-Leon (2013), p. 919.

[327] Hristova (2012–2013), p. 107. Bayefsky (2001), pp. 2 et seq.

[328] Bradley (2001), p. 471.

[329] See Sect. 5.3.

[330] Meyer (2003), p. 42.

Furthermore, states can combat their loss of influence over transnational corporations through the creation of such a treaty as it will lead to greater accountability of corporations. The overwhelming power of corporations over states in matters that should be state business will be limited, creating greater legal certainty for all parties involved.

7.5.1.4 Drawbacks

There are, however, considerable problems with the creation of such a treaty, at least currently. First, the definition of a transnational corporation need to be addressed as corporate entities are rapidly changing and growing. The new corporation is a far more complex that it has been before, with countless suppliers, manufacturers, franchisees and licensees. A treaty must thus encompass all business enterprises and not just those operating transnationally.

The scale of such a treaty needs to be kept in mind. There is an appeal in the idea of creating one treaty to "*bind them all*", yet keeping in mind the complexity and abstraction of such a treaty, many questions arise. The business and human rights label is attached to a vast array of activities, individuals and areas that it is difficult to create one set of governance obligations in one treaty.[331] Ruggie proposes to start the creation of a treaty concerning only the grossest human rights violations because these abuses are the most severe, their prohibition enjoys the greatest consensus among the international community and because the knock-off effect of such a treaty could aid in the creation of further legal instruments relating to corporate human rights conduct.[332]

This, however, is exactly the problem: the current lack of consensus apparent in the international struggle.[333] In July 2014, under the leadership of Ecuador, several states proposed to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights; an attempt that was wildly criticized by the USA and the EU.[334]

Globalization had led to treaties becoming less important and non-state governance systems gaining influence.[335] Additionally, forcing a treaty into existence

[331] John Ruggie at the 3rd annual UN Forum on Business and Human Rights, http://lcbackerblog.blogspot.hu/2014/12/blog-post.html.

[332] John Ruggie at the 3rd annual UN Forum on Business and Human Rights, http://lcbackerblog.blogspot.hu/2014/12/blog-post.html.

[333] Cata Backer (2014b), p. 47.

[334] A Treaty to End Corporate Abuses? Human Rights Watch, http://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses.

UN Human Rights Council adopts two resolutions on business & human rights - includes our analysis of recent developments, Business and Human Rights Resource Centre, http://business-humanrights.org/en/un-human-rights-council-adopts-two-resolutions-on-business-human-rights-includes-our-analysis-of-recent-developments.

[335] Cata Backer (2014b), p. 47.

will, in all likeliness, result in the creation of a paper tiger rather than a functioning system and will force a dramatic reorganization of the state system.[336] This reorganization, however, would result in the loss of exactly those structures which have driven the search for treaty alternatives. Furthermore, centralized enforcement mechanisms in the realm of business and human rights are impractical and inconsistent with the formal structure of power a treaty route is meant to embody.[337] This is the root of the problem of the resolution advanced by Ecuador, Bolivia, Cuba, South Africa and Venezuela calling for the creation of an international treaty on business and human rights: the object of the resolution is not to regulate economic activity in the human rights sector but rather it is intended to control corporations as they are still seen as instrumentalities of the home state and their investment goals.[338]

7.5.2 Implementation Problems

With regard to the general creation of a treaty on business and human rights, several implementation issues arise. As it has been demonstrated throughout, international state consensus on the obligations of corporate entities as to human rights obligations is lacking. Thus, the required element of an agreement between states, as stipulated by the Vienna Convention on the Law of Treaties will be almost impossible to come by currently. The inability to agree on what constitute corporate obligations for human rights and how these are to be implemented currently proves to be the biggest flaw of the treaty on business and human rights idea. However, this current lack of consensus should not and must not be understood to preclude this idea permanently. As discussions in the UN have shown, the number of states attempting to regulate corporate conduct is steadily increasing, leaving the door ajar for a consensus on a treaty in the future.

An additional concern is the fact that corporations cannot enter into international agreements with state parties, ultimately making the business and human rights treaty a legal document which would be imposed top-to-bottom and not through equal stakeholder dialogue. Input from corporations as to the best implementation of human rights by business entities is an absolute necessity for any legal document on the matter. Absence of consultation and input from all stakeholders would result in a treaty devoid of practical applicability.

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[336] Cata Backer (2014b), p. 47.

[337] Cata Backer (2014b), p. 48.

[338] Cata Backer (2014b), p. 50. Furthermore Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights, Ecuador and South Africa's resolution adopted by UN Human Rights Council on 26 June 2014 signed by Bolivia, Cuba, Ecuador, South Africa, Venezuela.

Ultimately, the time has not yet come for a business and human rights treaty—at least not in the next 5–10 years. Considering the advancement of society and business enterprises, an interim solution must be found to adequately address corporate human rights at the international level, pending the drafting and implementation of an international treaty.

7.5.3 The Interim Solution

While waiting for corporate initiatives, certification schemes and increased state responsibility to ripen into a human rights treaty for businesses, an interim solution needs to be executed. This solution will need to take into account the polycentric of the human rights in transnational business problem, while establishing international standards for corporations, states and individuals.

In a first step, transnational corporations need to implement a human rights code of conduct, externally reviewed and enforceable at all levels of the organization. This will create a corporate culture fostering development of sustainable business practices, ethical employees and lasting foreign investment benefiting investors, stakeholders and the community. Based on corporate human rights codes, ISO 26000 will need to be implemented as a certifiable standard. Having one uniform international certification scheme for corporate human rights compliance will level the playing field for corporations and enable better oversight, not only for customers but also for the state community. The combination of an enforceable human rights code at corporate level with an international certification scheme will help corporations implement their duty to respect, as established by the UN "Protect, Respect and Remedy" framework, in a comprehensive manner.

In a second step, states need to be better aware of their duty to protect in the realm of business and human rights. First, they need to review their human rights commitments and establish whether these are being fully honored. In cases where shortcomings can be identified by the state party, these need to be effectively remedied. Such deficiencies may include incomplete oversight of state-owned or state funded corporations operating abroad, outsourcing of state duties to corporate actors without proper instruction or control and granting state contracts to companies with negative human rights track records. In cases where a state is found to have violated its duty to protect, either through an act or an omission, the situation needs to be remedied immediately. States need to communicate the expectation that all businesses operating within their jurisdiction are to respect human rights clearly, implementing domestic measures with extraterritorial implications if necessary.[339] Human rights compliance should be introduced as a precondition in public procurement contracts.[340] The EU, the Council of Europe, ASEAN, the African Union

[339] Guidance on National Action Plans, p. 18.

[340] Guidance on National Action Plans, p. 23.

and the Organization of American states also need to advance the business and human rights agenda in their organizations as a platform for international development.[341]

All existing international human rights instruments need to be signed and ratified, ensuring protection of all individuals within their jurisdiction. National laws need to be improved and their enforcement enhanced. Adequate resources need to be allocated, capacity building fostered and gaps in legislation addressed.[342] National, regional and transnational judicial bodies must permit access to court for individuals who have suffered from corporate violations as a result of state inaction. Such access to court and the ensuing trial must fulfil the requirements of Art. 14 ICCPR and Art. 6 ECHR, allowing for swift and unbureaucratic resolution of the problem. In cases where such judicial bodies identify shortcomings in their admission procedures, these need to be fixed. Inadmissibility *ratione materiae* or *ratione personae* need to be reviewed, especially by the ECtHR, to allow for the adjudication of human rights violations.[343]

Third, an arbitrational panel for human rights violations comparable to the court for arbitration of sports needs to created. This court for the arbitration of business and human rights (CABHR) will cure the existing problems of access to court for individuals who currently cannot reach the regional human rights courts for reasons of inadmissibility. Modelling the new court on the basis of the CAS will use the existing, functioning and internationally accepted arbitration court model and develop it further to fit human rights considerations. The potential shortcomings of CAS regarding independence can be remedied by the creators of the CABHR, by ensuring that no party may influence the arbitrators.[344] The CABHR would be a successful institution, as it would provide victims of violations with an alternative to national courts, being quicker in the rendering of decisions and simpler to access. For corporations, CABHR would offer a more discrete way of addressing potential human rights violations while also saving litigation costs and time-consuming court hearings.[345] Allowing both parties to choose from a closed list of arbitrators ensures equality of arms, as victims of human rights violations are often unable to pay for high profile lawyers or law firms like their corporate counterparts.

Fourth, states and the international community must endorse the UN "Protect, Respect and Remedy" framework and the Guiding Principles and use them to inform national legislation and international policy. The framework and the Guiding Principles have been endorsed by many yet implemented by few. This needs to

[341] Guidance on National Action Plans, p. 27.

[342] Guidance on National Action Plans, p. 20.

[343] See Sect. 5.3.

[344] See Mangan (2009). Yi (2006) Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal, Yale Law School Legal Scholarship Repository, Student Scholarship Papers Paper 24.

[345] On the general benefits of arbitration, see Sussman and Wilkinson (2012) Benefits of Arbitration for Commercial Disputes, http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

change. By including the guidance from the UN documents in every aspect of business and human rights policy and legislation, states and supranational organizations will give further momentum to the UN business and human rights movement. The UN Working Group on the issue of Human Rights and Transnational Corporations and Other Business Enterprises has already called for the development of national action plans (NAP) by the state community, some of which have already begun to be implemented.[346] These NAPs are intended to as an evolving strategy devised by states to protect against adverse human rights impacts in conformity with the UN Guiding Principles.[347]

In December 2014, the Working Group published a Guidance paper for the implementation of the UN framework and Guiding Principles following a year-long consultative process that involved States, companies, civil society, NHRIs and academia.[348] The NAPs are to achieve greater coordination within governments on public policy, to identify national priorities and action measures and to monitor and implement the UN frameworks.[349] The Guidance booklet suggests including business and human rights issues in the Universal Periodic Review (UPR) of the UN human rights treaty monitoring bodies as a solution.[350] This would promote the exchange and dialogue with civil society organizations and other states, creating multi-stakeholder learning and the sharing of best practices.[351] Through the inclusion of business and human rights issues in the UPR, effective follow up can be ensured.

Although the creation of NAPs is a desirable step in the right direction for the implementation of the "Protect, Respect and Remedy" framework and the Guiding Principles, their slow implementation is alarming. The UN Guiding Principles were published in 2011 and 4 years later, only seven states have actually created NAPs.[352] It is questionable whether the drafting of an NAP will be sufficient to ensure that states adequately monitor the business and human rights agenda. It would be desirable for the Working Group to implement an oversight body for the implementation of the NAPs with the possibility of sanctions if implementation and compliance is not undertaken. The Working Group is ideally placed to oversee the process, yet its hand will continue to be bound if it is not given oversight and sanctioning tools.

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[346] Countries, whose implementation of a National Action Plans has begun include the UK, the Netherlands and Lithuania. UN Office of the High Commander for Human Rights, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx. See 6.2.5 for the UN Working Group.

[347] Guidance on National Action Plans, p. i.

[348] Guidance on National Action Plans, p. i.

[349] Guidance on National Action Plans, p. 1.

[350] Guidance on National Action Plans, p. 27.

[351] Guidance on National Action Plans, p. 27.

[352] This includes the UK, the Netherlands and Lithuania. UN Office of the High Commander for Human Rights, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

If the above proposed steps are taken by the international community, corporations and the UN, the business and human rights agenda will be considerably advanced, in harmony with the "Protect, Respect and Remedy" framework and the Guiding Principles while waiting for the drafting of a formal UN treaty. The proposed interim solution will ensure that all measures presented in the conclusion. will be implemented while advancing the quest for an international treaty on business and human rights. Ensuring coherent development of national, transnational and international policies on the basis of the Guiding Principles will lead to the creation of uniform standards for corporations and states and will facilitate the creation of an international consensus for the creation of a treaty.

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Chapter 8
Conclusion: The Future of Human Rights Compliance

Abstract What makes the corporate human rights obligations issue so difficult to resolve is the underlying philosophical question it is based upon: what is the role of the law? Should the law anticipate societal developments or should it respond to them? Is the law a tool for change or is it a vehicle for stability? Most importantly, when should the law step in? (On what the law and governments should do, see Thaler and Sunstein (2008) Nudge: improving decisions about health, wealth and happiness, Penguin Books.)

Keywords Compliance • Human rights • Sustainability

In the field of business and human rights, there is *no one right answer*.[1] It would be too easy to claim that corporations are malevolent machines set out to destroy humanity. Equally, it would be false to contend that corporation stand above all duties towards the society they operate in, based on the separation between company and managers. The relationship between business entities and human rights is much more complex than a single answer could ever hope to be.

In cases where the well-being of civilization and the well-being of the economy are equally at stake, the law should indicate society and corporations in the right direction. The failure of the law to do so in the business and human rights sector has resulted in numerous deaths, the vilification of transnational enterprises and a general helplessness on the part of human rights litigators not knowing where to turn.

Why should the law have stepped up to the task of clarifying the human rights and business connection earlier than 2015? Society itself is egoistical. Although many like to claim that they are motivated by altruism and *the greater good*, human beings aim at the maximization of their own pleasure first and foremost. Although it has long been argued that there exists a moral obligation for corporations to do the right thing, without a coherent legal framework both at corporate and international level, this moral obligation will remain what it is: a great aspiration. The law needs to prevent the quest for pleasure maximization of the few for the benefit of society

[1] Dworkin (1978). Dworkin argues that there exists a unique right answer for a vast majority of cases. See also Sect. 7.4.4.

J.R.-M. Wetzel, *Human Rights in Transnational Business*,
DOI 10.1007/978-3-319-31325-2_8

as a whole. Corporate human rights compliance will become such a great benefit if correctly implemented.

The purpose of business is business—at least it used to be. What was once the maxim of every great entrepreneur in the world has now become a somewhat obscure mantra chanted by a select few behind the doors of their corporate offices. Companies such as Shell, Nike or Arcelormittal, who used to operate for the sole purpose of amassing the greatest amount of revenue for their shareholders, have recently been confronted with the backlash for their socially irresponsible actions.[2]

Although Carrigan/Attalla argued in 2001 that the group of individuals who valued and responded to socially responsible corporations was small, this is no longer true in 2015.[3] As a matter of fact, already in 1997, Creyer noted that the ethicality of a company is a factor in consumer purchasing decisions and that ethical corporate behavior is expected.[4] These findings hold even truer today. The modern consumer is concerned about the origins of the products he purchases and is even willing to pay a higher price for them.[5] Responsible corporate behavior is no longer a burden; it has become a great business opportunity.

As discouraging as the past may have been, positive changes have been happening both at legal and at corporate level as of late, also as a result of *Kiobel*. The creation of various initiatives to target and combat misconduct has led to increasing awareness of the issue across different sectors. The creation of a UN Focus Group on Human Rights and Business as well as the conception of the "Protect, Respect and Remedy" Framework and the Guiding Principles are indicators of change.

Corporations too have begun to grasp that the old order of *anything goes* is, albeit slowly, being eroded. First responders to the Ethics and Compliance movement crossed all sectors; an encouraging development. Even more promising then, is the fact that companies formerly involved in misconduct have been eager to make changes to their policies and operations in order to improve their positive impact in the communities they operate in.[6] What needs to happen as a next step for corporations is that ethics and compliance offices do not remain an exceptional occurrence without enforcement tools but that they become the norm to implement codes of conduct. Corporate human rights compliance can only be achieved through adequate legal control and framing.

Without an enforceable legal framework, compliance cannot function effectively. Similarly, human rights compliance will be ineffective if the aims expressed in corporate codes are too idealistic and withdrawn from reality. Practicability, transparency and accountability should be key words for any organization effectively implementing sustainable business practices, as compliance can only work if

[2] ArcelorMittal 'no longer welcome in France', The Independent UK, http://www.independent.co.uk/news/business/news/arcelormittal-no-longer-welcome-in-france-8353061.html.

[3] Carrigan and Attalla (2001), p. 570.

[4] Creyer (1997), p. 428.

[5] Creyer (1997), p. 428.

[6] See Sect. 7.4.3.

the regulatory framework of human rights exists in conjunction with the practical demands of modern businesses. Once every corporation has created and implemented an effective strategy targeting its operational impact, corporate human rights compliance will not only be a movement, but more importantly, an institution.

Through the creation of an effective, binding human rights business strategy, corporations will reposition themselves favorably in the fierce competition on the international market. The market, however, can only function properly if it is embedded in a society with adequate legal and institutional rules.[7] Only if the market receives the legal framework it needs to survive and flourish can it address the needs of the people it seeks to target. Additionally, society needs such a framework to combat the adverse effects of the market. The market can and will pose a danger to society when it exceeds the legal frameworks intended to allow for its smooth functioning, as markets are economically and politically unsustainable when they outgrow their institutional underpinnings.[8]

Currently, the issue of corporate involvement in human rights violations is being highlighted again by the 2022 FIFA World Cup in Qatar. All major sponsors, such as Coca-Cola and Adidas, have a human rights compliance policy that would not allow them to support events with considerable human rights violations.[9] Consequently, with the rising death toll of workers building the infrastructure required in Qatar, the main sponsors have been urged to cease their sponsorship in widespread public campaigns.[10] The mistreatment of migrant workers could potentially have dire effects on sponsor shares, market value and reputation, as the silent condemnation by these companies is in direct opposition of their corporate codes of conduct, human rights due diligence and risk management. Public outcry and pressure became so considerable that Coca-Cola, Visa and Adidas issued statements in late May 2015, expressing their deep concern over the human rights situation in Qatar, yet remaining firm on their commitment to sponsor the World Cup.[11]

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[7] Ruggie (2001), p. 201.

[8] Ruggie (2001), p. 201.

[9] Adidas Group Human Rights and Responsible Business Practices, http://www.adidas-group.com/media/filer_public/2013/11/14/human_rights_responsible_business_practices_qa_july_2011_en.pdf.

Adidas Group Code of Conduct, http://www.adidas-group.com/en/investors/corporate-governance/code-of-conduct/.

For Coca-Cola's Code of Conduct and Human Rights Statement, see Sect. 7.4.3.2.

[10] Slogans include "Adidas – Impossible is nothing with slave labor", "Budweiser – You can't be the king without slaves" or "Coca-Cola – Proudly supporting the human rights abuses of World Cup 2022", http://www.boredpanda.com/qatar-2022-world-cup-human-rights-sponsor-anti-advertisement/.

[11] FIFA 2022 World Cup Sponsors Visa, Adidas, Coca-Cola Concerned Over Qatar's Labor Conditions, International Business Times, http://www.ibtimes.com/fifa-2022-world-cup-sponsors-visa-adidas-coca-cola-concerned-over-qatars-labor-1932365.

Although FIFA, forced by public pressure, has encouraged Qatari officials to address the guest worker situation, profound changes yet remain to be implemented.[12] Although the sponsors have stated to rely on the organization to redress the situation, this does not exonerate them from responsibility, as has been shown in previous chapters.[13] These corporations have committed to respecting and furthering human rights through the implementation of corporate codes of conduct and human rights statements; these commitments now need to be implemented and enforced.

Sponsors need to consider very carefully whether their support of major events in connection with human rights violations will still be in line with their corporate commitment to human rights, as expressed by their own codes of conduct. Failure to adhere to the values of their codes of conduct could entail far-reaching consequences for the brands, both financial and legal, in the future. Companies should not underestimate the consumers' motivation and power to redress corporate malpractice through boycotts and publicity campaigns.

Business is built on trust and reputation. Consumer product choice is heavily influenced by the way they feel about a brand just as investment choices are made largely based on reputational considerations. Recently, corporations have begun to embrace human rights not only to positively influence their brand's reputation and thus increase sales and profit but also to limit litigation costs and increase the flow of skilled workers. All corporate codes of conduct investigated show a clear and growing awareness of businesses across all sectors (extractive, apparel, food and beverage and cosmetics) that human rights compliance is, in fact, good for business. The major issue still unresolved by all corporate codes is their enforcement and grievance mechanisms that need to be complemented by external overseeing through certification and external human rights consulting. After all, if corporate human rights compliance is the car, enforcement is its engine.

Corporations need to understand the true value of a binding and enforceable human rights agenda in all aspects of the business. Only then will corporate culture develop and become a vehicle for change. There is a distinctive business advantage for those companies having implemented ethics and compliance procedures, especially in areas involving government contracts.[14] This is underlined by a recent publication by Maureen Shaw of the Huffington Post, who listed 13 companies to boycott during the Christmas sales, based on their negative human rights record. The list includes companies like Walmart, Urban Outfitters and Abercrombie and Fitch.[15] Organizations that manage to create successful corporate codes such as

[12] FIFA president Blatter signals mounting pressure on Qatar to tackle migrant worker problems, Daily News Egypt, http://www.dailynewsegypt.com/2015/03/19/fifa-president-blatter-signals-mounting-pressure-on-qatar-to-tackle-migrant-worker-problems/.

[13] See Sect. 4.5 and Chap. 6.

[14] Wulf (2012), p. 366.

[15] 14 Companies to Avoid If You Support Equality in America, http://mic.com/articles/102220/vote-with-your-wallet-companies-to-avoid-if-you-support-equality-in-america?utm_source=huffingtonpost.com&utm_medium=referral&utm_campaign=pubexchange.

Yahoo or The Body Shop can distinguish themselves from opponents in the same sector, granting them considerable competitive advantages.[16] This is reflected in the commitment of Verizon, Always and Levis Strauss towards equality.[17] Such companies become increasingly appealing to consumers, stakeholders and investors, obtaining more business opportunities because the modern consumer and investor values ethical corporate culture and responsible, sustainable business action.[18]

Translating human rights concerns into understandable business policies that can be imported into operative procedures has a considerable advantage: it will facilitate the implementation of human rights in the international business context and will therefore speed up the adoption and execution of human rights compliance procedures for business entities. Additionally, a translation of obligations will be less complex than a universal human rights treaty, with cheaper and quicker methods of addressing grievances and better chances of success.

Although a treaty or set of treaties should be the ultimate goal in the fight against corporate human rights violations, the task for the next 5–10 years must be the creation and implementation of operative human rights obligations as a successful business strategy for corporations. In the years to come, only those enterprises recognizing the true value of corporate human rights compliance will be able to establish dominance in the market.

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[17] "It's not all bad news, however. Amidst these anti-equality behemoths, however, are plenty of pro-equality companies who would love to accept your hard-earned cash. Here are a few you should consider supporting when given the chance." http://mic.com/articles/102220/vote-with-your-wallet-companies-to-avoid-if-you-support-equality-in-america?utm_source=huffingtonpost.com&utm_medium=referral&utm_campaign=pubexchange.

[18] Wulf (2012), p. 367.