Corporate Human Rights Obligations: Towards Binding International Legal Obligations?

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1. Introduction

The last few decades have witnessed fundamental changes in domestic and international environments. Globalisation has blurred the borders between economies and societies around the world. It has been characterised by the rising economic, social and political power of corporations, particularly transnational corporations. Far from being an exception here, corporations are at the forefront of these changes. As S. Narula notes, "the privatization and deregulation of economies and the liberalization of trade have diminished the state's influence over the daily economic lives of its people"[1]. In this light, it appears that state action alone does not suffice to protect fundamental human rights. Hence, this article explores how these changes have affected how individuals enjoy their human rights in relation to the activities of corporations. It examines whether corporations have any human rights obligations at the international level and, if so, which.

Deriving from respect for human dignity, human rights belong to a genus of "heavyweight" rights beneficial to society as a whole. The human rights of individuals are usually defined as a normative embodiment of the most important universal values of human beings, applicable in every human community. They are most commonly connected with the preservation of human life, the security of a person, fundamental labour rights, and equality and non-discrimination. They can be described in either a philosophical way as a moral claim that all humans possess or as a

[1] S. Narula, The Right to Food: Holding Global Actors Accountable Under International Law, 2006, 44 Columbia Journal of Transnational Law, 691, 750.

translation of these moral claims into positive law in national legal orders and at the international level.[2]

Lawyers, economists and social scientists alike have for a number of years agreed that foreign investments have the potential to act as a catalyst for the enjoyment of the individual's human rights, particularly in developing countries. This is even more so considering that investment agreements[3] often do not explicitly oblige corporate investors to observe human rights even though they exert considerable power over individuals, communities and indigenous populations. Such assertions have strengthened the normative link between human rights law and international law on foreign investment on a general level.

In 2006 developing countries attracted USD 380 billion in foreign direct investment.[4] Corporations, particularly transnational corporations, are increasingly operating most of the foreign direct investments in developing countries. They have assumed the role of the cardinal actors in foreign investment, even though states and individuals also often act as investors.[5] International investment standards are mainly aimed at greater investor and investment protection.[6] Whereas foreign direct investments can stimulate economic growth, development and employment, they can also contribute to improving the human rights situation in many developing countries as a direct consequence of the investments, or alternatively indirectly due to the presence of such investments. Despite this, there is little conclusive evidence that investments actually promote growth, development and employment in developing countries.[7]

Rather than presuming that the rules and practices of foreign investment contribute to the protection and promotion of human rights, the present article examines situations where the reverse possibility comes into play. It is true that some corporations express their commitment to observing human rights and

[2] F. Viljoen, International Human Rights Law in Africa, 2007, OUP, 4.
[3] The term "investment agreement" here refers primarily to private foreign investment contracts, although it may also refer to bilateral investment treaties where necessary.
[4] The World Investment Report 2007, Transnational Corporations, Extractive Industries and Development, iii.
[5] See J. Ruggie, 2008 Report, para. 12.
[6] International Law Association, First report of the Committee on International Law on Foreign Investment, 2006, 440.
[7] UN High Commissioner for Human Rights, Report on Human Rights, Trade, Investment, E/CN.4/Sub.2/2003/9, 2 July 2003, 6-8.

related standards.[8] Even though such statements cannot simply be brushed aside as "mere gestures"[9], it is precisely where the relationship between foreign investments, corporate investors and human rights stumbles at the first hurdle since corporate investors' voluntary approaches are often given too much weight. Foreign investments may have varying effects, either positive or negative, on the enjoyment of the individual's human rights.

Further, the effects will vary depending on the "type of investment, the host country, the sector targeted by investment, the motivations of the investor as well as the policies of both host and home country".[10] In other words, the potential for an investment to affect human rights differs from sector to sector. Corporate investors can have negative consequences on the individual's enjoyment of human rights, including an adverse effect on human rights preserving fundamental labour rights, human rights preserving the security of persons and those preserving non-discrimination.[11] It appears that the human rights under the strongest pressure due to foreign investment include human rights preserving labour rights and non-discrimination, whereas the category preserving safety and security is likely to prove less problematic. All in all, it appears that developing states are less likely to regulate and monitor corporate investors that do not violate human rights.

As the above introduction demonstrates, the relationship between investment law and human rights is based on two different standpoints. While one standpoint prioritises the investment law approach, the other gives priority to the wider interests of the community, including the protection and promotion of fundamental human rights by or involving corporations. This article employs the following outline: firstly, it briefly outlines and sketches the nature and extent of human rights violations by or involving corporations. It then succinctly analyses the feasibility and possibility of corporate responsibility for human rights in Section III. A discussion of the concept of corporations' fundamental human rights obligations follows in Section IV. In Section

[8] See Michael Wright and Amy Lehr, Business Recognition of Human Rights: Global Patterns, Regional & Sectorial Variations, UN Special Representative on Business & Human Rights, <www.business-humanrights.org>.
[9] S. Leader, 2006, Human Rights, Risks, and New Strategies for Global Investment, Journal of International Economic Law, 9 (3): 657-705, 660.
[10] Ibid. 7.
[11] See H. Mann, International Investment Agreements, Business and Human Right: Key Issues and Opportunities, IISD, February 2008. 39.

V the article then argues for the international legal personality of corporations. Section VI argues that corporations' fundamental human rights obligations also arise at the international level. Section VII identifies the fundamental human rights obligations of corporations. Section VIII concludes and presents some proposals for identifying corporate human rights obligations at the international level. It rejects the proposition that the fundamental human rights obligations of corporations do not have any place in human rights law. By contrast, they have played an important role in advancing the interests of victims who suffer fundamental human rights violations and they also strengthen the existing corpus (system) of human rights law.

2. The nature and extent of corporate human rights violations

As legal doctrines need to be discussed in relation to the reality of situations, this section identifies the nature and extent of the problem. The primary aim of this article is to examine corporate human rights obligations at the international level. Corporate responsibility for human rights is therefore not merely an abstract matter. On the contrary, the present article analyses an issue of great salience for thousands of victims of direct or indirect corporate human rights violations[12] around the world. Establishing any type of responsibility for human rights violations by or involving corporations has historically been a very demanding task and this may explain why the international community has not yet built upon the embryonic forms of regulating corporate responsibility.

[12] Here it must be noted that some commentators argue for a distinction between FHR violations and abuses. Martin Schenin, for example, argues that a "violation is a definitive conclusion that is established through a judicial or quasi-judicial procedure." For a detailed explanation, see his first report presented in his first report as Special Rapporteur to the Human Rights Council (Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (E/CN.4/2006/98), paras 67-71. In contrast, this study argues for a broader approach to the notion of human rights violations in relation to corporations as there are already mechanisms in place, particularly at the national level through which corporations question could be made accountable. Similarly, Christian Tomuschat argues that "human rights violations can, in principle, be committed only by states and/or the persons acting on behalf of the state"; Human Rights between Idealism and Realism 309 (2003). In contrast, this study argues that corporations can and do violate human rights. See Interview with Martin Schenin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 16 November 2006.

This section contextualises the discussion on corporate responsibility for human rights. It does so by briefly focusing on the nature and scope of human rights violations by or involving corporations and their officers. Corporations have been operating for centuries beyond the borders of the country in which they are registered. This is enabled by a range of mechanisms from wholly-owned subsidiaries, joint ventures or other partnerships with foreign companies to supply chain relationships with contractors and suppliers of goods and services. This has raised the question of the extent to which corporations are responsible for the protection, promotion and realisation of human rights, and the ways in which they can be held accountable for human rights violations connected with their activities. In addition, a few real-life scenarios from different parts of the world would be instrumental in illustrating the impacts corporations have on human rights.

In recent decades there has been a growing body of evidence that the impact of corporate activities on poor communities in developing countries can result in human rights violations.[13] Even though this phenomenon is far from new, globalisation and its inherent forces have created favourable conditions for the rise of corporate actors to power. J. Ruggie noted that "the rights of transnational firms – their ability to operate and expand globally – have increased greatly over past generation as a result of trade agreements, bilateral investment agreements and domestic liberalization."[14] Today there are some 70,000 transnational corporations, together with roughly 700,000 subsidiaries and millions of suppliers in every part of the globe.[15] Wal-Mart alone is reported to have more that 60,000 suppliers worldwide.[16] It may appear that corporations undoubtedly affect the quotidian lives of people around the world. Moreover, corporations are part of an extensive web of relationships between actors in the global

[13] See Human Rights Watch, On the Margins of Profit, Rights at Risk in the Global Economy, February 2008 Volume 20, No. 3(G). < http://hrw.org/reports/2008/bhr0208/ >, J. Ruggie, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5/Add.2, 23 May 2008 – summarising the scope and patterns of alleged corporate-related human rights abuse found in a sample of 320 cases posted on the Business and Human Rights Resource Centre webpage from February 2005 to December 2007.

[14] J. Ruggie, 2006 Report, para. 12.

[15] Research note, World Investment Report 2005: Transnational Corporations and the Internationalization of R&D Overview, United Nations Conference on Trade and Development, 104.

[16] See announcement of the lecture in the Prince of Wales's Business and the Environment Programme, <http://www.admin.cam.ac.uk/news/dp/2007013101>.

north and the global south. The largest corporations are based in the developed countries in the global north. Seventy-one corporations from a list of the 100 largest corporations are based in just five countries (France, Germany, Japan, the United Kingdom and the United States).[17] Twenty-five corporations based in the USA are on the list of the 100 largest non-financial corporations.[18] Commentators estimate that the top 25 corporations in the world are richer than 170 countries.[19]

It appears that the precise scale of fundamental human rights by or involving corporations remains difficult to ascertain. J.J. Paust notes that "in terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that thwart human rights than decisions and activities of some nation-states".[20] In this regard, the UN Special Representative of the Secretary-General on Business and Human Rights in 2006 found that the "extractive sector – oil, gas and mining – utterly dominates this sample[21] of reported abuses, with two thirds of the total."[22] The study "conducted by the International Council on Mining and Metals, for example, examined 38 allegations against mining companies in 25 countries."[23] Another study conducted by the Office of the UN High Commissioner for Human Rights in support of the SRSG's mandate analysed a sample of more than 300 allegations of corporate human rights abuses from all sectors collected by the Business and Human Rights Resource Centre.[24] J. Ruggie's report suggests that around 60 percent of reported cases involve direct forms of company involvement in the alleged violations, where the company is alleged to have directly committed violations through its own acts or omissions.[25] Only 40 percent of all

[17] UNCTAD World Investment Report 2005: Transnational Corporations and the Internationalization of R&D, New York and Geneva: United Nations, 2006, 15-18.
[18] Ibid. 15.
[19] M.B. Baker: Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise, 20 Wisconsin International Law Journal. 89, 2001, 94.
[20] J. J. Paust, Human Rights Responsibilities of Private Corporations (2002) Vanderbilt Journal of Transnational Law 35, 801, 802.
[21] The SRSG on Business and Human Rights employed a sample of 65 surveyed instances in 27 countries recently reported by NGOs.
[22] See J. Ruggie, 2006 Report. 25. Also see paras 24-30.
[23] J. Ruggie's 2008 Report, 108.
[24] J. Ruggie consultation, Corporate responsibility to human rights, Geneva, Dec. 4-5, 2007, 2.
[25] See J. Ruggie, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5/Add.2, 23 May 2008. 3, 14-15.

reported cases include allegations of indirect forms of corporate violations.[26] Most alleged human rights violations have occurred in the extractive industry, retail and consumer products and pharmaceutical and chemical sectors. A similar study was undertaken by the Corporate Accountability Working Group of the ESCR-Net which examined situations where corporations adversely affect human rights.[27] It found that in the 159 surveyed cases from 66 countries corporations have a negative effect on the individual's enjoyment of human rights.

The UN Panel of Experts on the Illegal Exploitation of the Natural Resources of the Democratic Republic of Congo (DRC) listed in Annex III of its 2001 Interim Report that several corporations had breached the OECD Guidelines.[28] Presently, over 40 private military and private security corporations employ 40,000 to 50,000 employees in Iraq alone,[29] whereas there are more than 130 private military and security companies operating in all regions of the world.[30] Examples of allegations of human rights violations by or involving private military and private security corporations are widely documented in the literature.[31] The next section turns to

[26] Ibid. 3, 14-15.

[27] Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net), Collective Report on Business and Human Rights, Submission to the 8th Session of the United Nations Human Rights Council, Executive Summary, June 2008, <http://www.escr-net.org/usr_doc/ExecSummary_CollectiveReport_eng.pdf>.

[28] See 2002 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2002/1146, 16 October 2002 Annex I, II and III.

[29] See Minutes of the Dialogue on private military and security companies and human rights, Meeting at the Business & Human Rights Resource Centre, London, 8 May 2007, 2. Private military industry is worth up to USD 100 billion annually. Singer, Peter W., Corporate Warriors – The Rise of the Privatized Military Industry, Cornell University Press, Ithaca and London, 2003. 8. See Documentary Iraq for Sale: The War Profiteers, 2006: Jeremy Sachil, Blackwater: The Rise of the World's Most Powerful Mercenary Army, Nation Books, 2007.

[30] The Business and Human Rights Resource Centre (<http://www.business-humanrights.org/>) currently lists over 28 individual companies in the "Security companies" section, 47 companies in the "Military/defence" section, 43 companies in the "Arms/Weapons" section, and 3 companies in the "Prison companies" section.

[31] Human Rights Watch reports that corporations in Indonesia's pulp and paper industry "have hired private security corporations who intimidate or assault members of neighbouring communities; whereas government security personnel who receive funding from the companies have assisted or acquiesced in these attacks". Human Rights Watch, Without Remedy: Human Rights Abuse and Indonesia's Pulp and Paper Industry, vol. 15, no. 1(C), January 2003, <http://www.hrw.org/reports/2003/indon0103/>, 32-44, 57-58.
Further, Human Rights Watch submits that "government and private security forces have responded with excessive, sometimes lethal, force against striking workers in China's heavy industries and protesters demonstrating against a massive power plant in India and oil companies in Nigeria." Human Rights Watch, Paying the Price: Worker Unrest in Northeast China, vol. 14, no. 6(C), August 2002, <http://www.hrw.org/reports/2002/chinalbr02/chinalbr0802-03.htm#P397_85990>, 18, 20, 22-25, 31-33; The Enron Corporation: Corporate Complicity in Human Rights Violations (New York: Human Rights Watch, 1999), 99-105; The Price of Oil: Corporate Responsibility and Human Rights Violations

the feasibility and possibility of obligations and the responsibility of corporations in relation to human rights.

3. The feasibility and possibility of corporate responsibility for human rights

The aim of this part is to briefly discuss objections to corporate responsibility and to thereafter examine the desirability and possibility of corporate responsibility for human rights. States are usually primarily responsible for the protection and promotion of human rights. However, they do not have an exclusive responsibility to observe human rights. For example, individual criminal responsibility for international crimes derives, inter alia, from the perception that mechanisms of state responsibility cannot adequately address accountability for alleged international crimes. It may, therefore, appear that corporate responsibility may offer an alternative but not exclusive mechanism for addressing corporations' human rights violations. The next section first presents some of the objections to corporate responsibility for human rights.

Objections

A number of arguments can be deployed against the imposition of human rights obligations and responsibility on corporations.[32] It might be asserted that the overriding and primary objective of the corporation as an institution is to serve the interests of its shareholders, resting on the concept of fiduciary duties setting out the obligations of directors, and that this has traditionally been the case and remains so today.

A number of commentators feel strongly that there can be no

in Nigeria's Oil Producing Communities (New York: Human Rights Watch, 1999), <http://www.hrw.org/reports/1999/nigeria/> 9-12, 123-124, 152-154.
Human Rights Watch also notes that corporations have been involved in killings and other violence against trade unionists through their ties to paramilitary groups. Letters from Human Rights Watch to British Petroleum Company Plc. (now BP), Occidental Petroleum Corporation, and Ernesto Samper, then president of Colombia, April 1998, <http://www.hrw.org/advocacy/corporations/colombia/>; Maria McFarland Sánchez-Moreno, Esq., principal specialist on Colombia at Human Rights Watch, testimony before the US House of Representatives Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, Subcommittee on the Western Hemisphere and the House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, Subcommittee on Workforce Protections, 28 June 2007, <http://hrw.org/english/docs/2007/07/23/colomb16458.htm>.

[32] Also see P. T. Muchilinski, Human Rights and Multinationals – Is There a Problem? International Affairs, 31 (2001).

legal regulation of corporate conduct. M. Friedman reflects this position clearly in the statement: "there is only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as its stays within the rules of the game, which, is to say, engages in open and free competition, without deception or fraud".[33] For M. Friedman, shareholders are the owners of corporations and managers are only their agents. Second, corporations have responsibilities to their shareholders, but not also for employees or society as a whole and they are only responsible for gaining profits to the benefit of the shareholders.[34] In other words, corporations are only responsible for profit maximisation. Similarly, the American Law Institute notes that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain".[35] Third, the protection and promotion of human rights is the sole responsibility of states, whereas corporations are only obliged to respect the law. Fourth, corporations are not obliged to observe the human rights of individuals as human rights protection is only designed for the relationship between the individual and the state. Fifth, P. Muchilinski observes that the existence of corporations' human rights obligations may have the result that some corporations and states will not comply with them.[36] Finally, another strong argument against corporate responsibility may be that economic growth, job creation, economic development and the expansion of financial resources, all facilitating tax bases, by corporations aided by rules of limited economic liability represent a better way of helping communities.[37] Having briefly described the arguments against corporate responsibility, which may all appear credible and plausible, the following section now turns to arguments for corporate responsibility.

[33] M. Friedman, A Friedman Doctrine – The Social Responsibility of Business is to Increase Its Profits, New York Times Magazine, 13 September 1970, 32-33 and 122-124. Similarly, a US court held in Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 688 (1919) that: "A business corporation is organised and carried on primarily for the profit of the stockholders. The powers of directors are to be employed for that end." M. Friedman further notes that "few trends so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible." M. Friedman, Capitalism and Freedom, Chicago: Chicago University Press, 1962, 133.

[34] J. Bakan, The Corporation – The Pathological Pursuit of Profit and Power, Constable, 2005.

[35] American Law Institute, Principles of Corporate Governance (1994), Section 2.01 (a).

[36] P. Muchilinski, 2007, 515.

[37] Some could argue that where corporations operate in countries with bad human rights records, they help facilitate economic development that would otherwise not have taken place.

The feasibility and possibility of corporate responsibility for fundamental human rights

The aim of this section is to present arguments for corporate responsibility for human rights. It argues that there is also a plethora of strong arguments in favour of corporations having human rights obligations.[38] As corporations assume ever more power in national and international environments, the question emerges as to whether the existing normative frameworks and responsibility and accountability structures can effectively and adequately address these ramifications in national and international environments.[39]

In this light, the regulatory leeway has left the law particularly ambiguous. Most commentators agree that the national and international normative system does not offer effective mechanisms to respond to real-life situations. In other words, on a normative level it can be argued that human rights violations by or involving corporations occur as a result of failures in the normative and regulative system already in place. Some commentators explicitly or implicitly note that the market should regulate the activities of corporations and their officers. However, it would appear somewhat na ve to leave the conduct of business, which impacts the quotidian aspects of everyone's lives, to voluntary approaches or, indeed, to the invisible hand of Adam Smith.[40] In contrast, it would also be unrealistic to assume that corporations are inherently harmful to public interests.[41] The objections noted above can be rebutted and

[38] See N. Jägers, Corporate Human Rights Obligations. In Search of Accountability, Intersentia, Antwerp, 2002.S. R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale Law Journal 443 (2001); P. T Muchilinski, Multinational Enterprises & The Law, OUP, 2007, 515.; A. Clapham, Human Rights Obligations of Non-State Actors, OUP, 2006, Ch. 6; P. Alston (ed.): Non-State Actors and Human Rights, OUP, 2005; D. Kinley and J. Tadaki; "From Talk to Walk": The Emergence of Human Rights Responsibilities for Corporations at International Law", 44:4, Virginia Journal of International Law, 931-1024; M. Kamminga, "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC", in P. Alston (ed.), The EU and Human Rights (OUP), 1999, pp. 553-569. O. De Schutter (ed.); Transnational Corporations and Human Rights. Oxford, Portland, OR: Hart Publishing, 2006.

[39] It appears that it would be futile to de lege lata seek the answer in the international environment as this may not be possible at the present time.

[40] A. Smith, An inquiry into the Nature and Causes of the Wealth of Nations, 447, (Edwin Cannan ed., Univ. of Chicago Press 1976). He notes: "The individual generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [He] intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention."

[41] Simon Chesterman and Chia Lehnardt; From Mercenaries to Markets: The Rise and Regulation of Private Military Companies, Oxford University Press, 2007.

one should take them with a grain of salt. This section explores arguments for a coherent framework of corporate responsibility for human rights. It argues that at least 11 compelling arguments exist for corporate responsibility and accountability for human rights.

Today, standard setting for the protection of human rights has largely come of age in the international arena. In the last 20 years, increasing attention has been devoted to the impact corporations have on human rights. There is a growing body of evidence that the impact of activities of corporations on communities in developing countries, especially in Africa, Asia and in Latin America, can result in human rights violations. However, the idea that corporations can commit violations of human rights is nothing new. Corporations committed human rights violations during the transatlantic slave trade and during the period of colonialism when more than 40 European corporations were involved in facilitating the slave trade or controlling colonised territories. What is new is that alleged human rights violations by or involving corporations must be effectively addressed/responded to. In other words, the current mechanisms fail to effectively respond to human rights violations.

The increasing inherent forces of globalisation and integration of the global market economy means that corporations are required to comply with human rights standards even where they are absent from national legal orders or where they are not enforced. Every market is embedded with normative rules and institutional frameworks which are required for the market to function and in fact to survive.[42] Such a permissive environment creates a governance lacunae allowing for human rights violations by or involving corporations to avoid sentencing or having to make reparations.[43]

Moreover, P. Muchilinski notes "that the relationship between corporations and human rights has so far been that of victim and beneficiary".[44] Another reason for corporate responsibility is that corporations enjoy a plethora of rights in relation to foreign investment laws such as "expropriation and compensation, and non-discriminatory treatments"[45] compared to national corpora-

[42] J. Ruggie's 2008 Report, 2.
[43] Ibid. 3.
[44] P.T. Muchilinski, 2001, 32.
[45] D. Kinley and J. Tadaki, 2004, 946-947.

tions, but they are not formally required to comply with fundamental human rights, at least under international human rights law.[46] What is more, the rights of corporations have increased over past decades.[47] Corporations do enjoy rights under international human rights law but not necessarily the corresponding obligations. In other words, "where there is power, there must be responsibility".[48]

Responsible corporations that observe fundamental human rights can avoid legal, financial and other risks and can benefit in the marketplace by assuming a more competitive position. The reputations of corporations increase when they treat their employees fairly and non-discriminatorily in compliance with fundamental human rights.[49] In doing so, they avoid negative publicity and the connected loss of profit and stock value.[50] W. Allen succinctly argues that "...corporations as independent social actors...do not simply owe contract or other legal duties to those affected by its operations, but owe loyalty in some measure to all such persons as well".[51] M. Porter and M. Kramer illustrate how a corporation and society can work together in mutually supportive interrelationships.[52] They argue that "strong regulatory standards protect both consumers and competitive companies from exploitation"[53] and rightly observe that "by providing jobs, investing capital, purchasing goods, and doing business every day, corporations have

[46] Ibid. The authors note that "corporations are also empowered to enforce some of the rights they enjoy under international law. For instance, corporations can submit disputes to binding arbitration under rules promulgated by the World Bank." 947.
[47] J. Ruggie's 2008 Report, 12-13.
[48] See J. Nolan, With Power Comes Responsibility: Human Rights and Corporate Accountability, 28. University of New South Wales Law Journal 581, 581 (2005). Also see D. Kinley and J. Tadaki, 2004, 1021. It is not the intention of the present study to purport that corporations should not enjoy equal protection under the law, but a traditional conception of human rights accepting only this protective approach to relationships between corporations and human rights should be modified so that at a minimum corporations should be expected to observe FHRs. Only by seeking a deeper understanding of this apparent paradox will it be possible to address corporate responsibility for FHRs.
[49] E. Assadourian, The State of Corporate Responsibility and the Environment, The Georgetown International Environmental Law Review, Vol. 18: 571, 574. B. Fisse notes that "in a recent empirical study of the impact of adverse publicity crises on seventeen major corporations, loss of corporate prestige, as distinct from financial loss, was found to be a significant concern of executives in all but two cases". See B. Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions (1983) 56 Southern California Law Review, 1141 at 1147-1154.
[50] Ibid. 584.
[51] W. T. Allen, Our Schizophrenic Conception of the Business Corporation, 14 Cardozo Law Review (1992), 271.
[52] M. E. Porter and M. R. Kramer, Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility, Harvard Business Review, December 2006. 97.
[53] Ibid. 83.

a profound and positive influence on society."[54] It appears that a corporation should pursue a substantive dimension of corporate responsibility as opposed to employing corporate responsibility as camouflage for public eyes. Finally, M. Porter and M. Kramer note that corporations must start thinking in terms of "corporate social integration" rather than "corporate social responsibility".[55] In this way, corporations would integrate (our) society's goal in their business policies and thereby achieve a competitive advantage. Corporations may able to attract and retain higher quality employees if they comply with human rights obligations. Several corporations already recognise that responsibility for fundamental human rights is in their best interests and that such a commitment must be supported by their resources. Corporations have resources to achieve the objectives of corporate responsibility and their involvement is a *condition sine qua non* for corporate responsibility for human rights.[56]

Further, businesses themselves recognise they have human rights obligations. A number of corporations have formally and publicly acknowledged responsibility for ensuring that their actions are consistent with fundamental human rights, starting with the Universal Declaration of Human Rights (UDHR). Some 125 corporations refer to the UDHR, whereas a further 77 have explicit human rights policies.[57] In addition, over 5,600 corporations have expressed their commitment to the UN Global Compact.[58]

Victims of human rights violations by or involving corporations often remain in the corner in the context of discussions on corporations and human rights. Moreover, NGOs note that "discussions concentrate more on abstract concepts rather than on the actual impact that corporate conduct has on the human rights of individuals, communities and indigenous peoples."[59] Victims of human rights violations by or involving corporations have little

[54] Ibid. 91.
[55] Ibid. 92. J. Brugmann and C.K. Prahalad, Cocreating Business's New Social Compact, Harvard Business Review, February 2007, arguing that corporations and NGO can create innovative business models to improve lives of poor people everywhere.
[56] S. Deva: Sustainable Good Governance and Corporations: An analysis of asymmetries, The Georgetown International Environmental Law Review, Vol. 18:707, 713.
[57] <http://www.business-humanrights.org/Documents/Policies>. For a detailed account, see Michael Wright and Amy Lehr; Business Recognition of Human Rights, research fellows, Mossavar-Rahmani Center for Business & Government, Kennedy School of Government, Harvard University, under direction of UN Special Representative John Ruggie, 12 Dec 2006.
[58] < http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.
[59] Joint Open Letter to UN Special Representative on Business and Human Rights, 241 signatories NGOs, <http://www.escr-net.org/usr_doc/OpenLetter_Ruggie_FinalEndorsements.pdf>.

or no access to justice either in their home country or in the country where the corporation in question is registered or, indeed, in their international legal order.[60]

Both individual and state responsibility have shortcomings in holding individuals and states liable for human rights violations by or involving corporations. Corporate responsibility may offer a viable, but not an exclusive, alternative to addressing corporate violations.[61]

Another argument in favour of corporate responsibility for human rights relates to the foundation of promotion and protection of human rights. Corporations employ millions of people worldwide[62] and this affects the daily lives of an even larger number of people. Section 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights."[63] It appears that one is entitled to all the rights and freedoms enshrined in the Universal Declaration of Human Rights by virtue of being human. Similarly, two international covenants suggest that human dignity makes up the core of human rights protection.[64] The UN Norms for corporations recognise in preambular paragraph one respect for, and observance of, procession on the basis of the normative argument that corporations are obliged to observe the international value system, which includes human rights. Second, the Preamble of the UDHR suggests that all organs of society "shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures".[65] This provision also includes legal persons.[66] Third, even though states have primary responsibility to ensure that human rights are respected, protected and fulfilled, this does not ab-

[60] "All states have obligations to secure the right to an effective remedy, including all possible form of reparations, and that states should exercise their jurisdiction to ensure that this right is ensured and has effect." Letter from NGOs to J. Ruggie, 1 October 2007.
[61] Also see S. Ratner, 2001, 473-475, and Brent Fisse & John Braithwaite, The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability, 11 Sydney Law Review 468, 483-88 (1988).
[62] Transnational (parent) corporations employed 73 million people all over the world in 2006. See UNCTAD, Development and Globalization: Facts and Figures, 2008, 30.
[63] UDHR, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Preamble.
[64] The International Covenant on Economic, Social and Cultural Rights (CESCR) (1966); preamble, paragraph 1, and the International Covenant on Civil and Political Rights (ICCPR) (1966), preamble, paragraph 1.
[65] UDHR, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Preamble.
[66] L. Henkin, The Universal Declaration at 50 and the Challenge of Global Markets, 1999, 25 Brooklyn Journal of International Law, 17, 25.

solve corporations or any other actors from a direct responsibility to respect, at the very minimum, human rights. Corporations are obliged, at the very least, to refrain from interfering in the individual's enjoyment of their rights.[67] Historically, international human rights law limited and governed the exercise of power by the state; however, it appears appropriate that its corpus should be further developed to cover situations where other actors interfere with the enjoyment of rights.

Corporate responsibility and accountability can ensure that different countries are not placed in the position of competing for investment by maintaining low standards or allowing (or even co-operating with) egregious corporate behaviour.

A corporate responsibility framework may level the playing field by limiting the competitive advantage of corporations that decline to undertake positive action. A corporate accountability framework would also create greater certainty and stability for corporations doing business around the globe, clarifying the expectations for corporate responsibility for human rights in their operations.[68] Complying with human rights may open access to new markets which would remain otherwise closed. In other words, corporate responsibility may open doors to new profits. Corporate responsibility enables corporations to stay ahead of their competitors and prepare in advance of a new normative framework and regulations, to reduce the cost of risky projects and, in so doing, attract capital from socially concerned consumers and investors?.

Determining corporations' minimum human rights obligations arising from national legal orders has considerable practical utility for corporations, governments and civil society alike. Yet, it would be completely implausible, for example, for a corporation to argue that its law is higher than the law of the state, including the protection of human rights, in which it is incorporated or in which it operates. This would be considered a breach of law by the states. Hence, corporations ask for recognition according to the law of the state in which they are active, and they have to comply with that law. The American Law Institute recognises that a corporation

[67] Interview with D. Türk, former Assistant Secretary-General for Political Affairs to the Secretary-General of the United Nations Organisation, 15 June 2006.
[68] Friends of the Earth, Corporate Accountability & the Johannesburg Earth Summit, <http://www.foe.org/WSSD/sixreasons.html>.

"is obliged ... to act within boundaries set by law" and that it "may take (into) account ethical considerations".[69] Given these disagreements, it is not surprising that implementation is difficult. Hence, the biggest challenges are to be found in national legal orders. In this respect, it is implicit that some of the inefficiencies within the international mechanisms are a direct result of implementation in national legal orders. Corporate responsibility for human rights would also enable developing countries and communities to assume control over their own resources and abilities to address poor social and environmental conditions.[70] Enforcement of corporate responsibility/liability in national legal orders and, potentially, at the international level would help ensure that communities actually control their own destinies. In addition, effective national and international frameworks for corporate responsibility can assist communities to effectively develop and control their own natural resources for use in a global economic context. For the reasons explained above, this article examines corporate responsibility for human rights and corporate human rights obligations at the international level.

4. The concept of corporations' human rights obligations

The protection of human rights is a fundamental value and reflects not only individual interests but the interests of society as whole. It appears that everyone has minimum demands on the rest of humanity. This article argues that corporations have obligations in relation to the human rights of individuals. Human rights constitute a normative minimum or normative floor which corporations have to observe.[71] The human rights that can be considered "fundamental" for the purposes of this article are those rights protected by constitutional norms in national legal orders and international human rights treaties that have been widely ratified

[69] American Law Institute, Principles of Corporate Governance (1994), Section 2.01 (a).
[70] Friends of the Earth, Corporate Accountability & the Johannesburg Earth Summit, <http://www.foe.org/WSSD/sixreasons.html>.
[71] See, for example, D. Kinley and Tadaki, 2002, 968-969 noting that "in delineating certain essential, minimum categories of international human rights duties that may be appropriately placed on TNCs, we have separated our consideration of such rights into two basic categories: 'core rights' and 'direct impact rights', with each being further divided into particular rights." Also see N. Jaegers, 2002, 51-74.

by the international community, specifically, the international bill of rights. By taking the value, consensual and pragmatic points of view, this section argues that corporations are asked to comply with human rights norms. This article places the lowest common denominator in the minimum consensus surrounding the values embedded in human rights.[72] Such an understanding integrates values and consensus approaches to identifying corporations' human rights obligations. It is important for the consensus approach that more than 200 corporations have human rights policy statements.[73]

Human rights are generally rights that include the values common to all individuals. Human rights are legal rights to the extent they are included in positive law. [74] Human rights are also moral rights as they protect the fundamental dimension of the lives of right holders. J. Ruggie correctly observes that "any attempt to limit internationally recognized rights is inherently problematic"[75] as business can "affect virtually all internationally recognized rights".[76] This article does not attempt to offer an exhaustive or limited list of rights, but offers three categories of human rights which corporations may be asked to observe as a point of departure for research in the field of human rights and business. As noted below, such an approach does recognise that corporations can and do have obligations to observe all human rights.

The human rights obligations of states and corporations are, however, not identical. They differ in their nature and scope. J. Ruggie correctly notes that corporate "responsibilities cannot and should not simply mirror the duties of States."[77] Admittedly, it appears impossible and inappropriate to transfer all state human rights obligations to corporations. M. T. Kamminga argues that

[72] See generally A. Cançado Trindade, International law for Humankind: Towards a new Jus Gentium, General Course on Public International Law, Hague Academy of International law, Martinus Nijhoff Publishers, 2006, Part V.
[73] See Business and Human Rights Resource Centre,
‹ http://www.business-humanrights.org/Documents/Policies›.
[74] See generally L. Zucca, Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA, OUP, 2007; and I. Seiderman, Hierarchy in International law – The Human Rights Dimension, Intersentia, 2001, attempting to argue that there is a hierarchy in international law.
[75] See J. Ruggie's 2008 report. 53.
[76] Ibid. para. 6. Paragraph 52 of the Report includes a list of nearly 30 previously recognised rights that businesses were alleged to have "impacted" between 2005 and 2007. This list is drawn from a study conducted for the mandate of 320 cases of alleged human rights abuses by corporations. The study was submitted as Addendum 2 to the Report: A Survey of the Scope and Pattern of Alleged Corporate-Related Human Rights Abuse, A/HRC/8/5/Add.2 (23 May 2008), <http://www.reports-and-materials.org/Ruggie-2-addendum-23-May-2008.pdf>.
[77] J. Ruggie's 2008 Report.

"companies are not expected to play government and that bigger companies such as multinational enterprises have wider responsibilities than small businesses."[78] The nature of some human rights obligations implies that they cannot be extended to corporations. These are rights which are inherently connected with state apparatus such as the right to a fair trial, right to nationality and right to political asylum. It seems that these rights fall within the public sphere obligations of the state.[79] The human rights obligations of states are intrinsically connected with notions of sovereignty.[80] In other words, the human rights obligations of states are much wider than those of corporations.[81] Human rights are rights all persons enjoy at all times, in all situations, and in all societies. This article does not attempt to exhaustively list the rights individuals have independently.[82] In addition, this article is not about human rights in general but about human rights in relation to corporate responsibility.

Three preliminary notes have to be made. First, some judicial and academic commentators have observed that human rights may amount to a breach of *jus cogens*.[83] A. Brundner notes that *jus cogens* represents "a transcendent common good of the international community, while *jus dispositivum* is customary law that embodies a fusion of self-regarding national interests".[84] Without going into specifics, it suffices to note that *jus cogens* forms a body of higher rules of public international law binding on all subjects of international law from which no derogation is possible.[85] It appears that the main objective of *jus cogens* is to protect the inter-

[78] M. T. Kamminga, Corporate Obligations under International Law; Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004. 6.
[79] S. Ratner, 2001 at 492–93. D. Kinley and J. Tadaki, 2004, 966-967.
[80] N. Jaegers, 2002, 79.
[81] Also see L. C. Backer, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 Columbia Human Rights Law Review 287 (2006).
[82] Joseph Raz, for example, notes "there is no closed list of duties which correspond to the right ... A change of circumstances may lead to the creation of new duties based on the old right." J. Raz, The Morality of Freedom 171 (1986).
[83] A. Orekhelashvili, Peremptory Norms in International Law, OUP, 2006, 53. Judge Tanaka observes that "surely the law of human rights may be considered to belong to the jus cogens". ICJ Reports, 1966, 298. Jus cogens remains a very vague and ill-defined concept in international law. The following FHRs violations may amount to jus cogens violations: prohibition of slavery, of torture, of genocide and of racial discrimination. See M. Evans (ed.), International Law, 138, 167-173, OUP, 2007.
[84] A. Brudner, The Domestic Enforcement on International Covenants on Human Rights: A Theoretical Framework, 35 University of Toronto Law Journal (1985), 219, 249-250.
[85] See generally A. Bianchi, Human Rights and the Magic of Jus Cogens, European Journal of International Law, 2008 19(3):491-508.

ests and values of the international community as a whole and not only the interests of individual states.[86] R. Higgins, however, notes that neither the wording of international human rights instruments, nor the practice thereunder, suggests that all human rights are *jus cogens*.[87] In this light, G. M. Danilenko argues that common interests exist that rest upon a widely shared, deeply felt and often expressed humanitarian conviction.[88] What this means is that standards for the protection of human rights against acts by or involving corporations are lowered to the minimum possible degree, which may appear to be in compliance with the rule of law in national legal orders. The concept of peremptory norms of international law as a body of rules vitally important to the international community as a whole requires the creation of fundamental principles binding not only all states but also non-state actors in the international arena. It reflects the deeply felt need of our increasingly interdependent global community for a public order for all mankind.[89] A. Orekhelashvili observes that "peremptory norms, although often criticised and even more often approached with sceptical nihilism, nevertheless attract growing doctrinal and practical attention and have increasing importance in determining the permissible limits on the action of State and non-State actors in different areas."[90] In the *South West Africa Case* before the ICJ, the applicants, Ethiopia and Liberia, contended that South Africa "may not claim exemption from a legal norm which has been created by the overwhelming consensus of the international community, a consensus verging on unanimity."[91] It may arguably appear that human rights also have the status of peremptory norms of international law and therefore their peremptory nature also extends to the obligations of corporations.

[86] A. Orekhelashvili, 2006, 46-47. C. L. Rozakis, The Concept of Jus Cogens in the Law of Treaties, 1976, 2.; L. Hannikainen, Peremptory Norms in International Law (1988), 2-5; D. F. Klein, A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts, 13 Yale Journal of International Law (1988), 332, 351.

[87] R. Higgins, Derogations under Human Rights Treaties, British Yearbook of International Law (1976-77), 282.

[88] See, for example, G. M. Danilenko, International Jus Cogens: Issues of Law-Making, 2 European Journal of International Law (1991).

[89] G. M. Danilenko, International Jus Cogens: Issues of Law-Making, 2 European Journal of International Law (1991), 49–56; Also see P. Klein, Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law, European Journal of International Law (2002), 1241-1255.

[90] A. Orekhelashvili, 2006, 2.

[91] ICJ, 38 ICJ Pleadings, South West Africa Cases 305 (Vol. 9) (statement by E.A. Gross, agent for the Governments of Ethiopia and Liberia) at p. 351.

If the approach taken is that some human rights have a peremptory character, the relevance of human rights increases. If one concludes that peremptory norms do not include human rights norms, then the relevance of the concept of peremptory norms of international law would be significantly reduced.

Secondly, the human rights of individuals may appear to be implied within the correlative obligations of corporations. Former UN Special Rapporteur Martinez noted in his final report that "every right, in one way or another, is linked to some obligation or some responsibility, and every time that a duty is fulfilled, it is very likely that the violation of some right is prevented."[92] This appears to suggest that human rights obligations are correlative. Similarly, the preamble of the African Charter provides that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."[93] It would follow from this language that human rights obligations are horizontal and "correlative, even though the text of the Charter suggests otherwise".[94] Finally, the fundamental human rights obligations here can offer solid foundations for higher standards for the protection and promotion of human rights.

5. Do corporations have international legal personality? The international legal personality of corporations

This section briefly explores whether corporations have subjectivity in international law. It is critical for the present article's argument that the human rights obligations of corporations can also derive from international law. In *Barcelona Traction*, the ICJ had the corporate entity in mind when it stated that "international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field".[95] When considering the legal status of corporations it appears nec-

[92] UN Commission on Human Rights, Promotion and Protection, Human rights and human responsibilities, Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the Study requested by the Commission in its resolution 2000/63, and submitted pursuant to Economic and Social Council decision 2002/277*, E/CN.4/2003/105, 17 March 2003, <http://www1.umn.edu/humanrts/instree/z1afchar.htm>, 43.
[93] African Charter on Human and Peoples' Rights, 27June 1981, 21 ILM 58 (1982).
[94] J. Knox, 2008, 40.
[95] ICJ, Case concerning the Barcelona Traction, Light and Power Company, 1970 I.C.J. Rep 3, para 37-8.

essary to examine whether such entities possess international legal personality and, if so, what the consequences of that legal personality are. There has always been a strong reluctance in the international community, and among scholars, to include corporations among the subjects of international law. D. A. Ijalaye, in contrast, notes increasing references to international law in the contracts concluded between corporations and states. Writing in 1978, he stated:

> Since the participation of private corporations at the level of international law would now seem to be a *fait accompli*, international lawyers should stop being negative in their approach to this obvious fact. They must realize that as a result of these new arrivals in the international scene, the commercial law of nations, more than ever before, now constitutes a formidable challenger to international and comparative lawyers alike.[96]

D. Kinley and J. Tadaki note that "it is possible to invest in TNCs sufficient international legal personality to bear obligations, as much to exercise rights".[97] In this way, A.A. Faturos suggests "it is possible for the international legal process to acknowledge that transnational enterprises are significant actors in the world economy and thus to recognize that they have a degree of legal capacity in international law".[98] He concluded that "there is still considerable room for exercise of legal ingenuity and originality in shaping new structures, informing new relationship and to some extent, avoiding formalistic legal problems in the pursuit of the goals of a new, and more just, international legal and economic order".[99] By contrast, P. Malanczuk notes that "multinational companies are still formally not 'subjects of international law' in any meaningful sense of the term".[100] Even recent treaties, such as the Internation-

[96] D.A. Ijalaye, The Extension of Corporate Personality in International Law. (New York, Oceana, 1978), 245. Also see M. T. Kamminga, Holding Multinational Corporations Accountable for Human Rights. Abuses: A Challenge for the EC" in P. Alston, M. Bustelo, and J. Heenan (eds.), The EU and Human Rights, OUP, 1999, 553-569.

[97] D. Kinley and J. Tadaki, 2004, 947. Also see Jonathan I. Charney, Transnational Corporations and Developing Public International Law, 1983 Duke Law Journal 748, 764 (observing that the accountability of corporations to international legal rules appear to be linked to the extent of their ability to be direct participants in the international legal process). Quoted in A. Clapham, 2006, 77.

[98] A. A. Fatouros, "Transnational Enterprise in the Law of State Responsibility" in R. B. Lilich (ed.), International Law of State Responsibilities for Injuries to Aliens (Charlottesville, Virginia: University Press of Virginia, 1983) 361-403, 389. Quoted in A. Clapham, 2006, 77.

[99] Ibid. 390-391. Quoted in A. Clapham, 2006, 77.

[100] P. Malanczuk, 2000, 71. Also see P.-M.Dupoy, L'unité de l'ordre juridique international: Cours gene-

al Convention for the Suppression of the Financing of Terrorism, include indirect obligations to regulate corporations.[101]

The definition of international legal personality has three elements: legal subjectivity, legal capacity and *locus standi*. It is debatable if all three elements must be cumulatively present for international legal personality to arise and whether corporations fulfil all three constitutive elements of international personality. It seems that at least one of the three above elements must be present to illustrate the existence of limited international legal personality of a particular actor. O. De Schutter observes that "the attribution of rights and obligations, and of an international legal capacity, does not follow from legal personality once it is granted; rather, international legal personality follows from the attribution of rights and duties, and of the recognition of an international legal capacity of certain actors in the international legal process."[102]

It has been argued that it is "possible to move beyond the self-imposed legal problem"[103] of the international subjectivity of corporations and concentrate on the capacity of those entities in the international legal order.[104] Equating international legal personality with subjectivity under international law is legally misleading and not helpful. J. Klabbers writes "after all is said and done, personality in international law, like 'subjectivity' is but a descriptive notion: useful to describe a state of affairs but normatively empty, as neither nor obligations flow automatically from a grant of personality".[105] A. Clapham suggests that "even without an international jurisdiction, the acts of corporations can be regarded as international crimes and therefore it makes complete sense to talk

ral de droit international public, Vol. 297 RCADI (Leiden: Martinus Nijhoff, 2002) 105.

[101] International Convention for the Suppression of the Financing of Terrorism Adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999. Article 5 (1) reads as follows: "1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in Article 2. Such liability may be criminal, civil or administrative."

[102] O. De Shutter, Transnational Corporations and Human Rights: An introduction, Global Law Working Paper 01/05, <http://www.nyulawglobal.org/workingpapers/GLWP0105DeSchutter_000.rtf>. 12. N. Jägers notes that "under present international law entities only owe responsibilities to the international community when they are considered to be subjects of law; in other words, the bearers of international legal personality." Nicola Jägers, The Legal Status of the Multinational Corporation Under International Law, in Michael K. Addo (ed.): Human Rights Standards and the Responsibility of Transnational Corporations, 1999, 259, 261.

[103] A. Clapham, 77, 2006.

[104] Ibid.

[105] J. Klabbers, Introduction to International Institutional Law, 2004, Cambridge University Press, 57. A. Clapham observes that noting that "there seem to be no agreed rules for determining who can be classed a subject, 2006, 62.

about limited international personality".[106] He notes that "conflating the question of subjectivity with the concepts of international legal personality and international capacity has prevented a clear recognition of the fact that non-state actors can bear international rights and obligations."[107] This explanation suggests that corporations may have direct obligations under international human rights law.

A. Clapham suggests that "trying to squeeze international actors into the state-like entities box is, at best, like trying to force a round peg into a square hole, and at worst, means overlooking powerful actors on the international plane".[108] Leaving the concepts of subjectivity and personality aside, it may be argued that corporations are capable of directly acquiring rights and obligations under international law. D.P. O'Connell suggests that not all entities in international law enjoy "all the capacities that states do under international law". [109] In this way, the ICJ observed in its *Reparation for Injuries Advisory Opinion* that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community".[110] It may thereby appear that corporations also have a limited number of rights of obligations under international law and that they be held accountable for human rights violations. O. De Shutter asks:

> Should a Code of Conduct be adopted tomorrow, for instance, under a resolution of the UN Commission on Human Rights creating a new thematic procedure making it possible to monitor the activities of transnational corporations under the Code, we would then have to conclude that transnational corporations will have acquired an international legal personality to that extent, just like we may conclude that they are exercising their rights, as international legal subjects, when they seek to vindicate rights attributed to them under an investment treaty.[111] (*footnote omitted*)

[106] A. Clapham, 2006, 77-78.
[107] A. Clapham, 2006, 80.
[108] Ibid.
[109] D.P. O'Connell, International Law, Vol. 1 (London Stevens and Sons, 2nd edn, 1970) at 81-82. Quoted in A. Clapham, 2006, 71.
[110] ICJ, Reparations for Injuries Suffered in the Service of the United Nations case, I.C.J. Reports 1949. 178.
[111] O. De Shutter, Transnational Corporations and Human Rights: An introduction, Global Law Working

The rights and obligations of states and corporations are, however, not identical. Admittedly, it appears impossible and inappropriate to translate all state rights and obligations to corporations. The nature of a number of rights and obligations implies that they cannot be extended to corporations. In other words, the rights and obligations of states are much wider than those of corporations.

N. Jägers writes that "even when examining the concept of legal personality, it becomes clear that the position that these entities are not subjects of international law is no longer tenable".[112] N. Jägers concludes that the doctrine of legal personality does not constitute a conceptual obstacle to recognising human rights obligations for corporations.[113] V. Lowe suggests that "corporations are neither subjects nor objects, neither States nor persons like human beings, to use traditional poles of classifications in international law. They have features of both, but need to be treated as entities *sui generis*".[114] A. Clapham observes that "if the Sunday Times had sufficient personality and capacity to enjoy rights under the European Convention of Human Rights, it might surely enough have enough personality and capacity to be subject to obligation under international human rights law."[115] Certainly, it has been noted that under international law corporations have certain obligations and rights, and the possibility to enforce these rights, while in certain cases claims can be brought against corporations.

The preceding sections have argued that corporations today have enough international legal personality to enjoy some rights and obligations at the international level.[116] International legal personality differs from that of states which remain the primary holders of rights and obligations at the international level. In sum, the doctrine of international legal personality *eo ipso* does not

Paper 01/05, <http://www.nyulawglobal.org/workingpapers/GLWP0105DeSchutter_000.rtf>. 12.

[112] N. Jägers, Corporate Human Rights Obligations: in Search of Accountability, Intersentia, 2002, 34-35.

[113] Ibid.

[114] V. Lowe, Corporations as international actors and international law makers, Italian Yearbook of International Law, Volume XIV, 2004 (B. Conforti et al., eds.), 38, arguing that corporations should not be "regarded simply as passive objects of international law", and "we must have regard to their special needs, and to their special capabilities to contribute to the development of international law and of the international legal system, for the benefit of the human beings who are the ultimate constituents of all social organizations."

[115] A. Clapham, 2006, 82.

[116] Ibid.

constitute a conceptual obstacle to recognising human rights obligations for corporations.

To state that an entity has international legal personality is to say that the entity is a bearer of rights and obligations in the international legal order. The legal personality of certain actors in any given national legal order is often taken for granted. Yale School of international jurisprudence takes a different approach to international legal persons; it focuses on actors – persons which have an impact on individuals' enjoyment of fundamental human rights. Scholars are increasingly rejecting the notion of subjects and objects in international law, and arguing that these are not consensually agreed rules for describing which entity can be described as a subject of international law. The main proponent of this study is R. Higgins, President of the International Court of Justice, who states "we have all been held captive by doctrine that stipulates that all international law is to be divided into "subjects" – that is, those elements bearing, without the need for municipal intervention, rights and responsibilities; and 'objects' – that is, the rest".[117] R. Higgins suggests that the whole distinction between subjects and objects is only a myth.[118]

Instead, it appears more useful to talk about participants at the international plane. By using the notion of participation is one able to argue that human rights obligations also apply horizontally between non-state actors. However, R. Higgins acknowledges international law as primary, governing the relations between states only as a temporary phase. She writes: "international law is, *for the time being* still primarily of application between states. States are, at this moment in history, still at the heart of international legal system."[119]

Even more straightforward is the description given by Jan Klabbers in his 2002 monograph *An Introduction to International Institutional Law*[120] where he asks us to think about who invented the notion of subjects and the overbearing tradition to which the young legal scholar is expected to conform. He writes:

[117] R. Higgins, Problems and Process: International Law and How We Use It, Oxford: Clarendon Press, Oxford University Press, 1994), at 49.
[118] Ibid.
[119] Ibid. at 39.
[120] J. Klabbers, Introduction to International Institutional Law, 2004, Cambridge University Press.

> To be subject of international law is to be given an academic label: a subject of international law is a legitimate subject of international research and reflection. Any attempt by an international lawyer to study, for example, the working of the city of Amsterdam, or of the Finnish Ice Hockey Association, or the Roman Catholic Church, can be challenged in terms of subjectivity: as these are not generally regarded as subjects of international law, the international legal scholar may have to address claims that he or she could have spent his or her time better.[121]

It may appear that a doctrine of participants in international law could also include corporations and other actors. If one desires to move beyond the prevailing subject/object dichotomy in international law, one needs to acknowledge the importance of the concept of international legal personality in the existing international framework. As noted, even when one insists on the concept of international legal personality, the concept does not pose an obstacle to holding corporations accountable for human rights violations. While corporations may have the status of a legal person in national legal orders, it may appear more apt to describe corporations as participants in international legal orders. It may be too philosophical and idealistic to build one's argument on that premise, especially given the realities of the international community, but one needs to recognise that corporations participate in the everyday lives of the international community.[122] It may be correct that they are not present at the time the treaties are negotiated or when courts' decisions are delivered, but nevertheless they are there and must be held accountable in international law.

6. Sources of corporations' human rights obligations at the international level

A. Binding international legal obligations

This section argues that corporate human rights obligations may derive from the international level. International law stand-

[121] Ibid. 43.
[122] See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

ards are the minimum standards agreed by and binding on the entire international community or part of it. Arguably, international law is a much shallower normative system than national legal orders, which also apply in relation to corporate human rights obligations. Nevertheless, this section argues that the international system may offer supplementary answers in relation to the sources of corporate human rights obligations. Traditionally, sources of international law[123] derive from international conventions, international customs, general principles of law, and subsidiary sources of law (judicial decisions and academic commentaries).[124] In this way, several international human rights treaties include state obligations to protect human rights in relation to the activities of corporations.[125]

The scholarly debate on the potential of direct and/or indirect international legal obligations of corporations has been on-going. Several commentators have argued that, despite the primary focus on states, corporations can have additional obligations under international human rights law.[126] In contrast, Ruggie concludes in his 2007 report that the main "international human rights instruments ... do not seem to impose direct legal responsibilities on corporations."[127] In a similar vein, Greenwood argues that "there is no basis in existing international law for the liability of corpora-

[123] Article 38(1) of the Statute of the International Court of Justice, Article 38 (1), http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 .

[124] H. Thirlway, "The Sources of International Law", in M. Evans (ed.), International Law, (Oxford: Oxford University Press, 2006), 115-140. For a critical analysis, cf. for example, J. Kammerhofer, "Uncertainty in the formal sources of international law: customary international law and some of its problems", 15 European Journal of International Law (2004) 523-553; A. E. Roberts, "Traditional and modern approaches to customary international law: a reconciliation" 95 American Journal of International Law 757-791 (2001); P. Alston, "The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in P. Alston (ed.) Non-State Actors and Human Rights (Oxford: Oxford University Press, 2005).

[125] J. H. Knox, Concept Paper on Facilitating Specification of the Duty to Protect, prepared for the UN SRSG on Business and Human Rights, 14 December 2007, http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers .

[126] A. Clapham, 2006, 266-270; N. Jägers, 2002, Chapter IV, 75-95; D. Weissbrodt & M. Kruger, "Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 American Journal of International Law, 913-915, 921; D. Kinley and J. Tadaki, 962-992; P. T. Muchlinski, Multinational enterprises and the Law, 2007, 519-524; N. Stinnet, "Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses", 28 Boston College International and Comparative Law Review 211 (2005).

[127] J. Ruggie's 2007 report, UN Human Rights Council, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035, 9 February 2007, para. 44 <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>, para. 44, further referred to as J. Ruggie's 2007 report.

tions and, consequently, no rules of international law regarding the questions which necessarily arise when a corporation is accused of wrongdoing."[128] For Vasquez, an international norm applies to corporations if "an international mechanism is established for enforcing an international norm against a non-state actor, then it may clearly be said that the international norm applies directly to non-state actors,"[129] or if the "language is indicating an intent to subject (the actors) to international enforcement mechanisms in the future."[130] In other words, international obligations cannot be directed towards corporations if they leave its enforcement to the national legal orders of states.[131] However, it appears that such an approach confuses apples with oranges. The nature of an obligation cannot be equated with the way it is implemented. As Ratner observes, such an approach "confuses the existence of responsibility with the mode of implementing it."[132] Articulating the direct human rights obligations of private actors, including corporations, should not depend on establishing a jurisdiction for implementing them. The recognition of corporations' international human rights obligations cannot be subject to the (non-)existence of a potential international jurisdiction.

There are a number of other conventions that indirectly regulate corporate behaviour. Article 2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions states "each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for bribery of a foreign public official."[133] Moreover, nuclear treaties and agreements, such as the Paris Convention on Third Party Liability in the Field of Nuclear energy,[134] hold operators of nuclear facilities liable for damages or loss of life to persons and property from private nuclear accidents.[135] Further, the International Convention on Civil Liability

[128] Declaration of C. Greenwood, Presbyterian Church of Sudan v. Talisman Energy Inc., Civil Action No. 1 CV 9882 (AGS), (7 May 2002) 8, para. 21.
[129] C. M. Vasquez, "Direct vs. Indirect Obligations of Corporations under International Law", 43 Columbia Journal of Transnational Law (2005) 927-959, at 940.
[130] Ibid. at 941.
[131] Ibid. at 934-944.
[132] S. Ratner, 2002, at 481.
[133] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 December 1997, S. Treaty Doc. 105-43 (1998), 37 ILM, entered into force 15 February 1999.
[134] Paris Convention on the Third Party Liability in the Field of Nuclear Energy, 29 July 1960, 956 U.N.T.S. 251.
[135] The Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear

for Oil Pollution Damage[136] and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of the Council of Europe place responsibilities on businesses by extending their reach to legal persons.[137] Both conventions define the persons liable to the convention as "any individual or partnership or any public or private body, whether corporate or not, including a state or any of its constituent subdivisions."[138] The hazardous waste convention imposes strict liability on the corporate generator of hazardous waste.[139] Reading these international treaties together, Kamminga correctly notes that "there are no reasons of principle why companies cannot have direct obligations under international law."[140]

Yet, as noted, international treaties only bind states. However, Clapham notes that it "makes sense to talk about the parties to a human rights treaty rather than use the expression states parties, which indicates that states are exclusive members of every human rights regime."[141] Nonetheless, several international human rights treaties only indirectly identify obligations for corporations. Accordingly, Koh asks "how can it be that corporations can be held responsible under international law for their complicity in oil spills, but not for their complicity in genocide? How can corporations be held liable under European law for anti-competitive behaviour, but not for slavery?"[142] He argues that "the commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals act through corporations."[143] Ratner suggests a method for translating obligations under current international human rights law to the corporate context by employing four criteria: the corporation's "relationship with the government, its nexus to affected populations, the particular human

Material, 17 December 1971, 974 U.N.T.S.

[136] The International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, Article 3(1).

[137] The COE Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21. 6. 1993, < http://conventions.coe.int/treaty/en/treaties/html/150.htm>.

[138] The International Convention on Civil Liability for Oil Pollution Damage, 29.11.1969, Article 1(1),

[139] Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 22.3.1989. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Article 2(6).

[140] M. T. Kamminga, 2004, 4.

[141] A. Clapham, 2006, 91.

[142] H. Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" 7 Journal of International Economic Law 263 (2004). 265.

[143] Ibid.

right at issue, and the place of individuals violating human rights within the corporate structure."[144] He submits that such a theory "offers a starting point for global actors to develop a corpus of law that would recognize obligations on businesses to protect human rights."[145] In sum, the state of the art seems to be that – for now – "international law, as it exists today, includes norms that address the conduct of corporations and other non-state actors but, with very few exceptions, the norms do so by imposing an obligation on states to regulate non-state actors."[146] What remains clear is that international norms may not have applicability to corporations if there is no international mechanism established for enforcing theses norms.

The commitment of corporations to observe human rights may also arise from soft law international documents. The preambular paragraph of the UDHR stipulates "that the General Assembly proclaimed the Declaration as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance..."[147] The preambular provision is implemented in Articles 29 and 30 of the Universal Declaration. Article 29(2) articulates the correlative private duty that everyone has to respect the rights of others. Similarly, Article 30 provides that a "group or person do not have any rights to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." Reading the preamble, Henkin notes that "every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, and no cyberspace. The Universal Declaration applies to them all."[148] Undoubtedly, the language of the preambular provision includes the role of corporations in the promotion and protection of human rights.

The 2003 UN Norms on the Responsibilities of Transnational

[144] S. Ratner, 2001, 496-497.
[145] Ibid. 530.
[146] C. M. Vasquez, 2005, 930.
[147] Universal Declaration of Human Rights (UDHR), Adopted and proclaimed by UN General Assembly Res. 217 A (III) of 10 December 1948.
[148] L. Henkin, "The Universal Declaration at 50 and the Challenge of Global Markets", 25 Brooklyn Journal of International Law (1999) 25.

Corporations and Other Business Corporations and Other Business Enterprises with Regard to Human Rights which states that corporations are required to promote, respect and protect "human rights recognized in international as well as national law."[149]

The OECD 1976 Guidelines for Multinational Enterprises (revised in 2000) require multinational enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[150] The ILO Tripartite Declaration notes that "all parties (including corporations) should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work and follow-up adopted in 1998."[151] The UN Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms notes that private actors have an "important role and responsibility ... in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized."[152]

B. "Soft law" international legal documents

The commitments of corporations to observe human rights may also arise from soft law international documents. It can be argued that these human rights obligations may derive from unilateral voluntary commitments by corporations themselves. The voluntary commitments made by corporations in human rights and the business field can most often be found in internal human rights policies or codes of conduct. The Organisation for Economic Cooperation and Development (OECD) defines codes of conduct as "commitments voluntarily made by companies, as-

[149] UN Norms, Section 1.
[150] The OECD Guidelines for Multinational Enterprises: Text, Guidelines, Commentary, DAFFE/IME/WPG (2000) 15 Final (Paris: OECD, 2001).
[151] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 204th Sess., 83 ILO. Official Bulletin (2000), para. 8. For a critical discussion, see J. Letnar Černič, Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Miskolc Journal of International Law, Vol. 6, No. 1, (2009), pp. 24-34.
[152] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. res.53/144, annex, 53 U.N. GAOR Supp., U.N. Doc. A/RES/53/144 (1999), Art 18.

sociations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace."[153] Similarly, the ILO defines a code of conduct as:

> a written policy, or statement of principles, intended to serve as the basis for a commitment to particular enterprise conduct. By their very nature, voluntary codes contain commitments often made in response to market incentives with no legal or regulatory compulsion. However, as public statements, codes usually are considered to have legal implications under laws generally regulating enterprise representations, advertising and, in cases of joint enterprise action, anti-competition.[154] (*footnote omitted*)

Codes of conduct are voluntary initiatives adopted by companies in order to improve their public reputation and to respond to demands for more responsibility in their activities. They include the normatively non-binding normative obligations/commitments of corporations. In other words, codes of conduct do not create legal, but at most, moral obligations.[155] They are drafted by corporations themselves because it is in their interests to adopt them. McCrudden notes that "codes of practice for transnational corporations are essentially guidelines setting out, usually in relatively general terms, what a corporation should do in a particular country, or when engaged in a particular type of operation, or where particular types of risk are apparent."[156] The codes of conduct include principles, standards or guidelines.[157] De Schutter observes

[153] OECD Directorate for Financial, Fiscal and Enterprise Affairs, Codes of Corporate Conduct: Expanded Review of their Contents, May 2001, Working Papers on International Investment November 2001/6, http://www.oecd.org/dataoecd/57/24/1922656.pdf, 3. See F. MacLeay, "Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: a Small Piece of a Larger Puzzle", Global Law Working Paper 2005/1, http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLV_015787.

[154] International Labour Organisation Governing Body, Working Party on the Social Dimensions of the Liberalization of International Trade, Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues, Executive Summary, GB 273/WP/SDL/1, 273d session Geneva, November 1998, http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm#N_23_, para. 26.

[155] N. Bernaz, P.-F. Morin, "L'Onu et sociétés transnacionales: La nécessité d'une collaboration opérationnelle en mati re de droits sociaux internationaux', in L. Boisson de Chazournes et R. Mehdi, Une Société international en mutation: Quels acteurs pour une nouvelle gouvernance? (Bruxelles: Bruylant, 2006) 75.

[156] C. McCrudden, "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?" Oxford Journal of Legal Studies 19 (1999), 168.

[157] See, for example, S.D. Murphy, "Taking Multinational Corporate Codes of Conduct to the Next Level", Columbia Journal of Transnational Law; Vol. 43, afl. 2, (2005) pp. 389-433; M.B. Baker, "Promises

that "they differ in their content by the monitoring mechanisms that they may or may not include, and by the level (the individual company, the sector, the country or group of countries) at which they are drafted and proposed for adoption."[158] They may be specific and broad in their nature. The codes of conduct usually take principles and norms from the principles and rules of international human rights law.

A number of corporations have formally and publicly acknowledged responsibility for ensuring that their actions are consistent with fundamental human rights, starting with the UDHR. For the purposes of this article, the human rights policies of the ten largest corporations will be examined. It must be noted that all ten have drafted and included human rights strategies in their business policies. In its General Business Principles, Shell Corporation, for example, supports fundamental human rights as part of the legitimate role of business within its five areas of responsibility.[159] For instance, the following corporations all refer in one way or another in their policies to human rights protection: Wal-Mart Stores,[160] Exxon Mobil,[161] British Petroleum,[162] General Motors,[163] Toyota, Chevron,[164] Daimler-Chrysler,[165] Conoco-Philips[166] and Total.[167] As noted, some 176 corporations refer to the UDHR, whereas a further 85 have explicit human rights policies.[168] More than an-

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and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?", Connecticut Journal of International Law; Vol. 23, (2007) pp. 123-163.

[158] O. De Shutter, Transnational Corporations and Human Rights: An Introduction, Global Law Working Paper 01/05, <http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLV_015787>. 11.

[159] Shell Corporation, Safeguarding Human Rights, http://www.shell.com/home/content/environment_society/society/using_influence_responsibly/human_rights/dir_human_rights_16042007.html.

[160] See Wal-Mart, requirements for suppliers, <http://walmartstores.com/Suppliers/248.aspx>, See Equal Opportunity Practices.

[161] Exxon Mobil, Statement of Principles on Security and Human Rights < http://www.exxonmobil.com/Corporate/community_rights.aspx>.

[162] British Petroleum, Human rights: A guidance note, 2005, http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/BP_Human_Rights_2005.pdf, 12.

[163] General Motors, http://www.gm.com/corporate/responsibility/.

[164] Chevron Corporation, Human Rights Policy, <http://www.chevron.com/globalissues/humanrights/>.

[165] Daimler-Chrysler, The Social Commitment, < http://www.daimler.com/company/sustainability/customers-and-society/social-responsibility>.

[166] See Conoco-Philips Corporation, Human Rights Position, <http://www.conocophillips.com/EN/susdev/policies/humanrightsposition/Pages/index.aspx>.

[167] Total Corporation, Position and Commitments on Human Rights, http://www.total.com/en/about-total/group-presentation/business-principles/human-rights-940522.html.

[168] See Business and Human Rights Resource Centre, http://www.business-humanrights.org/Documents/Policies. For a detailed account, see M. Wright and A. Lehr; Business Recognition of Human Rights: Global pattern, regional and sectoral variations, research fellows, Mossavar-Rahmani Center for Business & Government, Kennedy School of Government, Harvard University, under the direction of

other 5,600 corporations have expressed their commitment to the UN Global Compact.[169] The problem with all these references is that they are not specific and do not articulate clear guidelines as to the extent and limits of corporate human rights responsibility.

While it is true that voluntary initiative codes of conduct have never worked to alter corporate behaviour, they can nonetheless contribute to some extent to the corporate observance of human rights.[170] The voluntary commitments represent the third and additional layer of corporate obligations. Codes of conduct of corporations are essential for promoting compliance with human rights obligations amongst corporations and they offer the often required balance between normative protection and voluntary corporate social responsibility. MacLeay observes that "a well drafted and implemented code can be used to bring about real improvements in employee rights, particularly where the host state has little commitment to such rights and where independent civil society and unions are weak or non-existent."[171] In other words, corporations may encourage local authorities to develop the effective protection of human rights.[172] However, in contrast, it appears that they cannot be used as camouflage against attempts to strengthen the normative responsibility and accountability of corporations for their activities as they affect the human rights of individuals and communities.

Corporate codes of conduct also have a number of weaknesses. They are often vaguely defined and only include some human rights, whereas other human rights are omitted. In addition, most do not support the mechanisms and independent monitoring of their implementation. The UK National Contact Point noted in *Survival International v. Vedanta Resources plc* that "which-

UN Special Representative John Ruggie, 12 Dec 2006, http://www.reports-and-materials.org/Business-Recognition-of-Human-Rights-12-Dec-2006.pdf.

[169] UN Global Compact, < http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.

[170] See, for example, P. Rinwigati Waagstein, "From 'Commitment' to 'Compliance': The Analysis of Corporate Self-Regulation in the BP Tangguh Project, Indonesia", Jurnal hukum internasional UNPAD, Vol. 5, issue 2 (2005), pp. 100-117. She concludes that "the discussion on corporate self-regulation in the Tangguh Project reveals that corporate self-regulation is not merely a corporate commitment. It can inspire, highlight, sharpen, modify, and even supersede existing regulation. In this case, commitment can actually act as a co-regulation and reaffirm existing standard or lay new standards or precedent." 117.

[171] F. MacLeay, 2005, 20.

[172] Ibid. 23. See S. D. Murphy, "Taking Multinational Corporate Codes of Conduct to the Next Level", 43 Columbia Journal of Transnational Law, 389 (2004-2005), 398-399; I. Bantekas, "Corporate Social Responsibility in International Law", 22 Boston University International Law Journal 309 (2004), 314-315.

ever self-regulatory practices Vedanta chooses to adopt in order to minimise the risk of further breaches of the Guidelines in the future, it is essential that these practices, particularly the human and indigenous rights impact assessments and the adequate and timely consultation with all the affected communities of a project, do not remain 'paper statements' but are translated into concrete actions on the ground and lead to a change in the company's behaviour."[173] It may appear that corporate codes of conduct can be described as *lex imperfecta*. Yet it is clear that codes of conduct do not have the same normative value as the first two levels of sources of human rights obligations. They nonetheless provide an additional layer from which derives the corporate commitment to observe human rights. Identifying corporate human rights obligations is a large exercise of which the voluntary commitments of corporations only play a small but important part.

C. Interim conclusion

International law and national legal orders are two autonomous legal orders joined within a coherent pluralistic whole. The present section has argued that corporate human rights obligations stem primarily from national legal orders and, alternatively, from the international law level. It appears *non sequitur* to expect that only a normatively shallower system of international law could break the conundrum of human rights obligations that normatively fully-fledged national legal orders have difficulties with. Taken together, national legal orders and international systems impose human rights obligations on corporations. In addition, voluntary commitments may offer further evidence of such obligations. In this light, sources of corporate human rights obligations should be treated as mutually complementary and not as mutually exclusive.

A number of commentators agree that corporations can be held responsible for human rights violations. Other commentators argue that only states can violate international human rights.[174] Even

[173] Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from Survival International against Vedanta Resources plc, 25 September 2009, para. 80.

[174] International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (2002), http://www.ichrp.org/files/reports/7/107_report_en.pdf; A. Frey, "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights", 6 Minnesota Journal of Global Trade (1997); J. Paust,

though the precise content of corporations' human rights obligations is somewhat unclear, it may appear self-evident that corporations are asked to at least comply with fundamental human rights standards. Some practitioners and commentators argue that corporations do not have any obligations and responsibilities even for fundamental human rights.[175] No matter how plausible this conclusion might sound, it is unfortunately not persuasive as already now national legal orders, international treaties and declarations include the human rights obligations of corporations. It is true, however, that the scope of substantive obligations, and whether they are direct or indirect, remains contested. In a similar vein, Ruggie notes that "there are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations."[176] This is even more so "where host governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended."[177] Therefore, the development of substantive human rights obligations may require the translation of already existing human rights standards to the corporate context.

The fact that international jurisdictions for legal persons have yet to be developed does not imply that a corporation does not have any legal obligations. This is because corporate human rights obligations derive primarily from national legal orders. On the contrary, it would be futile to argue that a substantive obligation only arises when joined with a jurisdiction that can enforce it. In this way, it appears that corporations are obliged to *pro forma* observe the human rights of individuals. This not only matters on a normative level, but also beyond the form, beyond the pure normative, when corporations are *de facto* faced with a decision as to what kind of business policy to adopt. In other words, the problem is not that corporations and their officers would not have human rights obligations. The real, and far deeper, structural

"Human Rights Responsibilities of Private Corporations", 35 Vanderbilt Journal of Transnational Law 801 (2002).

[175] Andrej Logar, speaking on behalf of the European Union, regarding Action on Resolution on Mandate of Special Representative of the Secretary-General on Human Rights and Transnational Corporations, United Nations Human Rights Council, <http://www.unhchr.ch/huricane/huricane.nsf/view01/F862D09328BA5EACC125746C006CB1DF?opendocument>.

[176] J. Ruggie's 2006 report, para. 65.

[177] Ibid.

problem is that individuals do not have recourse to enforce their human rights and ideals against corporations.

7. Which fundamental human rights are corporations asked to observe?

It may appear that in order to qualify as fundamental, a human rights norm must protect values transcending those of the national and international value systems because its violation would result in so shocking a result as to be deemed absolutely unacceptable by the national and international communities as a whole. This part of the article aims to clarify various questions related to the notion of fundamental human rights. Fundamental human rights would include all those rights violations which would shock the conscience of mankind.[178] As noted, the human rights obligations of corporations are not identical to those of a state. Some commentators argue that corporations cannot have obligations which pertain exclusively to the state apparatus, such as the right to a nationality or the right to asylum.[179] In this regard, their obligations may be construed as an obligation to respect, protect and fulfil fundamental human rights, whereas some authors accept that such an obligation will also include the obligation to promote fundamental human rights in relation to contractors and subcontractors.[180] Thus, the constituting part of the concept of corporate responsibility for fundamental human rights must be examined more carefully.

Considering the value, consensual and pragmatic points of view in this section, it is submitted that corporations are asked to comply with fundamental human rights norms. This article locates the fundamental human rights obligations of corporations in the essential minimum standards. There is a difference between an individual's fundamental human right not to be tortured, which must be absolute, and the right of access to documents which was recently included in the EU Charter on Fundamental Rights.[181] A primary conceptual question here arises in relation to the univer-

[178] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 28 May 1951, 1951 I.C.J. 15, p. 23.
[179] D. Kinley and J. Tadaki, 2004, 967.
[180] Ibid. 966.
[181] Charter of Fundamental Rights of European Union, Official Journal of European Communities, C 364/C, 18 December 2000, <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>. Article 42.

sality of rights. Are the fundamental human rights in DR Congo the same as the fundamental human rights in Slovenia or Sweden? And who decides which rights fall into the fundamental human rights category? This study's approach places the lowest common denominator in the minimum consensus surrounding the values embedded in fundamental human rights. Such an approach integrates the values and consensus approaches to identifying the fundamental human rights obligations of corporations. The reason for concentrating on fundamental human rights has a valuable, consensual and pragmatic nature as opposed to any other reason. It must be noted that the category of fundamental human rights suffers from inherent vagueness. The exact definition of what constitutes a fundamental human right is difficult to pin down and variations occur in the literature. In identifying the minimum fundamental human rights obligations of corporations, this section distinguishes between three basic categories of rights. It proposes that the fundamental human rights which corporations are required to observe can be broken up into three categories:[182]

1. fundamental human rights preserving the security of persons;
2. fundamental human rights preserving fundamental labour rights; and
3. fundamental human rights preserving non-discrimination.

This categorisation of fundamental human rights is not organised in any particular order, hierarchy or priority, nor is it intended to be illustrative rather than exhaustive. The main aim of listing the three categories of fundamental human rights obligations is to identify some of corporations' fundamental human rights obligations in practice and to provide greater substantive content for a doctrinal framework. Within these categories, the rights may be expanded but not contracted. These categories of fundamental human rights are elastic concepts which can and will be expanded but not contracted in the future. The primary thematic subdivisions of the "fundamental human rights types" within the three different categories can be derived from both national legal orders and the emerging international legal order. In this way, the next three sections argue that corporations have obligations to observe fundamental human rights preserving

[182] See N. Jägers, 2002, Chapter III.

the security of persons, fundamental labour rights and non-discrimination.

A. Fundamental human rights preserving the security of persons

International human rights law protects fundamental human rights preserving the security of persons which *inter alia* include the freedom of human beings from torture, inhumane and degrading treatment,[183] arbitrary killings,[184] arbitrary detention,[185] enforced disappearances, rape and sexual slavery, extrajudicial killings, genocide, war crimes, crimes against humanity and other violations of humanitarian law,[186] and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.[187] It can be argued that fundamental human rights obligations preserving the security of persons derive from the international level. The UN Norms for Corporations postulate that "transnational corporations and other business enterprises, their officers and persons working for them are also obliged to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments."[188] Article 4 of the Genocide Convention implicitly covers situations where a private corporation commits or aids and abets in genocide.[189] In this light, consider, for example, the case where Bruno Tesch and two others were tried before a British military court, which held those corporate managers liable for producing lethal toxic gas for use in concentration camps.[190] In addition, Common Article 3 of the Geneva Conventions binds all parties to an armed conflict, including corporations

[183] UDHR, Article 5; ICCPR, Article 7.
[184] UDHR, Article 3; ICCPR, Article 6.
[185] UDHR, Article 9.
[186] See ICRC Study on Customary Rules of International Humanitarian Law, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList133/CE72DB35175CA0FEC1256D330053FA7B>
[187] A note of caution must be made that this is an open-ended list, not a closed list. Serious violations of those fundamental human rights amount to war crimes, crimes against humanity and genocide.
[188] UN Norms, Preamble, para 4.
[189] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, 9 December 1948. Article 4 reads as follows: "Persons committing genocide or any of other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."
[190] The Zyklon B Case, I Law Reports of Trial of War Criminals 93, 94 British Military Court, Hamburg, Germany, 1-8 March 1946. See K.R. Jacobson, "Doing Business With the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity" The Air Force Law Review, Vol. 56 (2005), pp. 167-231.

and other non-state actors.[191] The US Military Tribunal at Nuremberg in the cases Flick, Krupp and Farben addressed corporate criminal responsibility for international crimes, although it did not have jurisdiction over legal persons.[192] Fundamental human rights preserving the security of persons have the common objective to protect the full enjoyment of individuals' rights to life,[193] which is *eo ipso* one of the most important fundamental human rights in this category. To this end, prohibitions of crimes against humanity, of war crimes and of genocide have all achieved the status of customary international law and of the non-derogable peremptory norm of international law. Read together, it appears that the international level imposes indirectly on corporations, at the very least, an obligation to observe fundamental human rights preserving the security of persons.

[191] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force 21 October 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force 21 October 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force 21 October 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force 7 December 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force 7 December 1978, Common Art. 3.

[192] Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume IX, The Flick Trial, London, 1949; U.S. v Krauch, et al., The I.G. Farben case, 14 August-29 July 1948, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, The I.G. Farben and Krupp Trials, London, 1949, 3-67; Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, The I.G. Farben and Krupp Trials, London, 1949; U.S. v. Krauch et al., The I.G. Farben Case, p. 1108, Allied Control Council Law No. 10, 20 December 1945, Preamble, 15 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 1951; Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and eleven others, United States Military Tribunal, Nuremberg, 17 November 1947 - 30 June 1948, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, The I.G. Farben and Krupp Trials, London, 1949; United States v. Von Weizsaecker, Trials under Control Council Law No. 10 (Washington D.C.: United States Government Printing Office, 1949), Trial of War Criminals Before the Nuremberg Military Tribunals, Volume 12-14 (the Ministries Case). 1949; The Zyklon B Case, I Law Reports of Trial of War Criminals 93, 94 (British Military Court, Hamburg, Germany, 1-8 March 1946; French Government Commissioner v. Röchling, Superior Military Government Court of French Occupation zone in Germany (1949), Trials of War Criminal Before Nuremberg Tribunal Judgment of the General Tribunal of Military Government for the French Zone of Occupation in Germany, 30 June, 1948. Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. 14; United States v. Araki, R. at 48414, International Military Tribunal for the Far East (1948). See United reprinted in 101 The Tokyo Major War Crimes Trial: The judgment, Separate Opinions, Proceedings in Chambers, Appeals and Reviews of the International Military Tribunal for the Far East, (R. John Pritchard ed., 1998). In re Awochi, Nent. Temporary Court Martial Batvia, in United Nations War Crimes Commission, 13 Law Reports of Trials of War Criminals (1949).

[193] UDHR, Article 3; ICCPR, Article 6; ECHR, Article 2; ACHR, Article 4; African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 4 (entered into force 21 October 1986).

B. Fundamental human rights preserving fundamental labour rights

Corporate human rights obligations preserving fundamental labour rights also derive from the international level. The protection of fundamental labour rights is a very important value. Fitzgerald notes that "the most influential contact most individuals have with companies is through their employment."[194] The majority of national constitutions include the protection of at least one of the fundamental labour values. The prohibition on forced labour enjoys a universal character and forms part of international customary law. Forced labour may also be described as a modern form of slavery. For example, the ILO Convention concerning Forced or Compulsory Labour[195] has been ratified by 174 states[196] and the ILO Abolition of Forced Labour Convention[197] by 169 states.[198] This is even more so as it has been recognised as a peremptory norm of international law producing *erga omnes* obligations. Further, Article 5 of the Charter of Fundamental Rights of the European Union includes a reference to a prohibition on forced and compulsory labour.[199] What is more, corporations are obliged to comply with the prohibition on forced labour under respective national laws, which have transformed international standards into domestic legislation.

The Framework decision of the Council of the European Union on combating trafficking in human beings for the purposes of forced or compulsory labour or services, slavery or practices similar to slavery or servitude requires that each member state takes necessary measures to ensure that recruitment, transportation, transfer and harbouring are punished.[200] The Decision requires that member states ensure that "legal persons can be held criminally liable for an offence referred to in Articles 1 and 2, commit-

[194] S. Fitzgerald, "Corporate Accountability for Human Rights Violations in Australian Domestic Law" - [2005] Australian Journal of Human Rights, <http://www.austlii.edu.au/au/journals/AJHR/2005/2.html>. 1

[195] Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, entered into force 1 May 1932.

[196] ILOLEX, Database of International Labour Standards, <http://www.ilo.org/ilolex/english/newratframeE.htm>.

[197] Abolition of Forced Labour Convention (ILO No. 105), 320 U.N.T.S. 291, entered into force 17 January 1959.

[198] ILOLEX, Database of International Labour Standards.

[199] Charter of Fundamental Rights of European Union, Official Journal of European Communities, C 364/C, 18 December 2000, <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>, Article 5.

[200] EC Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [Official Journal L 203 of 01.08.2002]. 1.

ted for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person."[201] The Decision provides this possibility on three bases: "(a) a power of representation of the legal person, or (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person."[202]

International human rights standards for the prohibition of forced labour[203] are included in the ILO Forced Labour Convention, the ILO Abolition of Forced Labour Convention[204], and other relevant international human rights instruments. The ILO Forced Labour Convention, for example, defines forced or compulsory labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[205] With regard to corporations, Article 5 stipulates that "no concession granted to private individuals, companies ... shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade."[206] This prohibition also appears to apply to forced labour for the benefit of private corporations. Similarly, the UN Norms for Corporations determine that corporations "shall not use forced or compulsory labour as forbidden by relevant international instruments and national legislations."[207] In short, the prohibition on forced labour enjoys a universal character and forms part of international customary law. Further, at a minimum, corporations should be asked to comply with obligations to refrain from exploiting the worst forms of child labour as included in ILO Convention 182.[208] Similarly, the UN Norms oblige corporations to respect "the rights of children to be protected from economic exploitation."[209] A further argument in support of the view that corporations are obliged not to employ children in hazard-

[201] Ibid. Article 4.
[202] Ibid. Article 4 (1).
[203] See UDHR (Article 4), ICCPR (Article 8).
[204] Abolition of Forced Labour Convention (ILO No. 105), 320 U.N.T.S. 291, entered into force 17 January 1959.
[205] ILO Convention Concerning Forced Labour (No. 29), 28 June 1930, Article 2 (1), < http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>.
[206] Ibid.
[207] UN Norms, Section 5.
[208] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 2133 U.N.T.S.161, entered into force 19 November 2000, Article 1.
[209] UN Norms, Section 6. UN Global Compact Principle 5.

ous work can be derived from the Commentary of the UN Norms which explains that such work "by its nature or circumstances is hazardous, interferes with the child's education, or is carried out in a way likely to jeopardize the health, safety, or morals of young persons."[210] All in all, it can be concluded that the international level illustrates a strong commitment to the observance of fundamental labour rights.

C. Fundamental human rights preserving non-discrimination

Having briefly examined and identified the fundamental human rights obligations preserving fundamental labour rights, attention will now turn to an analysis of fundamental human rights preserving non-discrimination. All human beings are entitled to fair and equal treatment and freedom from discrimination. The prohibition of discrimination on the basis of race, gender, political opinion, disability and sexual orientation functions in relation to all rights. Non-discrimination derives its legal authority from national legal orders and also from the international order. Both direct and indirect forms of discrimination are prohibited. All humans enjoy freedom from discrimination and must be treated fairly and equally. The French Declaration of the Rights of Man first introduced the notion of equality in positive legislation.[211] It read that all "men are born and remain free and equal in rights."[212] Today, the written constitutions of at least "111 states include the right to equality or the corresponding prohibition of discrimination."[213]

Corporate human rights obligations preserving non-discrimination derive from the regional and international level. The Inter-American Court of Human Rights noted, for example, that "the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates

[210] UN Norms, Commentary, Section 6 (b).
[211] Declaration of the Rights of Man, Approved by the National Assembly of France, 26 August 1789, <http://avalon.law.yale.edu/18th_century/rightsof.asp>.
[212] Ibid. Article 1.
[213] M. Bossuyt, L'interdiction de la discrimination dans le droit international des droits de l'homme (1976), 78, quoted in D. Moeckli, Human Rights and Non-Discrimination in the "War on Terror", (Oxford: Oxford University Press, 2007), 57.

all laws."[214] Further, EU legislation prohibits gender discrimination and seeks to promote equality between women and men at work.[215] The ECJ held in *Defrenne* v *Sabena* that Article 141 (equal pay for equal work) of the EC Treaty has both a vertical and horizontal direct effect.[216] In other words, this Article can be relied on in claims between private actors without relying on domestic law. In this context, the EU directive also prohibits discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.[217] EU directives prohibit direct and indirect discrimination, as well as harassment and instructions to discriminate on grounds of racial or ethnic origin or gender. Directives may also have a horizontal effect, particularly in relation to subjects exercising public authority. Taken together, Article 21 of the Charter of Fundamental Rights of the European Union includes a general prohibition on discrimination.[218] In addition, the international human rights documents guarantee that everyone enjoys rights and freedoms, without discrimination, on the basis of equality before the law.[219] In this context, such obligations arguably at least indirectly also apply to legal persons. Clapham commented "the failure of the authorities to follow up the complaints made to them led to a finding of a violation of the Convention for action taken in the private sphere by a non-state actor."[220] Taken together, the inter-

[214] IACHR, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, OC/18/03, 17 September 2003, Ser. A No. 18 (2003), para. 101. The IACHR further held that: "nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens", 101.

[215] Directive 2000/78/EC of 27 November 2000 (OJ L 303, 2 December 2000, p 16) establishing a general framework for equal treatment in employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19 July 2000, pp. 22-26, Article 16; Directive of the European Parliament and of the Council of 5 July 2006 on implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, Official Journal L 204/23, 26 July 2006.

[216] Case 43/75 (1976) ECR 455 – Defrenne v Sabena (No.2). Also see P v S and Cornwall County Council, 30 April 1996, Case C-13/94, Lisa Jacqueline Grant v South-West Trains Ltd, 17 February 1998, Case C-249/96.

[217] Directive 2000/43/EC of 29 June 2000 (OJ L 180, 19 July 2000, p 22) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 14.

[218] Charter of Fundamental Rights of European Union, Official Journal of European Communities, C 364/C, 18.12.2000, <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>. 2000/C 364/01, Art. 21 (1).

[219] UDHR, Article 2; ICCPR, Article 2 (1), ICESCR, Article 2(2).

[220] A. Clapham, 2006, 321.

national level provides strong evidence that corporations have obligations in relation to non-discrimination.

D. Interim Conclusion

The present section has attempted to clarify a number of fundamental issues in relation to the fundamental human rights obligations of corporations. It appears that the existing treaty practice, international customs and general principles of law that have been significantly enriched during the last few decades have already created a sufficient basis for considering the extent to which fundamental human rights obligations of preserving the safety and security of persons, preserving fundamental labour rights and preserving non-discrimination have become concrete legal obligations. More specifically, it has sought to identify the fundamental human rights obligations of corporations. The present article has introduced a working categorisation of corporations' fundamental human rights obligations. In so doing it has identified three core categories of fundamental human rights which corporations are required to observe: fundamental human rights preserving the safety and security of persons, fundamental human rights preserving fundamental labour rights and fundamental human rights preserving non-discrimination. These fundamental human rights obligations are embedded in national and international legal orders and they serve as their cornerstones upon which the entire structure relies. Admittedly, it is important not to simply downplay the existence of corporations' human rights obligations. The next section will consider the spectrum of corporate responsibility for fundamental human rights.

To effectively implement the fundamental human rights obligations of corporations as has been proposed in previous sections, perhaps legislators must first work to guarantee them in practice and adopt a uniform approach. This may require a fundamental shift in the way the fundamental human rights of individuals are protected and promoted. But such a shift is not impossible. If a workable compromise can be formed in which a holistic approach to responsibility would be followed, then there may be a good chance of enhancing victims' address to legal remedies.

8. Proposals

Given the current lack of a legally binding international document on corporate human rights obligations, the focus on work leading towards legally-enforceable, existing international standards must be sharpened and new standards should be drafted.[221] It appears that the human rights obligations of corporations must be clearly defined, in particular so that the existing mechanisms available to enforce such obligations can apply, extraterritorially or not.

The UN Norms on the responsibilities of transnational corporations[222] place obligations upon corporations to promote, respect and protect "human rights recognized in international as well as national law".[223] The UN Norms for corporations attempt to identify the human rights obligations of corporations; however, their normative value must not be overestimated. Some commentators imprecisely note that the "draft Norms essentially present themselves as a restatement of the human rights obligations imposed on companies under international law".[224] J. Ruggie notes that "there is fluidity in the applicability of international legal principles to acts by companies ... most of it involves quite narrow, albeit highly important, areas of international criminal law, with some indication of a possible future expansion in the extraterritorial application of home country jurisdiction over transnational corporations".[225]

The articulation of uniform and coherent international standards as a matter of obligation would eradicate the fear of competitive disadvantage which is often voiced by corporations.[226] Due to discrepancies in the national implementation of human rights, it seems that the strengthening of standards in relation to corporations and human rights can be met with a focus on the adoption of international standards on business and human rights. M. Kamminga notes that "it no longer makes sense that international

[221] See section II.3.
[222] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Sub commission on the Promotion and Protection of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2, 26 August 2003.
[223] Ibid.1.
[224] O. De Schutter, Transnational Corporations and Human Rights, Hart, 2006, 11.
[225] J. Ruggie's 2006 report, 64.
[226] S. Joseph (2000) An overview of the human rights accountability of multinational enterprises" in M Kamminga and S Zia-Zarifi (eds.) Liability of Multinational Corporations Under International Law Kluwer Law International, The Hague, 87.

law addresses obligations to respect human dignity to states and to individuals but not to corporations".[227] Some commentators advocate "an international treaty that specifies the human rights obligations of corporations and requires states parties to provide criminal, civil, or administrative remedies for violations of those obligations".[228] What is clear is that no normative framework can survive in the long term without taking the realities of its environment into account.

If ratified, such international standards would apply to every corporation regardless of the nature of the corporation, industry sector or the host or home state. It appears that an explicit minimum universal standard of corporations' human rights obligations would be welcomed as they would apply to all corporations. Non-governmental organisations observe that what needs to be considered is the "evolving nature of law and the potential of national legal orders to expand the current reach of the law in so far as it concerns the human rights practices of business".[229] Yet, the law is not only about form, it is also about substance – and the substance of the norms is not a question of their formal sources. Corporations need to have "clarity with regard to their obligations and litigation does not always bring clarity".[230] To the highest degree possible, politics should be removed from the interpretation of corporations' human rights obligations and replaced by a judicial approach with the judicial resolution of disputes. That is, if persons in developing countries are to ever fully enjoy dignity and equal rights. Admittedly, it is in the interest of corporations and states. In this light, it appears that in recent years debate in this area has shifted from *why* corporations should have human rights obligations to *what* these obligations are and *how* they could be enforced, especially against corporations.

It appears that to strengthen the international human rights regime it would be necessary to draft clear international principles/

[227] M. T. Kamminga: Holding multinational corporations accountable for human rights abuses: a challenge for the European Community, in P Alston (ed.) The EU and Human Rights, Oxford University Press, Oxford, 568.
[228] Developments in the Law – Corporate liability for violations of international human rights law, 114 Harvard Law Review 2025, 2025 (2001). 2025.
[229] Joint NGO Letter in response to the interim report of the UN Special Representative on Human Rights and Business, <http://www.escrnet.org/actions_more/actions_more_show.htm?doc_id=430932>. 5.
[230] Human Rights and Transnational Corporations: Legislation and Government Regulation, Chatham House, 15 June 2008, < http://198.170.85.29/Chatham-House-legal-workshop-human-rights-transnational-corporations-15-June-2006.doc>. 4.

standards on corporations or business and human rights. The model instrument addresses the question from the point of view of who is responsible for human rights committed by or involving corporations. The aim is to create a framework for regulating the activities of corporations, at a minimum when they intersect with human rights. In this light, it appears necessary that international instruments specifying standards on corporations' human rights obligations and responsibilities should be adopted. Such instruments would include agreed minimum standards that are binding on the entire international community. National legal orders are *prima facie* devoted to a much stronger and sophisticated standard of protection. In that sense, recourse to international arbitration or adjudication to resolve alleged human rights violations by corporations may appear to be *a priori* doomed. In addition, the possibility of an international instrument which may seem flexible at this time for developed countries appears largely impracticable. It is a *non-sequitur* to expect that a normatively shallower legal order such as international law could break the conundrum that normatively fully-fledged orders have difficulties with. In a word, it appears that legal but non-binding documents can evolve through time to create a binding mechanism.[231]

The UN Declaration on the Rights of Indigenous Peoples, for example, was adopted after 22 years in the making.[232] Even now it is not a binding instrument and it remains to be seen if it will ever be developed into an international treaty. This illustrates that the development of any new international instrument, be it a declaration or treaty, is a lengthy process involving many years of negotiations. Nevertheless, any development towards drafting a set of principles in relation to corporate responsibility for human rights would be welcomed. Regardless of whether or not there is at present such a political will, it is possible for it to be increased or created over time. Surely, this would awake the primeval fear of some corporations and developed/developing states. In line with the central argument of the article, the Model International Instrument is limited to the fundamental human rights of individuals which transform into the human rights obligations of corporations. It was pointed out that one can distinguish three categories of human rights.

[231] J. Ruggie's 2007 Report, paras 45-62.
[232] UN Declaration on the Rights of Indigenous Peoples, United Nations General Assembly, 13 September 2007, A/RES/61/295.

9. Conclusion

The preceding sections have attempted to shed light on corporations' human rights obligations at the international level. It is beyond doubt that foreign investment and corporate investors can have a negative impact on individuals' enjoyment of their fundamental human rights. Such developments pose a challenge to the current normative framework. The rights of an investing corporation are often strengthened by investment agreements without taking their tripartite obligations to respect, protect and fulfil fundamental human rights into account, and consequently the rights of local populations. In this light, the obligations of corporations should also be strengthened in relation to the fundamental human rights of individuals and local communities. The promotion and protection of fundamental human rights should be included among the objectives of investment contracts and, generally, investment agreements.[233] This could then result in the interpretation of investment contracts or agreements in light of corporations' human rights obligations.[234]

The proposals offered in this article are far from radical and do not require a major overhaul of corporate regulation in relation to fundamental human rights. Most of the normative frameworks are already in place. That is why the bulk of this article has analysed the current normative framework. What appears to be required is a clarification of the existing framework in national legal orders. However, until attempts are made to reform the regulation of corporations at the international level, a vital part of victims' access to justice will remain absent. It is hoped that the embryonic nature of legal responsibility for fundamental human rights violations by or involving corporations will be developed in the forthcoming decades. The present situation may appear grim; however, a consensus does appear to be building for meaningful and continued reform. Even in today's globalised world, certain conduct by corporations should not be tolerated. Human rights obligations delimit the minimum standards of corporate conduct.

The international community can and should ensure that corporate investors do not exploit the deficiencies in an investment

[233] UN Commission on Human Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights, U.N. Economic and Social Council,, U.N. Doc. E/CN.4/Sub.2/2003/9, 2 July 2003, 57.
[234] Ibid.

agreement to the burden of individuals' enjoyment of their fundamental human rights. Yet that is exactly what often happens when corporations invest in developing countries. From developments in the two case scenarios it appears that there are possibilities for change. The fully-fledged reform of the investment framework is necessary, but whether the international community has the will to create it remains to be seen. All in all, it appears that investment values must be better balanced with non-investment values. In the future, a balance will need to be ensured between corporate rights and corporate responsibilities.[235]

[235] First report of the International Committee of International Law on Foreign Investment, 441.