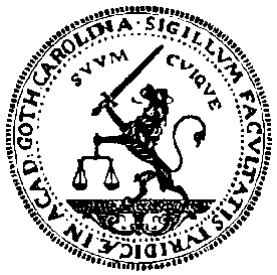

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Home States' Duty to Protect Human Rights

To what extent is Sweden requiring Swedish corporations to comply with human rights extraterritorially?

LAGM01 Graduate Thesis

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Sammanfattning

Det kan hävdas att multinationella företag undviker ansvar för mänskliga rättighetskränkningar på grund av otillräcklig nationell reglering så väl som folkrättsliga bestämmelser. Denna uppsats har därmed utformat tre syften: först ämnar uppsatsen att undersöka i vilken utsträckning staters skyldighet för att skydda mänskliga rättigheter kan minska företags straffrihet för mänskliga rättighetskränkningar. I detta avseende undersöks bland annat huruvida staters *due diligence*-ansvar även omfattar företags extraterritoriella verksamheter. Är så fallet, kommer stater vara mer benägna att reglera företags agerande för att undvika att hållas själva ansvariga. För det andra lyfter uppsatsen upp *human rights due diligence*-lagstiftning som ett exempel på reglering av företags extraterritoriella verksamheter. För det tredje undersöks i vilken mån Sverige kräver att svenska företag respekterar mänskliga rättigheter i sin internationella verksamhet.

För att besvara frågeställningarna måste gällande rätt fastställas vilket görs genom att undersöka folkrättens rättskällor – fokus kommer att ligga på mänskliga rättighetskonventioner, rättspraxis och uttalanden från FN:s övervakningskommittéer. Staters ansvar för företags mänskliga rättigheter undersökts genom att tillämpa statsansvarsreglerna.

Uppsatsen drar slutsatsen att det är tydligt etablerat inom folkrätten att stater har en skyldighet att skydda mänskliga rättigheter gentemot företag inom statens territorium. Stater kan bryta mot sina förpliktelser på två olika sätt; (1) när en kränkning, som företaget begår, kan tillskrivas staten och (2) när staten misslyckas med att skydda individer mot en rättighetskräkning. Beträffande det förstnämnda, kan en handling av multinationella företag sällan tillskrivas stater eftersom multinationella företag är väldigt självständiga och graden av kontroll (*effektiv kontroll*) som staten måste utöva över företaget sällan kan uppnås. Ett sätt att sänka tröskeln till statsansvar kan vara att sänka graden av kontroll till *overall control*. Beträffande det senare har stater *due diligence*-skyldigheter. *Due diligence* innebar att stater måste vidta alla rimliga åtgärder för att förhindra kränkningar, erbjuda offer tillgång till effektiva rättsmedel

och genomföra utredningar på ett seriöst sätt. I de fall stater misslyckades att vidta *due diligence* åtgärder hålls staten ansvarig.

Det finns starka argument för att en extraterritoriell skyldighet att skydda mänskliga rättigheter ska erkännas med stöd av internationell sedvanerätt och FN:s övervakningskommittéer. Enligt *do not harm*-principen får stater inte upplåta sitt territorium till verksamheter som skadar ett annan lands intressen. Dessutom står det klart i flera allmänna kommentarer av Kommitteen för ekonomiska, social och kulturella rättigheter (CESCR) att medlemsländer är skyldiga att reglera företags extraterritoriella verksamhet. Dock har Europeiska domstolen för de mänskliga rättigheterna inte erkänt denna skyldighet. Sammanfattningsvis, kan därmed staters *due diligence* skyldigheter minska straffriheten för rättighetskränkningar av företag, särskilt när det kommer till ekonomiska, social och kulturella rättigheter. I mindre utsträckning när det kommer till EKMR.

Svensk lagstiftning saknar på flera sätt en adekvat reglering av företags negativa mänskliga rättighetspåverkan i deras utländska verksamheter. I uppsatsen framhålls att flera förbättringar bör göras. Antingen kan Sverige modifiera hållbarhetsrapportringen i årsredovisningslagen eller införa lagstiftning som kräver att företag genomför *due diligence*. Sverige riskerar att framställas som likgiltig inför företags-relaterade kränkningar av mänskliga rättigheter om ändringar inte genomförs.

Summary

It has been argued that multinational corporations benefit from impunity when it comes to human rights violations due to inadequate corporate regulation in host states as well on the international level. Thus, there are three purposes of this thesis: first to examine to what extent states' duty to protect human rights can be utilised to hold corporations accountable for human rights violations in their global activities. In this context, the thesis examines to what extent states' due diligence obligations can be extended to corporate nationals' extraterritorial activities. If that is the case, states would be more implied to regulate corporate activities in order to avoid liability under international law. Second, human rights *due diligence-legislation* is examined as an example of how corporate nationals' extraterritorial activities can be regulated. Third, the thesis uses all previous information to examine to what extent Sweden is requiring Swedish corporations to respect human rights in their activities abroad.

In order to answer the research questions, current state of international law is established through studying the sources of international law - primarily human rights treaties, jurisprudence and other legitimate sources of interpretation. By applying the doctrine of state responsibility, states responsibility for corporate actions is examined.

The thesis concludes that it is well known under international law that states have a duty within its territory to protect individuals' human rights against corporate-related harm. States can fail their obligation to protect in two ways; (1) when a human rights violation committed by a corporation is attributed to the state and (2) when the state fails to protect individuals' human rights. In regard to the former, state attribution is hard to establish since multinational corporations (MNCs) rarely have a close relationship to the home state and since the degree of control the state must exercise (*effective control*) is set very high. One way of mending that would be to lower the threshold to *overall control*. In regard to the later, states have a due diligence obligation. Due diligence requires states to take all *reasonable measures* to prevent human

rights violations, to conduct investigations in a serious manner and make sure victims of human rights violations have access to effective remedies. If states fail to do that, states might be held liable for failure to protect.

International customary law and non-judicial monitoring human rights bodies present compelling arguments for recognizing extraterritorial due diligence obligations to protect human rights. According to the *do not harm*-principle states are required to prevent actors from using their territory to conduct business which cause harm on another state's territory. In addition, the General Comments by the Committee on Economic, Social and Cultural Rights (CESCR) suggest that State Parties are under an obligation to regulate corporate extraterritorial activities. However, the European Court of Human Rights (ECtHR) has not yet recognized the duty to protect extraterritorially based on corporations' nationality. In conclusion, states due diligence obligations do, to a certain extent, increase corporate compliance since states risk being responsible if not regulating corporations' activities. In the context of economic, social and cultural rights the duty to protect contributes to a greater extent to corporate compliance compared to the ECHR.

The thesis concludes that Swedish domestic law lacks an adequate regulation on corporate impact on human rights in their extraterritorial activities. Moreover, improvements could be done either by modifying the sustainability report or by introducing human rights due diligence legislation. By not regulating Swedish corporations' global activities, Sweden risks being portrayed as indifferent when it comes to making sure that its companies respect human rights globally.

Acknowledgement

This marks the end of my studies of law at Lund University. I would like to thank my friends and family who have been with me and supported me throughout my journey.

In addition, I want to thank my supervisor Britta Sjöstedt for continuously guiding me through this process.

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Abbreviations

CESCR	The Committee on Economic, Social and Cultural Rights
CRC	The Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
HRDD	Human Rights Due Diligence
IACHR	Inter-American Court of Human Rights
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation
MNC	Multinational Corporation
OECD	Organisation for Economic Co-operation and Development
SOE	State-Owned Enterprise
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights
The Vigilance Law	The Law on the Corporate Duty of Vigilance for Parent and Instructing Companies

1. Introduction

It has been argued that the absence of international corporate regulation on human rights has resulted in lack of corporate responsibility for human rights violations. John Ruggie[1] brought attention to the issue in 2011 with the adoption of the United Nations (UN) Guiding Principles on Business and Human Rights (UNGP). Despite increased attention, the international legal framework still lacks a binding instrument regulating corporate activities in relation to internationally recognized human rights.[2] An international legal framework on corporate responsibility to respect human rights would largely increase corporate accountability for violations of human rights. With a legal framework, corporations would be obligated to respect human rights regardless of how the host state[3], in which the corporation is operating, is fulfilling its duty to protect human rights.

The alleged impunity benefiting multinational corporations (MNC) can in most cases be traced back to the unwillingness or inability of the host states to ensure effective protection of human rights. It could be situations where the domestic law is insufficient to protect human rights or that the host state itself is benefiting from the corporations' activities in the country and is therefore unwilling to enforce effective corporate accountability.[4] In such situations, an international legal binding framework on corporate responsibility to respect human rights would contribute to hold corporations responsible for human rights violations. Additional to the inability and unwillingness of host states, the corporate accountability gap can be traced to the traditional *state-centered* approach to international law. The result of a

[1] John Ruggie was appointed in 2005 to Special Representative on the issue of human rights and transnational corporations and other business enterprises by the UN Secretary-General, at that time, see United Nations Human Rights Office of the High Commissioner, 'Special Representative on the issue of human rights and transnational corporations and other business enterprises', <https://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx> [accessed 10 May 2020].
[2] Markus Krajewski, 'The State Duty to Protect against Human Rights Violations through Transnational Business Activities', (2018) Deakin Law Review, volume 23, page 17-18.
[3] Host states are states where the MNC's activities take place, see chapter *1.6 Terminology.*
[4] D Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', (2004) 5 Melbourne J Int'l L 1, 35, page 27-28.

state-centered interpretation of the international legal system is that states are prime subject of international law.[5] International human rights law is therefore directed towards states and liability for corporate incompliance will depend on domestic legislation.[6] To counter the harmful consequences of MNCs' negative impact on human rights, soft law instruments[7] have been developed.

Due to all above mentioned factors - inability and/or unwillingness of host states, state-centred interpretation and the non-binding nature of soft law - home states[8] could play a crucial role in holding MNCs accountable for their extraterritorial human rights violations. This thesis will, therefore, analyse the possibility of holding home states responsible for their corporate nationals' human rights violations in activities conducted abroad. If states can be held responsible for corporate extraterritorial human rights violations, the incentives for states to regulate corporate activities abroad will increase in order to avoid liability.

1.1 Purpose and Research Questions

The thesis aims to examine the indirect role of international law to hold corporate nationals accountable for human rights violations in their offshore activities. The purpose is to identify states' duty to protect individuals from corporate-related human rights violations and to examine whether international human rights law require states to regulate their corporate nationals' extraterritorial activities. In this context, the thesis introduces human rights due diligence (HRDD) legislation as one way of regulating corporate extraterritorial activities. Once international human rights law has been unfolded, the thesis aims to examine in what situations Swedish

[5] Eric De Brabandere, 'Human Rights & International Legal Discourse Human Rights and Transnational Corporations: Limits of Direct Corporate Responsibility' (2010) Human Rights & International Legal Discourse, Vol. 4, Issue 1, page 69.
[6] Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (eds), *Non-State Actors and Human Rights* (2005), page 230.
[7] Soft law is on-binding social norms of moral and political commitments which influences the behaviour of actors in international relations, see chapter *1.6 Terminology*.
[8] Home states are states under whose law the MNCs are incorporated, see chapter *1.6 Terminology*.

extraterritorial regulation of corporate respect for human rights can be improved.

States' duty to protect individuals from corporate-related human rights violations within and outside their territory will be examined. The focus will be on how the doctrine of state responsibility can be utilised to increase corporate responsibility for human rights. If home states can be held responsible for corporate human rights abuses, either by failure to protect human rights or through state attribution, home states may be encouraged to adopt legislation which holds corporations directly accountability under domestic law. The ambition is to increase the understanding corporate-related human rights violations and the importance of domestic legislation.

What role a state should take, when ensuring that corporations under its jurisdiction or territory do not commit or are complicit in human rights violations, is a complex issue.[9] An attempt is made to identify under which circumstances the state is violating the duty to protect human rights regarding corporate activities abroad and which measures a state should to take to fulfil its duty under international human rights law. Two situations will be examined: (1) when a human rights violation committed by a corporation is attributed to the state and (2) when the state fails to protect individuals' human rights.

With this in mind, the thesis will therefore attempt to answer following research questions:

1. To what extent can home states' duty to protect human rights be utilised to increase corporate nationals' accountability for human rights violations outside the home states' territory?
    - What does states' due diligence obligations entail?
2. To what extent is Sweden requiring Swedish corporations to respect human rights in their extraterritorial activities?

[9] Exploring Extraterritoriality in Business and Human Rights: Summary Note of Expert Meeting, 14 September 2010, Harvard Kennedy School, USA, page 1. Available <https://www.business-humanrights.org/sites/default/files/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf>.

- To what extent does the sustainability report contribute to corporate compliance?

1.2 Delimitation

The thesis aims to examine generally how states' duty to protect can be applied in order to increase corporate accountability, therefore is no limitation of human rights applied. Even if the duty to protect falls equally on host states and home states, it is home states' responsibility to protect which will be of main focus in this thesis.[10] The thesis will only examine when the home states' duty to protect outside its territory is triggered by a MNC's nationality. That excludes situations where states voluntarily establish jurisdiction to protect human rights in an extraterritorial situation or when international criminal law requires states to regulate corporate behaviour extraterritorially.

Both private corporations and state-owned corporations operating abroad will be subjects of examination. In this context, the thesis will only focus on state-owned corporations that operate commercially. That means that corporations exercising governmental function or are organs of the state will fall outside the scope of this thesis. Furthermore, the main focus will be on human rights violations by equity-based MNCs domiciled in the home states. The thesis will touch upon the issue of whether parent companies can be held responsible for subsidiaries' human rights violations and discuss what problems may arise. However, the thesis will not touch upon the concept of piercing the corporate veil. Since it is not regulated in Swedish domestic law and therefore limited established and on uncertain grounds.[11] A Swedish parent company will most unlikely be held liable for its subsidiary's human rights violations abroad.[12]

[10] D Mzikenge Chirwa (2004), page 4;
Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', in Yannick Radi (eds.), (2018) Research Handbook on Human Rights and Investment, page 2.
[11] Torsten Sandström, *Svensk aktiebolagsrätt*, 3:e upplaga, Nordstedt Juridik (2010), page 338.
[12] Mannheimer Swartling, 'Promemoria till Utrikesdepartementet: Angående möjligheten för enskild att inför svensk domstol föra talan mot svenska bolag till följd av kränkningar av mänskligas rättigheter begångna utomlands', (2015) Mannheimer Swartling, page 16.

When considering the issue of whether the duty to protect can be used to increase the incentive for states to regulate corporate nationals' extraterritorial activities, the thesis will concentrate on HRDD. If states can be found liable for corporations' extraterritorial activities, states would be more inclined to regulate corporate activities in order to avoid liability. HRDD legislation will pose as an example of how corporate nationals' extraterritorial activities can be regulated. Even if there are other ways to regulate corporations, HRDD is chosen since it is the method used in UNGP and several states have introduced HRDD in their domestic legal system. In that regard, the Law on the Corporate Duty of Vigilance for Parent and Instructing Companies law (The Vigilance Law) will be exemplified since it was inspired by the UNGP.

The thesis will examine what steps Sweden has taken to regulate corporate nationals' extraterritorial activities. In this regard, focus will be on the sustainability report and what a due diligence legislation could contribute to. The sustainability report is chosen since it is not limited to a certain company form or certain human rights.

1.3 Current State of Research

States' duty to protect human rights extraterritorially and corporate responsibility to protect human rights have previously been discussed by the UN and international law scholars.[13] Legal scholars have written about this issue. For instance, Olivier De Schutter who is a legal professor expert specialised within social and economic rights and on trade and human rights and Ian Brownlie who specialised in international law and was a prominent international litigator.[14] However, the issue still remains greatly debated.[15]

[13] See: United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/OUB/11/04 (UNGPs); Ian Brownlie, *System of the Law of Nations. State Responsibility*, (Clarendon Press, 1983); Nicola Jägers, *Corporate Human Rights Obligations: in search of Accountability*, (2002) Intersentia.

[14] Vaughan Lowe, *Sir Ian Brownlie, KT, CBE, QC (1932-2010),* (2011) British Yearbook of International Law, Volume 81 issue 1.

[15] Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) European Journal of International Law, page 1082;

Some scholars have argued that corporations shall be directly accountable for human rights violations at an international and domestic level. Whereas others, maintain the view that the duty to protect human rights according to international law is the responsibility of the state.[16] It is therefore, interesting to examine to what extent the states' duty to protect human rights extraterritorially can be used to breach the corporate accountability gap.

The thesis aims to contribute to the identification and understanding of current applicable law in the field. The thesis will study what states' duties are under the international legal order and apply it to Swedish domestic law in order to identify gaps in the Swedish legal order as well how it can be mended. The issue of Swedish compliance has been subject of research previously. For instance, did the *Statskontoret* publish a report on Sweden's compliance with the UNGP in 2018.[17] However, instead of only focusing on the UNGP, this thesis aims to build on the understanding of to what extent international human rights law requires Sweden to adopt domestic legislation on corporate extraterritorially compliance with human rights.

1.4 Material and Methodology

The thesis will apply a classical doctrinal methodology. In order to answer the research questions, the current state of international law regarding states' duty to protect human rights against corporate extraterritorial activities needs to be identified. To determine the current state of international human rights law, the sources of international law must be studied. Article 38 of the Statute of International Court of Justice is an attempt to define the legal sources of international law. According to Article 38, the sources are conventions or treaties, international customary law and general principle of international law.[18] Judicial decisions and doctrine of the most highly qualified publicists of various nations are subsidiary means to determine the international rule of

Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) Business and Human Rights Journal, page 72.

[16] D Mzikenge Chirwa (2004), page 3.

[17] Statskontoret, 'FN:s vägledande principer för företag och mänskliga rättigheter – utmaningar i statens arbete (2018:8)' (Statskontoret 2018).

[18] Article 38(1) (a), (b) and (c) of the Statute of International Court of Justice.

law. According to the hierarchy of international sources, treaties, customary law and general principles are primary sources of international law whereas the later are secondary sources.[19]

Bearing in mind that doctrine and international jurisprudence are recognized sources of international law, the theoretical analysis of the thesis will consist of a literature and jurisprudence study. The jurisprudence study will include the international courts such as the European Court of Human Rights (ECtHR), International Court of Justice (ICJ) and Inter-American Court of Human Rights (IACHR). However, ECtHR case-law will be of increase interest since it is relevant to the Swedish domestic legislation. The literature study will include international human rights scholar articles and books which try to unfold the current state of international human rights law regarding corporate responsibility to respect human rights and state duty to protect human rights both within and outside states' territory. General Comments by UN non-judicial human rights bodies such as the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC) will be of most importance when seeking to identify applicable international law. General Comments by monitoring bodies are a legitimate source of interpretation of the human rights treaties and can, therefore, contribute to the understanding of current applicable law.[20] By using a literature study, one can identify in what situations states have a duty to protect human rights against corporate nationals' extraterritorial activities.

When considering the issue of states' duty to protect human rights, general international law, international doctrine, non-judicial human rights monitoring bodies as well as ECtHR case-law will be examined. When considering the issue of Swedish law, a classical doctrinal methodology will also apply. To answer the question regarding applicable law, the thesis will study the traditional sources of law – such as legislation, preliminary work, and doctrine.

[19] Henriksen, Anders, *International Law*, Oxford University Press (2017), page 23.
[20] Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 20.

Summaries will be provided throughout the thesis to facilitate the understanding of each section and to increase the overall comprehension of the final discussion and analysis.

1.5 Disposition

Before turning to attempt to answer the research questions, the thesis will expand on what issues MNCs present regarding corporate accountability for human rights violations, in the second chapter *Business and Human Rights.* That chapter will also address why soft law instruments on business and human rights have developed and how states can assert jurisdiction over corporations' activities abroad. All this in order to provide the reader with the parameters of why states' duty to protect might play an important role in corporate accountability.

In the third chapter, the scope of states' duty to protect human rights will be examined in detail. States' duty to protect within their territory is first examined, followed by the duty to protect outside. That is because one need to understand the parameters of the duty before analysing to what extent the duty can be applied in extraterritorial circumstances. The doctrine of state responsibility for international wrongful acts will be used to see if states can be held responsible for corporations' human rights violations and if states can be held responsible for its failure to protect individuals from corporate-related human rights violations. The thesis will try to pin down under what circumstances states can be responsible for corporate human rights violations and what states have to do to avoid such liability. In this regard ECtHR case-law will be analysed.

In chapter 4, the thesis will turn to examine the parameters of a HRDD legislation and analyse to what extent it would increase corporate accountability for human rights violations in their offshore activities. An example of such legislation will be exemplified to increase the understanding of HRDD.

The last research question, regarding to what extent Sweden is requiring Swedish corporations to respect human rights in their global operations, will be addressed in chapter five. Chapter six will draw conclusions and attempt to answer the research questions.

1.6 Terminology

Extraterritorial Jurisdiction

Extraterritorial jurisdiction refers to a state's competency to make, apply and enforce rules of conduct regarding persons, property or activities abroad (outside a state's territory).[21] Direct extraterritorial jurisdiction is when a state is exercising its authority over actors and activities outside its territory. Indirect extraterritorial jurisdiction is when a state is exercising its authority over actors and activities within its territory which has extraterritorial consequences.

Host and Home States

In this thesis host states are states where the MNC's activities are taking place. Whereas home states are the states under whose law the MNCs are incorporated or that have another link to the MNC, such as location of registered main office or the principal centre of business.[22]

Human Rights Due Diligence

According to Max Planck Encyclopaedia of Public International Law due diligence is an "obligation of conduct on the part of a subject of law"[23] and the failure does not consist of failing to achieve a certain result but failing to

[21] Max Planck Encyclopaedia of Public International Law, Menno T Kamminga, *Extraterritoriality*, available <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=h2Rfuj&result=1&prd=MPIL> [accessed: 2020-04-17].
[22] D Mzikenge Chirwa (2004), page 4;
Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 2.
[23] Max Planck Encyclopaedia of Public International Law, Timo Koivurova, *Due Diligence*, available < https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?rskey=dCL29O&result=1&prd=MPIL> [accessed: 2020-04-17].

take the necessary steps towards that result.[24] Two types of due diligence will be referred to in this thesis. The first one is states' due diligence obligation under international human rights law. The second one is domestic HRDD legislation requiring corporations to exercise due diligence in their activities affecting human rights.

Soft Law Instruments on Business and Human Rights

Soft law could be described as social norms of different character that influence the behaviour and decisions of actors on the international platform. They can either be binding, legal obligations, or non-binding, moral and political commitments.[25] In the context of this thesis, soft law on business and human rights is first and foremost of non-binding character.[26]

States' Duty to Protect

The states' duty to protect human rights entails an obligation to refrain from committing human rights abuses and protecting individuals' human rights from being violated by private actors.[27]

2. Business and Human Rights

2.1 What Problems Does the Multinational Corporations Present?

MNCs' impact on human rights has been well documented.[28] The role multinational corporations should take when it comes to realisation of human

[24] Max Planck Encyclopaedia of Public International Law, *Due Diligence*.
[25] Max Planck Encyclopaedia of Public International Law, Daniel Thürer, *Soft law*, available <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469?rskey=fA2J1B&result=1&prd=MPIL> [accessed: 2020-04-17].
[26] For instance, the UNGP.
[27] Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (eds), *Non-State Actors and Human Rights* (Oxford University Press 2005), page 234;
Olivier De Schutter, *International Human Rights Law: Cases, Material, Commentary*, third edition (Cambridge University Press 2019), page 436.
[28] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum:

rights is difficult to determine.[29] All attempts to create corporate legal binding norms at the international level have failed. However, that does not mean that corporations do not have obligations to respect human rights. Corporate human rights obligations are instead regulated by domestic law.[30] However, the complexity of MNCs rises question of whether domestic regulation is enough to protect human rights.

Along with globalisation and privatisation, the international legal system changed which has created a gap in realisation of human rights. Globalisation of the world economy has weakened the barriers between states which has made it possible for transnational corporations to extend their activities to foreign countries. [31] Privatisation of the public sector has resulted in the involvement of non-state actors, such as corporations, in activities usually exercised by the states. With increased privatisation, a decrease of accountability for human rights violations followed since activities of corporations usually fall outside the scope of state attribution.[32] Corporations' power when it comes to controlling human, natural, financial, and other resources increased due to privatisations.[33]

With increased power, non-state actors have leverage over the state which could be used to stifle the possibility of corporate human rights accountability regulation. Since states are constantly competing for investment opportunities, lowering human rights standards becomes a means to attract MNCs to their jurisdiction. For instance, developing states, which usually are host states, might be unable or unwilling to regulate and control the activities of MNC due to the threat of relocation. These states are, thus, threatened with the withdrawal of business if too protective human rights standards are

Corporations and Human Rights: a survey of the Scope and Patters of Alleged Corproate-related Human Rights Abuse, UN Doc. A/HRC/8/5/Add.2 (2008).
[29] Eric De Brabandere (2010), page 68.
[30] Markus Krajewski (2018), page 17-18.
[31] Eric De Brabandere (2010), page 69-70.
[32] Eric De Brabandere (2010), page 68-70;
See also Draft articles on Responsibility of state for international wrongful acts.
[33] Ana Maria Mondragon, 'Corporate Impunity for Human Rights Violations in the Americas; The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice', (2016) Harvard International Law Journal, Volume 57 (Online Symposium), page 54;
De Brabandere (2010), page 69-70.

enforced – this is known as the 'race-to-the-bottom'.[34] This slippery slope could be hampered if uniform international standards are passed and enforced. Without uniform international human rights standards on corporate compliance with human rights, states that implement a higher human rights standard will be in a disadvantage in terms of investment opportunities compared to other states.[35]

2.2 The Problem of International Legal Personality

Another issue contributing to the corporate accountability gap for human rights violations abroad is the issue of international legal personality. Legal personality is a prerequisite for bearing international rights and duties. The ICJ explained international legal personality as "a subject of international law […] capable of possessing international rights and duties, and […] has a capacity to maintain its rights by bringing international claims"[36]. According to that definition, international legal personality consists of three elements; legal subjectivity, legal capacity, and *jus standi*.[37]

In line with a traditional state-centred interpretation of the international legal system, corporations do not have legal personality under international law. Instead, international law is classically addressed to states. Since corporations are not afforded a legal personality, they cannot be bearer of rights and duties.[38] Consequently, the international legal system does not consist of corporate duty to respect human rights.[39] Thus, *state-centered* interpretation is often referred to as one of the obstacles for imposing effective protection of internationally recognized human rights. Corporate obligations to respect human rights are instead a matter of domestic law, based on the international

[34] D Mzikenge Chirwa (2004), page 27-28.
[35] D Mzikenge Chirwa (2004), page 27-28.
[36] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ. Reports 1949, p. 174, page 179.
[37] Nicola Jägers, *Corporate Human Rights Obligations: in search of Accountability* (Intersentia 2002), page 35.
[38] Nicola Jägers (2002), page 19.
[39] Eric De Brabandere (2010), page 71.

legal obligation of states to ensure effective protection under their jurisdiction.[40]

However, some scholars have rejected the notion of subjects of international law.[41] The doctrine of rejection of subjects was first introduced by Wolfgang Friedmann in 1964 and has been defended by Rosalyn Higgins recently.[42] Higgins compared the notion of subject to a myth and based her reasoning on the fact that there seem to be no agreed rules for determining what a subject of international law is.[43] Furthermore, the international legal order recognizes that states are not the only subjects of international law. According to Higgins MNCs are participants in the international legal order, along with states, international organisation, individuals, and non-governmental groups. The community is composed of all these participants and if the international legal order recognized the role of all these participants it would bring the international law into conformity with present-day reality.[44] Andrew Clapman is also rejecting the notion of subjectivity and argues that rights and duties under international law depend on the *capacity* of the entity to enjoy those rights and bear those obligations rather than the notion of subjectivity of international law.[45]

2.3 Emergence of Soft Law Instruments on Corporate Responsibility

Non-binding initiatives within the area of business and human rights began to develop in the late 20th century in order to counter the consequences of a *state-centered* approach to international law.[46] The issue of business and human rights was put on the international agenda as a result of the United Nations

[40] Eric De Brabandere (2010), page 74.
[41] Andrew Clapham, *Human Rights Obligations of Non-State Actors* [Electronic research] (Oxford University Press 2006), page 68.
[42] Nicola Jägers (2002), page 23.
[43] Andrew Clapham (2002), page 63.
[44] Nicola Jägers (2002), page 23.
[45] Andrew Clapham (2002), page 68-69.
[46] Business and Human Rights Resource Centre, *Business and Human Rights – A brief introduction*, available https://www.business-humanrights.org/en/business-human-rights-a-brief-introduction> [accessed: 2020-01-20].

(UN) Guiding Principles on Business and Human Rights (UNGP). But before that, the issue had been addressed in several soft law instruments. For instance, the OECD countries adopted the *Declaration on International Investment and Multinational Enterprises* in 1976 which became the OECD Guidelines for multinational corporations in 2011. The Guidelines consist of a non-binding standard for corporations to make a positive contribution regarding economic and social progress.[47] In 1978 the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* was introduced by the International Labour Organisation (ILO). It was the result of efforts to constrain the negative impact corporations had on labour rights. The Declaration has since been updated several times.[48] In 2000 the Global Compact was enacted. The Global Compact includes nine principles within the environment, labour, and human rights. It advocates for good corporate practicing in these areas and contributes to the voluntary standard and practical norms of corporate behaviour. Under the Global Compact corporations may voluntarily commit to protecting human rights.[49]

Two additional instruments must receive attention when discussing business and human rights soft law, namely the UNGP which was adopted by the UN Human Rights Council in 2011 and the Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (revised version) which were presented in 2019.[50] The Zero-draft is another attempt at

[47] Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) International and Comparative Law Quarterly, page 4.
[48] International Labour Organisation, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) 5th Edition (2017),* available < https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm> [accessed: 2020-03-17].
[49] Barnali Choudhury (2018), page 5;
Ralph G. Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New *Lex. Mercatoria*' in Philip Alston (eds), *Non-State Actors and Human Rights* (2005), page 206.
[50] Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework;
Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (revised version) (2019) access:
<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>.

hardening the obligation on states to require corporations domiciled in their jurisdiction or territory to undertake HRDD in relation to their activities. Article 9(1) of the Zero-Draft sets out the obligation on states to ensure that its domestic legislation requires corporate nationals to under undertake HRDD throughout its business activities.

In 2011 UN Human Rights Council unanimously endorsed the UNGP, which marks the first time the UN Member States adopted a common policy on business behaviour regarding human rights.[51] The UNGP does not create any binding international obligations on states or transnational corporations and the endorsement by the Human Rights Council does not change that since the Council's resolutions are not legally binding. However, the Council is mandated to establish *international standards* in the field of human rights and that is the aim of the UNGP. Thus, the UNGP contributes with a coherent and comprehensive instrument on business and human rights.[52]

Even if these non-binding standards of conduct and norms are often relied upon by corporations to show their engagement in human rights and acceptance of corporate responsibility these instruments cannot be seen as evolving norms of customary international law. Mostly because these instruments were not intended to be binding. Soft law can be guidelines of future changes and evidence of desired behaviour, but as it stands today soft law is not binding under international law.[53]

[51] Radu Mares, 'The UN Guiding Principles on Business and Human Rights - Foundations and Implementation' (2012) Martinus Nijhoff Publishers, page 1.
[52] The Permanent Mission of Switzerland to the United Nations Office, *The Human Rights Council – A practical guide*, available <https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide_en> [accessed: 2020-03-17], page 5;
Marco Fasciglione, Corporate Human Rights Responsibility, 'State's Duty to Protect and UN GPs' National Action Plans: Some Thoughts After the UK 2016 NAP Update', (2016) European Papers, Vol 1, page 622-623.
[53] Eric De Brabandere (2010), page 82.

2.4 A Closer Look at The United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGP) addresses corporate responsibility to respect human rights. The UNGP is a *non-binding* instrument addressed to states to increase corporate compliance with human rights. It is constructed in a tripartite framework consisting of three pillars; 1) *protect* - the state duty to protect human rights, 2) *respect* - the corporate responsibility to respect human rights, and 3) *remedy* - access to remedy for victims of business-related abuses.[54]

The first pillar regulates states' duty to protect human rights. Article 1 underlines that states' duty to protect includes a duty to protect human rights against abuse within its territory and jurisdiction. That includes business corporations. States must take appropriate measures to fulfil its obligation, for instance legislative measures.[55] According to Article 2 states shall clearly set out the expectation that all businesses domiciled in their territory or jurisdiction shall respect human rights throughout their activities. However, states are not generally required to *regulate* extraterritorial activities of businesses domiciled in their territory or jurisdiction. The commentary to Article 2 in the UNGP reads as follows:

> "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

[54] Florian Wettstein, 'CSR and the debate on business and Human Rights: bridging the Great Divide', (2012) Business Ethics Quarterly, Vol. 22 Issue 4, page 741.
[55] Article 1 UNGP Commentary.

> There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or support."[56].

Thus, the UNGP are taking a cautious approach to the extraterritorial dimension of states' duty to protect human rights. This will be more thoroughly discussed in chapter *3.3 Extraterritorial Obligations under International Human Rights Law.*

The second pillar of the Framework focuses on corporate responsibility to respect human rights. This responsibility is a global standard which supersedes national laws and regulations and exists irrespectively of states' abilities or willingness to fulfil their obligations. Thus, the corporate responsibility to respect human rights is an autonomous corporate duty which corporations shall comply with regardless of domestic legislation.[57]

The duty to respect does not mean that corporations have to actively perform any actions. It rather entails a negative obligation to refrain from actions that may be harmful and is a reflection of the do not harm-principle.[58] Companies should act with due diligence to avoid infringing on human rights and address their human rights impact.[59] It applies to all corporations, no matter size, sector, operational context, ownership, and structure.[60] The magnitude of the responsibility will be appropriate to several factors, size among others, and the severity of the impact is determined by the scale, scope, and irreversible damage of the impact.[61]

[56] Article 2 UNGP Commentary
[57] Radu Mares, 'A gap in the corporate responsibility to respect human rights', (2010) Monash university Law Review, vol 36.3 pp 33-83 [pdf], page 2.
[58] Florian Wettstein (2012), page 755;
Protect, Respect and Remedy: A Framework for Business and Human Rights, UN doc. A/HRC/8/5, para 24, page 9.
[59] Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance', (2019) Melbourne Journal of International Law Vol 20, page 224.
[59] Principle 11 UNGP.
[60] Principle 14 UNGP.
[61] United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04 (UNGPs), page 15.

The UNGP is constructed upon the concept that corporations know and show that they respect human rights.[62] The first stage of responsibility is to become aware of the human rights problems and the second stage entails a responsibility to act on such information in terms of prevention and mitigation.[63] For companies to meet these requirements, John Ruggie has laid out the basic parameters of a HRDD approach in the UNGP. HRDD is about enabling companies to report that they have taken reasonable steps to prevent and remedy human rights violations to prevent the company from being linked to alleged or proven violations.[64] The UNGP outlines four core elements of due diligence namely; (1) having a human rights policy in place to identify, prevent, mitigate and explain how they address human rights impacts, (2) assessing the human rights impacts of the activities, (3) integrate these commitments and assessments into management and control mechanisms, (4) tracking and reporting progress.[65]

2.5 Jurisdiction

Due to no international legally binding framework on corporations' duty to comply with internationally recognized human rights, corporations cannot be held liable under international law for human rights violations. Instead, domestic legislation regulates corporate activities. Corporations can, therefore, be held accountable for extraterritorial human rights violations under domestic legislation in those cases where jurisdiction can be established.[66]

States have the competence to regulate business activities when they can exercise jurisdiction in a situation. Jurisdiction refers to a state's lawful power

[62] Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework, page 15-16;
Principle 15-16 UNGP.
[63] Radu Mares, 'A gap in the corporate responsibility to respect human rights', (2010), page 4.
[64] Statskontoret (2018), page 44.
[65] Principle 16-22 UNGP;
United Nations Human Rights Council (UNHRC), 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009) UN Doc A/HRC/11/13, para 49.
[66] Eric De Brabandere (2010), page 74.

to make and enforce rules. It expresses under which circumstances a state is entitled to exercise its legal authority.[67] The ability of a state to try, intervene, and make amends to extraterritorial corporate human rights violations is dependent on the jurisdiction established by the law.[68] It is clear that states have jurisdiction within their territory, but it is uncertain to what extent states can assert jurisdiction outside their territory.

2.5.1 Asserting Jurisdiction

States can assert jurisdiction in three ways; prescriptive jurisdiction which concerns the ability of states to prescribe laws, adjudicative jurisdiction which refers to a state's authority to decide competing claims and enforcement jurisdiction which refers to a state's authority to ensure legal compliance.[69] International law prohibits a state from exercising extraterritorial enforcement jurisdiction since a state is not allowed to exercise its authority to enforce compliance on another state's territory. However, international law does not explicitly prohibit a state from exercising prescriptive and adjudicative jurisdiction in its own territory with respect to acts taken place abroad. [70]

Under international law, a state may not exercise extraterritorial jurisdiction over foreign activities without the consent of the territorial state unless jurisdiction is exercise pursuant recognized bases.[71] There are four recognized jurisdictional bases that can justify the extraterritorial application of national laws. These are; active personality principle, the passive personality principle, the protective principle, or the universality principle.[72] In most cases where states have established jurisdiction over transnational corporations' activities

[67] Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 10.
[68] Enact, *Företag och mänskliga rättigheter: Påtagliga brister och luckor i svensk lagstiftning. Rapport till Statskontoret*, (2018) Enact, page 33.
[69] Max Planck Encyclopaedia of Public International Law, *Extraterritoriality*.
[70] Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 11;
De Schutter Olivier, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' (2006) Catholic Univ. of Louvain and Colleged of Europe, page 25.
[71] Methven O'Brien (2018), page 52.
[72] Cedric Ryngaert, *Jurisdiction in International Law*, (Oxford University Press 2008), page 7.

abroad, the link between the activities and the state is the *corporation's nationality*. Thus, justifying exercising extraterritorial jurisdiction over a corporation's activities abroad on the *active personality principle*.[73]

One should differentiate between *direct extraterritorial jurisdiction* and *indirect extraterritorial jurisdiction*. Direct extraterritorial jurisdiction cover acts and omissions which occur outside a state's territory whereas indirect extraterritorial jurisdiction is domestic measures with extraterritorial effects. The domestic measure is performed within the state's territory, but it has certain consequences outside the state's territory.[74]

A state *may* extend the application and the jurisdiction of their courts to situations occurring abroad.[75] The question of whether states are under an *obligation* to extend its national laws and courts to conduct abroad to fulfil its duty to protect human rights will be addressed in chapter *3.3 Extraterritorial Obligation under International Human Rights Law.*

2.5.2 State Competence and Limitation

Exercise of extraterritorial jurisdiction is limited by the jurisdictional bases and the test of reasonableness. To meet the requirements of reasonableness, the exercising state must respect the principle of non-intervention in the internal affairs and sovereignty of the host state.[76] Consequently, states are prohibited from "intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State"[77]. However, that does not mean that states are prohibited from asserting extraterritorial jurisdiction. ICJ

[73] Olivier de Schutter (2006), page 7.
[74] Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 13.
[75] Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 11;
De Schutter Olivier, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations' (2006) Catholic Univ. of Louvain and College of Europe, page 25.
[76] Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 19;
Olivier de Schutter (2006), page 21.
[77] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA resolution 2625, 25th session, UN A/RES/25/2625 (24 October 1970).

stated in the Nicaragua case that an intervention is only prohibited if it infringes on matter the state is permitted to decide upon freely.[78] It could therefore be argued that states' exercise of extraterritorial jurisdiction to ensure that corporations, domiciled in the states, comply with the states' domestic legislation would not be interfering with matters the host state has a right to decide freely upon. That argument might also be extended to regulation that requires corporate nationals to ensure their subsidiaries and suppliers compliance (i.e. a HRDD legislation).[79]

Another problem is that there is no definition of corporate nationality. However, where the corporation is registered, has its principal place of business or has its central place of administration are generally accepted to derive a link between the state and the corporation which justifies the exercise of extraterritorial jurisdiction.[80] Due to the lack of definition of the nationality of a corporation, the concept of extraterritorial jurisdiction might be subject of exploitation. For instance, the determination of the corporation's nationality could be manipulated to allow a state to extend its jurisdiction to extraterritorial acts of corporations that are incorporated abroad. In that case, one could argue that it would be contrary to the principle of non-interference.[81]

An additional problem with exercise of extraterritorial jurisdiction is that it can be seen as distrustful of home states. Since MNCs fall under the jurisdiction of the host state in which their activities are taken place and under the jurisdiction of the home state in which they are domiciled, MNCs are subjects of multiple jurisdictions.[82] The exercise of parallel jurisdiction by the home state could either be seen as distrust of the host state's ability to

[78] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgement, ICJ Reports 1986, p.14, para 205.
[79] Markus Krajewski (2018), page 29-30.
[80] Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1(1) Business and Human Rights Journal 41, page 46.
[81] Olivier De Schutter (2015), page 46.
[82] Aldo Ingo Sitepu, 'Application of Extraterritorial Jurisdiction in European Convention on Human (Case-study: Al-Skeini and Others v. UK)' (2016) 13 Indonesian Journal of International Law 353, page 359-360.

protect individuals' human rights. Home states might, therefore, be reluctant to exercise such jurisdiction. [83]

3. State Responsibility to Protect Human Rights in Regard to MNCs

States are the prime responsible subject for upholding human rights on the international level even though one can detect an increased awareness of the non-state actors.[84] This chapter will explore the *indirect* role of international human rights law and general international law in holding corporations responsible for human rights violations. The first section will examine states' duty to protect human rights *within their territory* and the second section will examine states' duty to protect human rights *outside their territory*.

3.1 States' Duty to Protect Human Rights within its Territory

3.1.1 Corporate Nationals' Activities

States are under an obligation to not only respect human rights (which they agreed to abide when ratifying human rights treaties) but also to protect human rights. States shall make sure that its organs refrain from any action contributing or constituting a violation of human rights. States shall also protect these rights from being violated by private actors, such as corporations.[85] It is generally accepted that what a state is prohibited to do under international human rights law, a state is not allowed to authorize private actors to do. In other words, if a state is prohibited from infringing on human rights they cannot remain passive in the face of human rights

[83] Olivier de Schutter (2006), page 21.
[84] Nicola Jägers (2002), page 137.
[85] Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (eds), *Non-State Actors and Human Rights* (2005), page 234.
Olivier De Schutter (2019), page 436.

violations being committed by private actors.[86] That means that states need to adopt preventive measures to prevent human rights risks from materialising. In case preventive measures fail, states are under an obligation to provide effective remedies to individuals whose rights have been violated.[87]

The duty to protect human rights by regulating private actors' behaviour is well understood in international law. Several human rights courts and non-judicial human rights monitoring bodies have recognized states' obligation to ensure human rights protection in the private sphere within their territory.[88] For instance, under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC)[89] is of the position that the obligations under the Covenant will only be fulfilled if individuals are also protected against acts committed by private actors, such as business corporations.[90]

Under the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights (CESCR) adopted the same position in the General Comment No. 12 (1999) and expressed that the; "obligation to protect requires measures by the State to ensure that enterprises [...] do not deprive individuals of their access to adequate food"[91].

3.1.2 The Due Diligence Test

The term used to describe the duty to protect human rights is *due diligence*. When states fail to carry out due diligence regarding their duty to protect human rights, the state can be held responsible even if the alleged violation was committed by a private actor.[92] State responsibility may also arise when

[86] Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (eds), *Non-State Actors and Human Rights* (2005), page 233-234.
[87] Olivier De Schutter (2019), page 436.
[88] D Mzikenge Chirwa (2004), page 13.
[89] The Human Rights Committee is the body which monitors the implementation of the International Covenant on civil and political rights by its State Parties.
[90] United Nations Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004), para 8.
[91] Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art 11)* (1999), para 15.
[92] Nicola Jägers (2002), page 146-147.

the private actor's action can be attributed to the state. That will be examined chapter *3.2.1 State Responsibility Arising from State Attribution*.[93]

In order to avoid responsibility, states need to exercise due diligence to prevent human rights violations. In the landmark case *Velksquez Rodriguez v Honduras*, the Inter-American Court of Human Rights (IACHR) concluded that a state can be held responsible, even if the human rights violations were committed by a private actor, if the state failed to exercise due diligence to prevent and respond to the violation (in terms of punish the responsible). The Court came to the conclusion that "an illegal act which is initially not directly imputable to a State (for example, because it is the act of a private person […]) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violations or to respond to it as required by the Convention"[94].[95]

The obligation to exercise due diligence can be divided into three obligations. States are under a duty not to violate human rights, states must take positive measures to ensure enjoyment of human rights and states must protect human rights against corporate activities.[96] The duty to protect is understood as an obligation to take all *reasonable measures* possible which may prevent infringements on human rights *without imposing an unreasonable burden* on the state. [97] That includes *legislative measures*, establishing a regulatory and monitory mechanism to prevent occurrences of human rights abuses.[98]

Additionally, states shall investigate in a *serious* manner. That includes identify the responsible, impose the appropriate punishment, and ensure compensation to the victims to fulfil its due diligence obligations.[99] Consequently, a state can be held responsible in cases of human rights

[93] Nicola Jägers (2002), page 150.
[94] *Velásquez Rodríguez v Honduras*, merits, judgement, Inter-American Court of Human Rights series C, no 4 (July 29, 1988), para 172.
[95] D Mzikenge Chirwa (2004), page 14, 17.
[96] Nicola Jägers (2002), page 149.
[97] Olivier De Schutter (2015), page 44.
[98] D Mzikenge Chirwa (2004), page 14;
Nicola Jägers (2002), page 165;
Velásquez Rodríguez v Honduras case, para 175.
[99] *Velásquez Rodríguez v Honduras* case, para 175;
D Mzikenge Chirwa (2004), page 15.

violations by private actors if the state did not use the means at its disposal to carry out a serious investigation.[100] The mere fact that violations have occurred does not necessarily prove the state's failure to take reasonable and serious steps. Only in cases where the states fail to take reasonable and serious measures will the state be held responsible.[101]

Before state responsibility can be assumed, two cumulative conditions need to be met: (1) the state had the *means to prevent or repress* the violation and did not act and (2) the state *knew or should have known* about the risk of human rights abuse and did not act. The first condition relates to the capacity of states to influence the actions of private actors and protect human rights through states' power to adopt for instance legal and administrative measures. Under the second condition, states are only liable if they knew or should have known and did not act according to the first condition.[102]

The obligation to protect is, therefore, an obligation of means rather than an obligation of result.[103] The scope of the duty to protect will, therefore, be determined by what is reasonable to expect from the state.[104] The judgement by ECtHR in the case *Osman v. United Kingdom* can shed some light on what the scope of reasonableness is. In the case, the Court identified three factors that limited the obligation to protect; the unpredictability of human conduct, budgetary priorities, and the obligation of states to respect other conflicting rights.[105]

Following *Osman* case, it is apparent that the ECtHR has adopted the due diligence standard as a test to determine states' compliance with the duty to protect human rights under the ECHR.[106] ECtHR have embraced the IACHR's view that due diligence means an obligation to take all *reasonable measures.* In the *Guerra v. Italy* case the ECtHR added the term *effectiveness*.

[100] Nicola Jägers (2002), page 147.
[101] D Mzikenge Chirwa (2004) page 14-15.
[102] Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 7.
[103] Olivier De Schutter (2019), page 436-437.
[104] Olivier De Schutter (2019), page 465.
[105] *Osman v. UK* (App no 23452/94) ECHR 1998-VIII 3124, para 115.
[106] D Mzikenge Chirwa (2004), page 16-17.

In order for states to avoid responsibility, the measures adopted by states must provide individuals with an *effective protection* against corporate harmful activities.[107]

Thus, in order to fulfil the obligation under ECHR states' measures must be *effective* and states have to *strike a balance* between the interest of the community and the individual's enjoyment of human rights.[108] When striking a balance states are given a margin of appreciation, however, it is not sufficient to refer to the economic well-being of the country to justify infringements of human rights.[109] This position of the Court is of importance when considering corporate harm since states cannot justify failure to safeguard human rights with a general reference to the economic benefit the company is contributing.[110]

In conclusion, according to the due diligence obligations, states shall strike a fair balance between the interests concerned, conduct a proper investigation, and adopt effective measures. To avoid responsibility, the state should take, foremost legislative, measures to prevent corporate activity to infringe on human rights.

3.2. State Responsibility Arising from State Attribution

Now turning to in which situations state responsibility may arise when corporate extraterritorial human rights violations are attributed to the state. ICJ stated in the *Gabcikovo-Nagymaros Project* (Hungary/Slovakia) case that it is well established that international responsibility is likely to be invoke regardless of the nature of the internationally wrongful act. International jurisprudence is, therefore, backing up the view that state responsibility can follow a violation of international human rights obligations.[111]

[107] Nicola Jägers (2002), page 153.
[108] Nicola Jägers (2002), page 153.
[109] *Hatton and others v. The United Kingdom* (App. No. 36022/97) ECHR 08/08/2003, para 16.
[110] Nicola Jägers (2002), page 153.
[111] D Mzikenge Chirwa (2004), page 9-10.

The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) is the ILC's attempt to codify international rules on state responsibility. It is generally acknowledged that the Draft Articles provide evidence of established international customary law.[112] The doctrine of state responsibility, which is intended to protect the rights of aliens, has its limitations with respect to state responsibility for violations of human rights in the private sphere. According to the Draft Articles, state responsibility for private actors' actions occurs when two elements are fulfilled. There must exist an act or omission which is attributed to the state and the act or omission must constitute a breach of international law. State responsibility is therefore dependent on the link between the state and the act.[113]

When it comes to private actors exercising the breach of international law, there must exist a link between the private actor and the state, so the conduct of the private actor qualifies as an *act of the state*.[114] An act by a corporation can therefore be attributed to a state if the act is considered an act of the state. According to the Draft Articles, an act of a state can occur in four different situations. If corporations are "empowered by the law of that State to exercise elements of the governmental authority"[115] or "acting on the instructions of or under the direction or control of that state"[116]. If states acknowledge or adopt the conduct as its own,[117] or states are aiding and assisting in the commission of an internationally wrongful act by another state.[118]

When considering whether corporate activities can be attributed to a state, article 8 (regarding the instruction of, under the direction or control of a state) will be considered since it is not limited to governmental activity. Even non-

[112] D Mzikenge Chirwa (2004), page 5.
[113] D Mzikenge Chirwa (2004), page 5.
[114] D Mzikenge Chirwa (2004), page 5, 8.
[115] Article 5 Draft Articles.
[116] Article 8 Draft Articles.
[117] Article 11 Draft Articles
[118] D Mzikenge Chirwa (2004), page 6-8;
Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 5.

governmental activity can be attributed to the state based on the virtue of degree of control exercised by the state over the company.[119]

3.2.1. State Responsibility for State-Owned Corporations' Activities

Turning to in what situations states can be responsible for acts committed by state-owned enterprises (SOE). It is important to remember that the concept of separate legal personality of corporations also is recognized under international law.[120] State-owned enterprises have a legal personality distinct from the state (the shareholder) and will therefore be treated as a separate entity like any other company.[121]

Nevertheless, the central question whether a state can incur responsibility for SOEs' conduct is the degree of involvement by the state. Even if a state owns majority of the shares in a company the state may not be in control of the company since the control may lie with the board of directors. Three avenues of influence can be identified; (1) if the state is the controlling owner, the state is in a position to nominate and elect board of directors without the consent of other shareholders, (2) the state may influence the senior management of the SOE, and, (3) the state's ownership may be made accountable before a political body, such as the Parliament. The third avenue of influence relates to the fact that states can never entirely be relived from its obligations as a state. [122] These features constitute grounds to argue that direct attribution to the state for conducts committed by the SOE is possible. However, state attribution does not occur automatically because the company is state-owned. The degree of control must meet the requirements of state attribution.[123]

[119] D Mzikenge Chirwa (2004), page 6;
International Commission of Jurists, *Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility* (2008) International Commission of Jurists, page 27, available <https://www.business-humanrights.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf> [2020-05-03].
[120] D Mzikenge Chirwa (2004), page 7.
[121] International Commission of Jurists (2008), page 18.
[122] International Commission of Jurists (2008), page 19-20.
[123] International Commission of Jurists (2008), page 20.

In the Nicaragua case, ICJ outlined the degree of control that needs to be met in order for states to be held responsible for private actors' conduct. ICJ held that in order to hold the US responsible for the activates, which were contrary to international law carried out by the Contras, it has to be proven that the US had *effective control* over the activities. ICJ ruled that the US did not have effective control over the operations even though the US financed, organised, trained, supplied, equipped the Contras, and planned a number of paramilitary or military operations carried out by the Contras.[124] Thus, the degree of control for a state to be held responsible for human rights violations is a very high threshold.[125] Due to this high threshold many situations in which a state might be implicit in human rights violations committed by a private party fall outside the scope of state responsibility.[126]

However, another degree of control was indicated by the International Criminal Tribunal for the Former Yogoslavia in the case *Prosecutor v. Tadic*. The Court held that *overall control* could be enough to hold a state responsible for acts of armed forces. The overall control would be going beyond financing, equipping forces, and participation in the planning and supervision of military operations.[127]

When studying SOE, it is clear that it exists a link between the state and the SOE due to the ownership and the possibility of the state to exercise control over the SOE. Typically, the more shares a state holds, the stronger its influence will be, and the likelier state attribution is. Whether the control a state is conducting is sufficient to reach the threshold for state attribution will be determined based on particular facts.[128] In the commentaries, ILC refers to several cases where responsibility was established based on *factual circumstances of state control arising from state ownership*.[129] In these cases, conduct of the SOE has been attributed to the state where the state was *using*

[124] *Nicaragua* case, para 106, 108, 113 and 115.
[125] D Mzikenge Chirwa (2004), page 33-34.
[126] D Mzikenge Chirwa (2004), page 33-34.
[127] D Mzikenge Chirwa (2004), page 7.
[128] International Commission of Jurists *X v* (2008), page 29.
[129] See for instance,. *X v. Ireland*, (App No. 14079/04) ECHR 15/12/2009, p. 198.

its ownership to achieve a specific result.[130] Thus, state responsibility arise when the SOE was used by the state to achieve a particular purpose despite the separation of legal personalities.[131]

State attribution is, therefore, dependent on the degree to which the ownership is used as actually controlling and directing the company towards a specific result.[132] Based on the capacity of states to exercise significant control over SOE and the indication that state control can arise from ownership, state attribution can be based on article 8.[133] It is essential that activities of SOEs, that are under the influence, or control of the state, can be attributed to the state itself despite the principle of separate entities. Since it would be unsustainable if states could avoid state responsibility by committing certain violations through a corporation instead.

3.2.2. State Responsibility for Non-State-Owned MNCs' Activities

Regarding non-state-owned MNCs' activities, it is very unlikely that MNCs' human rights violations are attributed to the home states due to the level of independence the MNCs possess. MNCs are rarely close enough to the home state to be considered as exercising governmental function, acting on instructions, or under control of the home state. Additionally, because of the threshold of *effective control* many situations, in which a state might be implicit in human rights violation committed by a MNC, will fall outside the scope of state responsibility.[134] Even if the threshold *overall control* was applied, many wrongful acts committed by private actors will not be attributed to the state. In many cases of where a state is offering financial support or aid to private actors with the knowledge that violations may occur will not result in liability for the state.[135]

130 Article 8 para 6 Draft Articles.
131 D Mzikenge Chirwa (2004), page 7-8.
132 International Commission of Jurists (2008), page 31.
133International Commission of Jurists (2008), page 31.
134 D Mzikenge Chirwa (2004), page 33-34.
135 D Mzikenge Chirwa (2004), page 7.

Even if human rights violations are not easily attributed to home states, home states can still be held responsible for their own wrongful conduct if home states breach their positive obligation to protect human rights under international human rights law or general international law.[136]

3.3 Extraterritorial Obligations under International Human Rights Law

As concluded in the previous chapter, state responsibility can arise for failure to exercise due diligence in preventing corporate harmful activities within the state's territory.[137] Turning to whether due diligence duties apply extraterritorially. If states can be held responsible for corporate human rights violations abroad, due to failure to control corporate extraterritorial activities, it could be an effective means to increase corporate accountability for human rights violations.

3.3.1 The Extraterritorial Application of Human Rights Treaties

Human rights treaties have different scopes of application, it can differ between a jurisdictional or territorial scope of application. With chapter *2.5 Jurisdiction* in mind, states need to assert jurisdiction to be able to intervene or try corporate human rights violations. ICJ has acknowledged the extraterritorial scope of core human rights treaties by looking at the object and purpose of human rights treaties in conjunction with the lack of territorial limitation provisions.[138] For instance, the ICCPR applies within State Parties' territory and jurisdiction according to Article 2 para 1. The ECHR obliges State Parties to ensure the rights under the Convention within their jurisdiction.[139] Whereas, the ICESCR neither refers to jurisdiction nor territory, implying that State Parties' obligations under the Covenant apply irrespectively of where the violations take place.[140] However, the ICJ has

136 Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 5.
137 See chapter *3.1.2 Due Diligence Test*.
138 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports (2004), p 136, para. 109-112.
139 Article 1 ECHR.
140 Olivier De Schutter (2019), page 146.

stated in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion that the lack of application provision is because the rights are of essential territorial notion.[141]

Nevertheless, it would be unsatisfying to consider the notion of jurisdiction only to be within the territory of a state.[142] Even if the ECtHR has recognized that the jurisdictional competence of a state is primarily territorial, it has also recognized in several cases that Article 1 of the ECHR is not limited to the region or the territory of a contracting state.[143] Contracting states shall comply with ECHR wherever the states act, regardless if it is inside or outside the state's territory.[144]

Furthermore, the HRC held, in the case *Lilian Celiberti de Casariego v Uruguay*, that Article 2(1) of the ICCPR does not equal that a state cannot be held accountable for human rights violations abroad and that it would be "unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory"[145].[146]

Three preconditions can be identified for when human rights treaties apply extraterritorially, and States Parties shall exercise extraterritorial jurisdiction in order to fulfil their duty to protect. States shall comply with human rights, within the meaning that the state shall refrain to commit violations and

[141] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para 112.
[142] Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (eds), *Non-State Actors and Human Rights* (2005), page 245.
[143] See *X v FRG, Cyprus v. Turkey* and *Issa v. Turkey* amongst other cases.
[144] D. Augenstein, L. Dziedzic, 'State responsibility to regulate and adjudicates corporate activities under the European Convention on Human Rights', (2017) EUI Department of Law Research Paper, page 25;
Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (eds), *Non-State Actors and Human Rights* (2005), page 241.
[145] *Lilian Celiberti de Casariego v. Uruguay*, CCPR/C/13/D/56/1979, UN Human Rights Committee (HRC), (1981), para 10:3.
[146] D Mzikenge Chirwa (2004), page 29.

exercise due diligence in protecting human rights against infringement by third parties in three situation outside their territory.[147] First if the state can assert effective control over territory outside its territory, second if the state can assert effective control over persons (either state agent authorities/ organs or individuals), and third if the state can assert effective control over activities.[148] The last one is recognized by the IACHR in the advisory opinion *The Environment and Human Rights*. The Court accepts the judicial link to effective control over activities, "when the state of origin exercise effective control over the activities carried out that caused the harm and consequent violation of human rights"[149].[150] Under these circumstances, states have to protect human rights of individuals extraterritorially. Thus, the due diligence duties are activated, and state responsibility can arise from the state's own failure to protect.[151] Since states' duty to protect is extended outside states' territory, corporate extraterritorial human rights abuse can bring the victim of the abuse under the state's jurisdiction if the harm originates in territory under the state's effective control or is cause by an act attributed to a state.[152]

3.3.2 State Responsibility Arising from a Duty to Control Corporate Activities

Now turning to when state responsibility may arise from states' failure to protect human rights against corporate extraterritorial activities. This chapter will first and foremost, analyse to what extent the states' due diligence duties can be applied to corporate nationals' extraterritorial activities. In other words, if states need to adopt legislative measures with extraterritorial effect or allow their courts to hear claims arising from situations abroad in order to fulfil their duty to protect human rights extraterritorially.

147 See chapter *3.1.2 The Due Diligence Test*.
148 Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 13;
Olivier De Schutter, (2019), page 179.
149 *The Environment and Human Rights,* Advisory Opinion OC-23/17, Inter-American Court of Human Rights (15 November 2017), para. 104(h).
150 Antal Berkes, 'A new Extraterritorial Jurisdictional Link Recognised by the IACtHR' (2018) European Journal of International law.
151 Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 13.
152 D. Augenstein, L. Dziedzic (2017), page 27-28.

As explained in chapter *2.4 A Closer Look at The United Nations Guiding Principles on Business and Human Rights*, the UNGP are taking a cautious approach to the extraterritorial dimension of states' duty to protect human rights. The UNGP does not establish the existence of extraterritorial obligations but recognizes that states are not prohibited from exercising extraterritorial jurisdiction in order to protect human rights outside their territory. However, it can be argued that the view on extraterritorial human rights duties has changed and that the UNGP perhaps set the bar below the current state of international human rights law in some areas. This perception can be argued based on general international law and the practice of non-judicial UN human rights monitoring bodies. Additionally, ECtHR has to a certain degree recognized state duty to protect human rights in extraterritorial situations in relation to *non-refoulement* which could be used to draw parallels to the subject of this thesis.

i. International General Law

First of all, according to Article 56 UN Statute, the UN Member States have committed to "take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55"[153]. One of the purposes set forth in Article 55 is universal respect for and observance of human rights.[154] There is no territorial limitation on the commitment to take both joint and separate action to respect human rights. The commitment shall, therefore, be considered when addressing the question of whether the states' duty to protect human rights goes beyond states' territory and jurisdiction.

According to international customary law states are prohibited from allowing their territory to be used in a manner that would cause injury to the territory of another state or properties or persons therein. This is called the *due diligence standard* or the *do not harm*-principle which was recognized in the *Trail Smelter Arbitration* case.[155] In the *Trail Smelter* case, the Court

153 Article 56 of the UN Charter.
154 Articles 55 (c) of the UN Charter.
155 International Council on Human Rights Policy (ICHRP), *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (2002), page 3.

recognized a duty of care between states. The Court stated that ”no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein”[156]. The ICJ recognized the same duty in the *Corfu Channel* case, stating that “it is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”[157].[158] The Human Rights Council endorsed the *do not harm*-principle and confirmed its applicability to human rights law.[159]

Following the *do not harm*-principle formulated in the *Corfu Channel* case, states cannot knowingly allow their territory to be used by corporations domiciled within their jurisdiction to cause damage on the territory of another state. [160] States need to take *all necessary steps* to prevent harm from causing other states according to the *Corfu Channel* case.[161]

Henceforth, one could argue that states are, based on the do not harm-principle, required to prevent individuals from using the territory to conduct business that cause harm on anther state’s territory. [162] Since states are under an obligation to not knowingly allow its territory to cause harm on another state’s territory, state responsibility will arise in situations home states to not exercise due diligence in controlling the companies that states may exercise control over. In this regard, states may exercise control over corporations which are domiciled within their territory - that includes corporation which are incorporated, have their statutory seat, central administration or principle

[156] *Trail Smelter Arbitration* (United states, Canada) Report of the International Arbitration Awards (RIAA), Vol. III, pp 1965
[157] *Corfu Channel Case* (UK v. Albania), merits, judgement, ICJ Reports 1949, page 22.
[158] The principle prohibiting states for allowing its territory to be used to cause damage on the territory of another state has also been referred to in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (1), page 226 and *Gabčíkovo-Nagymaros Project* (Hungary/ Slovakia) Judgement, ICJ Report 1997, p. 7.
[159] De Schutter O, Eide A, Khalfan A, Orellana M, Salomon M, Seiderman I, ‘Commentary to the Maastricht Principles on Extraterritorial Obligation of States in the Area of Economic, Social and Cultural Rights’ (2012) Human Rights Quarterly, Commentary to Principle 3, para 9, page 1095-1096.
[160] Nicola Jägers (2002), page 167.
[161] *Corfu Channel* Case, page 23.
[162] Markus Krajewski (2018), page 25.

place of business in the state.[163] Thus, the principle of *do not harm* could be a legal basis for imposing onto states an obligation to regulate extraterritorial activities of corporations domiciled within their territory or jurisdiction.[164]

However, Bartels puts forward an argument against this conclusion. He argues that the *do not harm*-principle only applies to harmed caused by physical agents. Consequently, is the principle not applicable to harm caused by a policy decision (by a corporation) taken within the territory of the alleged responsible state.[165] However, the decisive point for whether state responsibility arise is not what kind of decision/ act caused the harm but whether the state failed to prevent the private actors from engaging in the harmful activity. Thus, it seems that this principle can be applied in the context of business and human rights and also in regard to policy decision by a parent domiciled in home state. [166]

The control exercised by states within their territory does not automatically mean that states knew, or ought to have known of any human rights breaches that took place. Hence, state responsibility cannot automatically arise merely on the fact that the violations occurred on the state's territory.[167] However, it can be assumed that states *should* have sufficient knowledge regarding what human rights risks the corporation presents or might be involved in when it comes to state-owned corporations. In regard to public corporations, states *can* have sufficient knowledge of harm caused on another state's territory. If that is the case, the home state is under an obligation to take all necessary steps to prevent realisation of such risks.[168]

[163] Ian Brownlie, System of the Law of Nations. State responsibility, (Clarendon Press, 1983), p. 165;
Nicola Jägers (2002), page 172.
[164] De Schutter O, Eide A, Khalfan A, Orellana M, Salomon M, Seiderman I, 'Commentary to the Maastricht Principles on Extraterritorial Obligation of States in the Area of Economic, Social and Cultural Rights' (2012) Human Rights Quarterly, Commentary to Principle 3, para 9, page 1095-1096.
[165] Lorand Bartels (2014) page 1082;
Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) Business and Human Rights Journal, page 72.
[166] Markus Krajewski (2018), page 25.
[167] *Corfu Channel* Case, page 18.
[168] Nicola Jägers (2002), page 171.

ii. Non-Judicial Human Rights Monitoring Bodies

In contrast to the perception put forward by the UNGP, several human rights treaty bodies are increasingly prepared to impose extraterritorial obligations on State Parties for them to comply with the treaty. Even if their recommendations are non-binding it is a legitimate source of interpretation of the treaties. Several monitoring bodies seem to reason that since State Parties has jurisdiction over the MNCs' conduct within its territory the state also has the means to regulate the MNCs' conduct abroad.[169]

The CESCR has in numerous general comments underlined that states should take steps to prevent third parties from violating human rights in other countries. For instance, the CESCR stated in General Comment No. 15 that State Parties should take steps to prevent their citizens and corporations from violating the right to water abroad.[170] According to General Comment No. 12, States Parties shall take steps to respect the enjoyment of the right to food abroad.[171] The CESCR has stated specifically regarding corporations in two different general comments;

> "States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant."[172]

> "The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due

[169] Antal Berkes, 'Extraterritorial responsibility of the home state for MNCs violations of human rights', (2018), page 20.
[170] Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Art. 11 and 12)* (2003), para. 33.
[171] Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art 11)* (1999), para 36.
[172] Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural rights' E/C. 12/2011/1, para. 5

diligence in order to identify, prevent and mitigate the risks of violations of the Covenant rights"[173].

The CESCR urges home states to take steps to prevent corporations from violating rights abroad if the states are able to influence these actors through legal or political means. Corporations domiciled within a state's territory or jurisdiction would by definition be under legal and political influence.[174] The CESCR recognizes the extraterritorial application of the Covenant and goes even further by imposing a duty on states to regulate corporations. State Parties should then adopt appropriate legislative and administrative measure in order to ensure legal accountability for corporations domiciled in the state and their subsidiaries manged from the state's territory.[175] According to General Comment No. 24 shall states require corporations to undertake human right due diligence to prevent abuses in the corporate supply chain and by business partners.[176]

States Parties can violate the Covenant either by action or omission. States can either be held responsible for direct actions by the state or by other entities that are insufficiently regulated by the state.[177] State Parties can also be responsible for omission, when they fail to adequately protect the rights, for instance failure to regulate third parties that affects the enjoyment of the rights.[178]

Due to multiple general comments directing State Parties towards a legal framework to hold domiciled corporations legally accountable for human

[173] Committee on Economic, Social and Cultural Rights, *General Comment No. 24: on State obligation under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (2017), para 16.
[174] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000), para 39;
CESCR, General Comment no. 19 (4 February 2008) UN Doc E/C.12/GC/19, para 54.
[175] CESCR, 'Concluding observations: Finland' (17 December 2014) UN Doc E/C.12/FIN/CO/6, para 10(b);
CESCR, 'Concluding observations: China, including Hong Kong, China, and Macao' (13 June 2014) UN Doc E/C.12/EHN/CO/2, para 13(b).
[176] Committee on Economic, Social and Cultural Rights, *General Comment No 24: on State obligation under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (2017), para 16.
[177] CESCR, General Comment no. 19 (4 February 2008) UN Doc E/C.12/GC/19, para 64.
[178] CESCR, General Comment no. 19 (4 February 2008) UN Doc E/C.12/GC/19, para 65.

rights violations abroad, the CESCR has been described as a pioneer in interpreting State Parties' extraterritorial obligation. This is mainly because the Covenant does not delimitate State Parties' jurisdiction to their territory. As well as the fact that the Covenant enshrines on State Parties to take measures "with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means"[179]. That includes legislative measures.[180] These numerous recommendations by the CESCR in several general comments, suggest that home states are required to adopt certain measures to ensure the legal accountability of corporations and their subsidiaries, operating or managed within the territory or jurisdiction of State Parties.[181]

Additionally, the Committee on the Rights of the Child (CRC) underlined in General Comment No. 16 that home states have obligations to protect the children's rights under the Covenant in the context of corporations' extraterritorial activities. Similarly, to what has been described above, this obligation applies provided there is a link between the business enterprise and the home state. This link can be that the enterprise has its centre of activity, registered, domiciled, or has its main place of business in the state.[182]

Correspondingly, the Human Rights Committee has encouraged Germany in its concluding observations to enact legislation to ensure that corporations domiciled under its jurisdiction comply with the ICCPR in their extraterritorial operations and to adopt appropriate measures to strengthen remedies for victims of activities of such corporations domiciled in Germany.[183]

[179] Article 2(1) International Covenant on Economic, Social and Cultural Rights.
[180] Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 21.
[181] Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 21.
[182] Committee on the Rights of the Child (CRC), *General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC(C/GC/16, para 79-81.
[183] UN Human Rights Committee, 'concluding observations: Germany' (2012) UN Doc CCPR/C/DEU/CO/6, para 16;
Olivier De Schutter (2019), page 190.

iii. ECtHR Case-Law

Moving on to examine to what extend the ECtHR has allowed human rights violations aboard to fall under the applicability of ECHR and thus obliged State Parties to protect human rights extraterritorially. Even if the ECtHR has been active on the subject, the Court has not based State Parties' extraterritorial jurisdiction on the active personality principle in any decision.[184] Apart from the exception to a territorial jurisdiction identified under chapter *3.3.1 The Extraterritorial Application of Human Rights Treatis*, the Court held in the *Al Skeini* case that a contracting states' jurisdiction under Article 1 ECHR extends to *acts of its authorities which produces human rights effects outside its territory*.[185] Extraterritorial effects cases indicate that a state can be held accountable for acts performed within its jurisdiction which contributes to or facilitates violations of human rights in another state. In this context, the ECtHR jurisprudences on *non-refoulement* are noteworthy and the best examples of extraterritorial effects cases for the present purpose.[186] The jurisprudence is significant since it suggests that states can be held accountable for acts performed within its territory that lead to human rights violations abroad.[187] These cases can therefore provide an analogy to the issue of extraterritorial corporate-related human rights violations.[188]

Two cases are worth bringing up. In *HLR v. France* case, the ECtHR concluded that the protection of Article 3 ECHR[189] *extends to threats from private actors (abroad)*, especially when the receiving government is unable to afford sufficient protection.[190] In the context of business and human rights, the protection of Article 3 extends to threats by foreign corporations abroad.

[184] Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 20-22.
[185] D. Augenstein, L. Dziedzic (2017), page 22;
Al-Skeini and Others v. The United Kingdom (App no 55721/07) ECHR 07/07/2011.
[186] Antal Berkes, page 22.
[187] D. Augenstein, L. Dziedzic (2017), page 29.
[188] Antal Berkes, page 21-22.
[189] Article 3 ECHR states that no one shall be subject to torture or to inhuman or degrading treatment or punishment.
[190] D. Augenstein, L. Dziedzic (2017), page 29;
HLR v France (App no 24573/94) ECHR 29/04/1997.

In the *Rantsev v Cyprus & Russia* case, the Court recalled State Parties' obligation to *regulate and control the conduct of private actors within its jurisdiction to prevent human rights violations abroad*. The case concerned the death of a woman who had allegedly been illegally trafficked by a non-state actor from Russia to Cyprus. Russia argued that the application was inadmissible on the basis of *ratione loci,* since the alleged violation took place outside its jurisdiction. However, the Court held that it was competent to examine whether Russia had complied with its obligation within its jurisdiction to protect Ms Rantseva from being subject to human rights violations.[191] ECHR confirmed, in the *Rantsev* case, a positive obligation to take operational measures if the state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual has been, or was, at real and immediate risk of being, trafficked or exploited"[192]. If a state is aware and fails to take adequate measures to remove the risk, that state will be in non-compliance with the Convention.[193]

In relation to corporations, these cases demonstrate that State Parties have an obligation to protect human rights in situations where the threat to human rights originate from corporations abroad and where corporations within the state's territory contributes to materialising the human rights violations. Since states are under a duty to prevent corporations under its jurisdiction to facilitate a human rights violation abroad when there is a connection between the state and the victim of the violation. The jurisdictional link required is established through the *victims' presence on the state's territory*.[194]

It is clear that ECtHR and UN non-judicial Human Rights monitoring bodies have different views on states' duty to regulate and control private actors within their territorial jurisdiction to prevent human rights violations committed outside their borders. ECtHR has established that for a state party

[191] Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 23;
D. Augenstein, L. Dziedzic (2017), page 29.
[192] Rantsev v. Cyprus and Russia (App no 25965/04) ECHR 7.1.2010, *para 286.*
[193] Rantsev v. Cyprus and Russia (App no 25965/04) ECHR 7.1.2010, *para 286.*
[194] D. Augenstein, L. Dziedzic (2017), page 30.

to be under an obligation to regulate and control a private actor which contributes to human rights violation in a third country the necessary jurisdictional link is established through the fact that the *victim is present on the State's territory*.[195] Whereas, the UN non-judicial Human Rights monitoring bodies which hold the position that a state's control, power, or authority over a business entity is sufficient for established the jurisdictional link and trigger extraterritorial human rights obligation even if the victims are located outside the state's territory.[196]

In circumstances there the ECHR applies extraterritorially, states are under a duty to ensure access to justice and effective remedies for corporate-related human rights violations abroad. [197]

3.3.3 Conclusion

Turning to the analysis of what due diligence obligations entail. Does due diligence obligation mean that states need to regulate extraterritorial activities of business domiciled in their jurisdiction in order to avoid responsibility for failure to protect human rights? As stated above, the UNGP does not include a duty to regulate MNCs under the duty to protect human rights. However, one could argue that states have due diligence obligations to protect human rights extraterritorially based on the *do not harm*-principle and several general comments by CESCR. As concluded, the do not harm-principle entails that states cannot not allow knowingly their territory to be used by corporate nationals to cause harm to another state's territory. Thus, state responsibility will arise in case states do not act due diligently in preventing such activities. Numerous concluding observations and general comments, primarily by CESCR, goes even further. They argue that home states are required to *adopt*

[195] See also the ECtHR Mohammed Ben El Mahi and Others v. Denmark. The case concerned the publication of twelve cartoon caricatures of Prophet Muhammad by a Danish newspaper, the Court found no jurisdiction link between the applicants in Morocco ("victims") and Denmark and thus the Court had no competence to examine the complaints and declared the application inadmissible;
D. Augenstein, L. Dziedzic (2017), page 30.
[196] General Comment on State Obligation under the International Covenant on Economic, Social and Cultural Rights in the Context of business activities, E/C.12/60/R.1. (2017), para 33.
[197] D. Augenstein, L. Dziedzic (2017), page 32.

certain measures to ensure the legal accountability of corporations and their subsidiaries, operating or managed within the territory or jurisdiction of State Parties, regarding human rights violations abroad in order to fulfil their due diligence duty.[198] In this regard, Olivier De Schutter and others are arguing that the UNGP is setting the bar below the current state of international human rights law when it does not include a duty to regulate in the duty to protect.[199]

However, this development toward extraterritorial obligation has not been verified by ECtHR in any case. It might therefore be hard to establish with certainty a *general* duty of states to regulate their corporate nationals' extraterritorial activities. Although international human rights law does not explicitly oblige states to undertake extraterritorial jurisdiction to protect human rights against business-related human rights violations abroad, there are generally no obstacles in the international human rights law to use such jurisdiction as a tool in order to compel transnational corporations to comply with internationally recognised human rights in their activities.[200] The liberty of states to act goes beyond the limited situation where states are obligated to act under international law. One could even argue that it is reasonable under international law to regulate extraterritorial activities of corporations since it aims to protect internationally recognized human rights.

4. Extraterritorial Regulation

As have been demonstrated in the previous chapter, the obligation to protect human rights requires states to regulate corporations' activities within their territory or under their jurisdiction. States can be held accountable for corporate human rights abuses if the state fails to exercise due diligence in regard to protect the individual's rights. One can also draw the conclusion that in some areas of international human rights law there is a movement

198 Antal Berkes, 'Extraterritorial responsibility of the home state for MNEs violations of human rights', (2018), page 21.
199 Olivier De Schutter (2015), page 45;
States' Obligations to Respect and Protect Human Rights Abroad Joint Statement on John Ruggie's Draft Guiding Principles, page 1-2, available <https://www.fidh.org/IMG/pdf/States_obligations_to_respect_and_protect_human_rights_abroad-2.pdf> [accessed: 2020-02-03].
200 Olivier De Schutter (2006), page 28.

towards an obligation to regulate corporate nationals' activities abroad to avoid state responsibility. The obligation to regulate corporations' extraterritorial activities only applies to corporations within a state's control, domiciled in the state, and first and foremost within economic, social and cultural human rights.[201] States can fulfil their duty to not knowingly allow their territory to cause harm on another state's territory by regulating corporate nationals. One way of regulating corporations' extraterritorial activities is through a HRDD-legislation.

4.1 Human Rights Due Diligence Legislation

In international law, due diligence is referred to as an obligation of conduct rather than an obligation of a certain outcome. As previously explained, that puts the focus on the behaviour of the company rather than the result of the behaviour. According to Max Planck Encyclopaedia of Public International Law due diligence is an "obligation of conduct on the part of a subject of law"[202] and the failure does not consist of failing to achieve a certain result but failing to take the necessary steps towards that result.[203]

The UNGP describes the duty of the state to protect human rights against corporate abuses as following: taking appropriate steps to prevent, investigate, punish and redress human rights abuse through effective policies, legislation, regulation, and adjudication.[204] The widespread recognition of the UNGP and the impact of the society's "new judges" (in particular civil society, non-governmental organisations, shareholders etc.) have assisted in embedding human rights principles into positive law in many domestic legal systems. This recent trend involves the requirement for businesses to respect human rights and is based on the notion of "know and show" which is

[201] Olivier De Schutter (2019), page 177.
[202] Max Planck Encyclopaedia pf Public International Law, *due diligence*.
[203] Max Planck Encyclopaedia pf Public International Law, *due diligence*.
[204] Article 1 UNGP.

recommended in the UNGP.[205] Specifically, many countries have started to consider legislation that embeds elements of HRDD into domestic law.[206]

Three generations of HRDD legislation can be identified. The first generation focuses on *HRDD reporting obligations*. The second generation concentrates on a full HRDD obligation which entails risk identification, obligation to act on identifies risks, report on measures taken, and their outcome. However, the link between corporate liability and access to justice remains unclear or default. The third generation provides an explicit link between HRDD obligations to existing (civil) corporate liability and hence redresses the lack of corporate accountability. An example of a third generation HRDD is the French Law on the Corporate Duty of Vigilance for Parent and Instructing Companies (The Vigilance Law).[207]

France is the only country in the EU that has adopted a HRDD-legislation in relation to all business sectors and human rights. However, that might be changing since the European Commissioner for Justice, Didier Reynders, announced on the 29th of April that the EU Commission will propose a new EU law on mandatory human rights and environmental due diligence for EU corporations' supply chains.[208] According to the final report by the European Commission on due diligence requirements through the supply chain, only one out of three business respondents answered that they currently undertook due diligence measures in relation to human rights and environmental impacts. A majority of business respondents agreed that an EU HRDD would

[205] Stéphane Brabant, and Elsa Savourey, 'French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective' (2017) 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires, page 4, Avaliable: <https://www.business-humanrights.org/sites/default/files/Law%20on%20the%20Corporate%20Duty%20of%20Vigilance%20-%20A%20Contextualised%20Approach%20-%20Intl%20Rev.Compl.%20%26%20Bus.%20Ethics.pdf> [accessed: 28 February].
[206] Europe Coalition for Corporate Justice, *Key Features of Mandatory Human Rights Due Diligence Legislation*, (2018) ECCJ Position Paper, page 1, available; <https://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf> [accessed; 2020-03-29].
[207] Europe Coalition for Corporate Justice, *Key Features of Mandatory Human Rights Due Diligence Legislation*, (2018), page 1-2.
[208] Business and Human Rights Resource Centre, *EU Commissioner for Justice commits to legislation on mandatory due diligence for companies*, (2020) available <https://www.business-humanrights.org/en/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies> [accessed: 2020-05-05].

increase legal certainty and levelling the playing field by holding EU competitors within the supply chains to the same standard.[209]

4.1.1 Overcoming the Problem with Separate Legal Entities

When seeking to hold corporations accountable for human rights violations which they are either directly or indirectly responsible for in another state, the concept of separation of legal personalities is a frequent problem.[210] MNCs can organise its international activities in different ways. This thesis has identified two situations. *The first situation* relates to when the MNC is directly present in the host state, by setting up an office or a branch in that state. *The second situation* is when a parent and subsidiary relationship is established through the creation of a separate legal entity which the parent company controls by for instance holding the majority of the shares. In those situations, the MNC is structured into an equity-based corporation.[211]

In regard to the first situation, when the MNC is directly represented in the host state through a branch or an office, there is no specific problem with impunity since the alleged violation is directly attributed to the parent company in the home state. The extraterritorial application of home state legislation is based on the active personality principle and is therefore to a large extent unproblematic.[212]

However, it becomes more problematic regarding the second situation when it is the subsidiary that has violated human rights in the host state. Since the limited liability privileged is recognised under international law, it will apply to the parent/ subsidiary-relationship.[213] The concept of limited liability of corporations entails that a shareholder cannot be held liable for a subsidiary's actions although the parent company could influence the decisions made by

[209] European Commission, *Study on Due Diligence requirements through supply chain – final report*, (2020), page 144 and 146, available; <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> [accessed: 2020-05-05].
[210] De Schutter Olivier (2006), page. 35.
[211] De Schutter Olivier (2006), page. 35.
[212] De Schutter Olivier (2006), page. 35.
[213] D Mzikenge Chirwa (2004), page 7-8.

the subsidiary through the ownership of shares.[214] The purpose of the limited liability doctrine is to encourage individual investors to take certain risks. Investors take these risks within the meaning of that if the company in which they have invested in fails, the investors will not be held liable beyond their contributions. The doctrine of limited liability also applies to shareholders which are corporations and is known as the corporate veil between the parent company and the subsidiary.[215]

In a situation where the subsidiary fails to bear the full costs for the harm its activities caused, the backside of the separate legal personality principle is revealed. The subsidiary can either fail to bear all the cost due to lack of domestic legislation to hold the subsidiary responsible, a weak government that fails to detect or punish adequately the misconduct, or due to inadequate financial means of the subsidiary to compensate the damages. In case the victim fails to exercise its rights in the host state, the victim is inclined to direct its case against the parent company in the home state. However, the limited liability creates an obstacle for the victim to access remedies since the principle rule is that parent companies are not responsible for their subsidiaries' debts.[216] It is, therefore, necessary to identify the parent company as the corporation behind the subsidiary and direct the lawsuit towards the parent company directly. A parent company can be held liable for its subsidiary's debts when the corporate veil is pierced or if the parent company is under a legal obligation to control its subsidiaries. Thus, one can circumvent the issue of separate legal entities by imposing due diligence obligations onto parent companies. Consequently, the parent company can be held liable for its own *failure to exercise due diligence* to prevent human rights violations by its subsidiaries, rather than argue that the parent company should be held liable for harm caused by another legal entity.[217]

[214] De Schutter Olivier (2006), page 36.
[215] De Schutter Olivier (2006), page. 36.
[216] R Mares R. 'Legalizing Human Rights Due Diligence and the Separation of Entities Principle' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rigths: Context and Contours* (2017) Cambridge University Press, page 172-173.
[217] De Schutter Olivier (2006), page. 52.

4.1.2 The Law on the Corporate Duty of Vigilance for Parent and Instructing Companies

The Vigilance Law came into force in 2017 and is integrated under the French Commercial Code. It is unprecedented legislation that addresses the harmful impacts of large corporations and multinational companies have on human rights and the environment.[218] The rationale behind the law is to prevent human rights abuses, improve corporate liability and access to justice for human rights violations caused by French companies and their subsidiaries, subcontractors, and suppliers. The objective is twofold in the sense that the law aims to encourage multinational companies to act responsibly with the aim of preventing human rights and environmental damages in France and abroad, as well as obtaining remediation for victims of such violations.[219]

The Vigilance law establishes a legally binding obligation for corporations to identify and prevent risks and severe impacts on human rights throughout their operations. It also applies to operations conducted by companies they control or subcontractors and suppliers with whom an established business relationship is maintained.[220] Control arises when a company holds the majority of voting rights and appoints, for two periods of two consecutive financial years, the majority of administration, management body, or supervising body or the parent company is exercising dominant influence either through contract or statutory clauses. [221] An established commercial relationship is defined under French law as a stable relationship with a certain magnitude of business and under a reasonable expectation that the business

[218] Sandra Cossart, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019) Business and Human Rights Resource Centre, available: <https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives> [accessed: 2020-02-10].
[219] Sandra Cossart, Jérome Chaplier and Tiphaine Beau de Lomenie, 'French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) Business and Human Rights Journal, page 320.
[220] European Coalition of Corporate Justice, *French Corporate Duty of Vigilance Law – Frequently Asked Questions* (2017), available <https://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions> [accessed: 2020-03-02].
[221] European Coalition of Corporate Justice, *French Corporate Duty of Vigilance Law – Frequently Asked Questions* (2017);
See French Code of Commerce in Article L 233-16 II for the definition of control.

relationship will sustain over time.[222] By imposing these obligations onto corporations, the law recognizes that current international soft law is insufficient. It also recognizes that parent companies possess influence over their subsidiaries and supply chains when it comes to compliance with human rights.[223]

The law applies to large companies established in France that at the end of two consecutive financial years:

- employ 5 000 employees, within the company and its direct and indirect subsidiaries, and have its head office located on French territory or,
- employ 10 000 employees in its service and in its direct and indirect subsidiaries, and have its head office located on either French territory or abroad.[224]

Corporations that fall under the scope of the law shall fulfil three obligations; (1) establish a vigilance plan, (2) effectively implement the plan and, (3) publish the plan. According to Article 1 para 4-5 of the Vigilance law, which incorporates Art. 225-102-4 of the French Commercial Code, the vigilance plan shall be constructed in association with stakeholders and include the following:

- a mapping which is identifying, analysing and ranks human rights risks;
- procedures that regularly assess subsidiaries, subcontractors or suppliers (to whom an established commercial relationship is maintained) in line with the risk mapping;
- appropriate action to mitigate risks or prevent serious abuses;
- an alert mechanism which collects report of existing and actual risks;

[222] Sandra Cossart, Jérome Chaplier and Tiphaine Beau de Lomenie, 'French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) Business and Human Rights Journal, page 320.
[223] Sandra Cossart, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019).
[224] Vigilance Law, Article 1 (1).

- a monitoring plan in order to follow up on the implemented measures and assess the efficiency of the measures.[225]

When making the plan public, the corporation must include a report on how the plan is *effectively* implemented in the management. The measures included in the vigilance plan must *identify* and *mitigate* human rights violations and they must be *adequate* and *effectively* implemented.[226]

To enforce the law, judicial mechanisms are available. If the concerned corporations fail to publish a vigilance plan, a person with a legitimate interest can file a complaint with the relevant jurisdiction according to Article 1. When a company has received the complaint, they are given three months to comply with its obligations under the law. If a company fails to comply, the court can urge the company to comply, under financial compulsion if that is appropriate.[227] An injured party can request compensation under civil liability law, in case a company has failed to *adequately* and *effectively* implement a vigilance plan and the failure is linked to harm suffered by the injured party. The company will then be obligated to compensate for the harm which could have been avoided by implementing due diligence in accordance with the law.[228] In other words, if human rights harms could have been avoided by effective implementation of an adequate vigilance plan the company could face liability for damages due to non-compliance.

4.1.3 Analysis

The Vigilance law provides two means in order to guarantee its effectiveness; mandatory publication of the vigilance plan, including the report of its

[225] Vigilance Law, Article 1 (4) (5).
[226] Sandra Cossart, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019).
[227] Vigilance Law, Art. 1 (II) (1) (Art. L. 225-102-4);
Sandra Cossart, Jérome Chaplier and Tiphaine Beau de Lomenie, 'French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) Business and Human Rights Journal, page 321.
[228] Sandra Cossart, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019).
Vigilance Law, Art. 1 (II) (1) (Art. L. 225-102-4);
S Cossart, J Chaplier and T Beau de Lomenie, 'French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) Business and Human Rights Journal, vol 2, page 321.

effective implementation, and the possibility of imposing penalties.[229] The publication of the vigilance plan enables stakeholders and civil society to scrutinise companies' efforts and assess whether the companies are taking adequate measures to mitigate human rights risks and implementing them effectively.[230] The vigilance law introduces an *ex-ante liability* since the Vigilance law aims to prevent harm from occurring. Penalties increase the incentive for corporations to fulfil their obligations pursuant to the law and are therefore important for the fulfilment of the preventive objective. Liability occurs when corporations fail to fulfil preventive obligations and is not depended on the actual violation of human rights.[231]

Even if the French law is a great step in the right direction regarding business and human rights, the French law did not live up to its full potential. It lacked some fundamental provisions which would have ensured the corporate compliance regime to be more effective. One of these fundamental provisions is shifting the burden of proof onto companies.[232] Even if access to judicial remedies and the opportunity to claim damages for non-compliance are crucial tools for effective implementation, it might be hard to prove a causal link between inadequate due diligence and the harm. Especially when the burden of proof lies on the claimants. Therefore, the strength of the vigilance law rather lies in mainstreaming identification and disclosure of human rights risks than possibility of obtaining damages.[233]

[229] Stéphane Brabant, and Elsa Savourey, 'Law on the Corporate Duty of Vigilance: A Contextualised Approach', (2017), page 4, 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires.
[230] Sandra Cossart, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019).
[231] Stéphane Brabant, and Elsa Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look At Penalties Faced by Corporations' (2017), page 4, 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires.
[232] Sandra Cossart, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019).
[233] Alison Berthet, 'Emerging Voices: Momentum Builds for Mandatory Human Rights Due Diligence' (2019) OpinioJuris Available:
<http://opiniojuris.org/2019/08/13/emerging-voices-momentum-builds-for-mandatory-human-rights-due-diligence/> [accessed: 2020-03-10];
Sandra Cossart, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019).

5. Swedish Regulation of Corporate Extraterritorial Activities

5.1 Introduction

As concluded above, Sweden can be held responsible for human rights violations committed by corporations in those cases state attribution can be established – although it might be highly unlikely regarding private MNCs. State responsibility can also arise due to failure to exercise due diligence in protecting human rights within its territory. One might argue that it also applies to extraterritorial activities in a limited amount.[234]

Two problems can be identified when it comes to Swedish regulation of corporate extraterritorial activities. First, Swedish courts might not have jurisdictions over the alleged human rights violations. Since there is no international obligation for corporations to comply with human rights it is crucial that Swedish *courts have the competence* to adjudicate in a certain matter and that *Swedish law is applicable.* With no extraterritorial legislation, affording human rights victims abroad access to the Swedish courts, one need to look at the general principles of when extraterritorial corporate human rights violations fall within the Swedish jurisdiction.[235] According to 1§ 10 chapter of the Code of Judicial Procedure [Rättegångsbalken], Swedish courts have the competence to adjudicate in matters regarding Swedish companies.[236] If a Swedish corporation commits human rights violations abroad, either directly or through a branch, the possibility to initiate legal proceedings before a Swedish court is good. In case a subsidiary (outside the EU) commits the alleged human rights violation, it is harder to initiate a legal proceeding in Sweden against the Swedish parent company since the injuring conduct has to be undertaken or damages has to be sustained within

[234] See chapter *3.3.2 State Responsibility Arising from a Duty to Control Corporate Activities*.
[235] Statskontoret (2018), page 52.
[236] Chapter 10 paragraph 1 Code of Judicial Procedure.

Sweden.[237] It would be too far-fetched to claim that the injurious conduct by the subsidiary was undertaken in Sweden based on the fact that the injurious conduct was taken on instructions from a Swedish parent company.[238] Consequently, the possibility of initiate legal proceedings before a Swedish court is not considerable. Furthermore, when it comes to determining whether Swedish law is applicable, it follows by the Rome II regulation that *lex loci damni* is applied. That means that, as a principle rule the law applicable is the states' in which the harm arose (and for the purpose if this thesis, that is in the host state).[239]

Second, Sweden has only taken few steps to regulate corporate nationals' extraterritorial activities. Sweden's ability to try, intervene and make amends to extraterritorial corporate human rights violations is dependent on the jurisdiction established by law.[240] Other countries have given themselves a broader competence to intervene in relation to corporate-related human rights violations than what Sweden has done.[241] Sweden has no specific domestic legislation regarding Swedish corporations' impact on human rights in their activities abroad, additional to the sustainability report [hållbarhetsrapporteringen] and procurement legislation [Lag om offentligupphandling]. The procurement legislation requires suppliers and subcontractors to carry out the contract in compliance with ILO:s core conventions in those cases Swedish labour law is not applicable.[242]

In this context it is important to mention that EU has adopted a regulation on mandatory due diligence for EU importers of tin, tantalum, tungsten and gold to carry out due diligence on their supply chains (Regulation). [243] The Regulation has entry into force but in line with Article 20 (3) several articles

[237] Chapter 10 paragraph 8 Code of Judicial Procedure.
[238] Mannheimer Swartling (2015), page 13.
[239] Mannheimer Swartling (2015), page 19.
[240] Enact (2018), page 33.
[241] Statskontoret (2018), page 52;
For instance, France, see The Vigilance Law.
[242] Concord 'Hållbart företagande med respekt för mänskliga rättigheter – Hur når vi dit?' (2019), page 2, available <https://concord.se/wp-content/uploads/2019/05/positionspapper-foretagande-och-manskliga-rattigheter-concord-sverige.pdf> [accessed: 2020-03-30];
Chapter 6 paragraph 10 Annual Reports Act (1995:1554);
Chapter 17 paragraph 6 Swedish public procurement act (2016:1145).
[243] Article 1(1) Regulation (EU) 2017/821.

will not apply until 1 January 2021.[244] The object is to help corporations respect human rights and avoid contributing to conflict through their operations.[245] The Regulation requires EU importers to comply with the supply chain due diligence set out in the Regulation and keep documentation that demonstrates their compliance.[246] In line with the Regulation, EU importers shall comply with management system obligations, third-party audit obligations and disclosure obligations. That includes for instance that the importers shall adopt and communicate to suppliers their supply chains policy and incorporate their supply chains policy into contracts and agreements with suppliers.[247] The due diligence obligations are supposed to be conducted in accordance with the OECD:s Guidelines on Due diligence for Responsible Supply Chains of Minerals from Conflict-affected and High-Risk Areas (OECD Due Diligence Guidance).[248] In addition, the Regulation requires a third person review of the policy and importers' compliance.[249] As well as that Member States shall carry out ex-post checks, in order to ensure that importers comply with the regulation.[250]

The thesis will now take a closer look at the requirement to establish a sustainability report since it applies to all human rights and all company forms.

5.2 Sustainability Report [hållbarhetsrapportering]

5.2.1 The Content of the Law

Swedish legislation requires certain corporations to implement a sustainability report [hållbarhetsrapporteringen] according to chapter 6

[244] Article 20 (3) Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.
[245] European Commission, The EUs' new Conflict Minerals Regulation: A quick guide if your involved in the trade in tin, tungsten, tantalum or gold, (2017), available: <https://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155423.pdf> [accessed: 2020-05-15].
[246] Article 3(1) Regulation (EU) 2017/821.
[247] Article 4 Regulation (EU) 2017/821.
[248] Article 4 (b) Regulation (EU) 2017/821.
[249] Article 6 Regulation (EU) 2017/821.
[250] Article 11 Regulation (EU) 2017/821

paragraph 10 Annual Reports Act [årsredovisningslagen] (1995:1554).[251] All corporations, no matter form of association, shall establish a sustainability report if each of the last two fiscal years meet more than one of the following requirements; (1) average number of employees add up to more than 250, (2) the corporation's total balance sheet must have amounted to more than SEK 175 million and/ or (3) the corporation's total annual turnover must have amounted to more than SEK 350 million.[252]

A company must provide the sustainability information needed to understand the company's development, position and results, and the consequences of its operations in four areas. These areas are; environment, social conditions and personnel, human rights and corruption. In the report the company shall provide the information needed to understand the development, position and results and the consequences of the company's activities within these four areas.[253] More specifically, shall the report include the following:

- the business model of the company;
- the policies applicable in relation to each topic mentioned above which shall include the due diligence procedures the company has taken;
- the result of above policies;
- the essential risks related to the issues;
- how the company deals with the risks, and;
- main result indicators relevant to the business.[254]

What is meant by policies in the second point, is guidelines, core principle or standard of corporate conduct in regard to all four issues (human rights issues are the focus of this thesis). Companies are obligated to follow up and analyse to what extent the policy is complied with and account for what measures are taken in order to comply with the policy. The enforcement of these policies

[251] Chapter 6 paragraph 10 Annual Reports Act (1995:1554).
[252] Chapter 6 paragraph 10 1-3pp Annual Reports Act.
[253] Svenskt näringsliv, "Vad innebär lagen om hållbarhetsrapportering?", page 8, available <https://www.svenskhandel.se/contentassets/c368b07910fb43e0a2e941efcfbf67a5/faq-lag-om-hallbarhetsrapport.pdf>, [access 2020-4-20].
[254] Chapter 6 Paragraph 12 1-6pp Annual Reports Act.

is monitored by due diligence proceedings. Due diligence proceedings shall include information of measures taken to review supplier, subcontracting supply chains etc. in order to identify, prevent and mitigate adverse consequences. The information can for instance be a description of how the company investigates and monitors human rights issues in relation to the suppliers and subcontracting supply chains.[255]

There is no limit of how far in the supply chains risk assessments shall extend to. In the assessment of whether a risk if relevant, one shall consider the factual relationship between consequences and the activities of the company.[256] If a risk has been identified, risk management disclosures shall include measures taken to prevent identified risk.[257] The accountant shall by a statement indicate whether the corporation, that falls under the law, has established a sustainability report or not.[258]

5.2.2 Analysis

There are multiple factors that decrease the value of the sustainability report. To begin with, there is no general or specific requirement of transparency regarding company's impact on human rights apart from the sustainability report.[259] It has been argued that the sustainability report does not require companies to disclose enough information in order to evaluate whether a company has properly responded to its impact on the human rights.[260] There is no requirement of external examination of the report to make sure that corporations have fulfil their duty under the law, apart from the statement by the accountant whether a report has been established or not. A company can choose voluntarily to let the accountant or another person examine the report in order to make sure the report is complete.[261] If a company refrains from submitting the report to the Swedish Companies Registration Office there is no possibility of imposing sanctions in order to force the company to

[255] Svenskt näringsliv, "Vad innebär lagen om hållbarhetsrapportering?", page 9.
[256] Svenskt näringsliv, "Vad innebär lagen om hållbarhetsrapportering?", page 10.
[257] Svenskt näringsliv, "Vad innebär lagen om hållbarhetsrapportering?", page 10.
[258] Svenskt näringsliv, "Vad innebär lagen om hållbarhetsrapportering?", page 12.
[259] Enact (2018), page 29.
[260] Enact (2018), page 30.
[261] Prop. 2015/16:93 *Företagens rapportering om hållbarhet och mångfald*, page 52.

compliance.[262] Consequently, even if the sustainability report pose a great opportunity to monitor corporations' human rights impact the law has not reach its potential. However, the sustainability report in the Annual Reports Act would perhaps reach its potential if it were to be harmonized with the UNGP. For instance, the sustainability report should include a verification system to make sure that corporations, that fall under the scope of the law, comply.[263]

5.3 Conclusion

The lack of domestic legislation in Sweden obstructs accountability for corporate human rights violations.[264] Presently, Swedish domestic legislation does not require corporations to carry out a HRDD in their *supply chain* which would entail a risk and impact assessment and an action plan in order to identify, prevent, mitigate and account for how corporation should deal with human rights risks.[265] However, during 2018 and 2019 several initiatives have advocated for a HRDD-legislation and extraterritorial jurisdiction.[266]

The lack of uniform legislation creates an uncertainty of what measures corporations should take when it comes to human rights implications in their operations. This uncertainty will likely result in arbitrary assessment of what human rights risks and effective preventive measures are. With no legislation in place, the courts will not be able to adjudicate over alleged violations, thus judicial guidance in the assessment of human rights risk and effective preventive measures not be available.[267] The vacuum of legal requirements will create different "rules" for corporations in the same branch leading to different competitive starting points. Corporations that are investing

[262] Prop. 2015/16:93 *Företagens rapportering om hållbarhet och mångfald*, page 49.
[263] Statskontoret (2018), page 50.
[264] Statskontoret (2018), page 42.
[265] Concord 'Hållbart företagande med respect för mänskliga rättigheter – Hur når vi dit?' (2019), page 2.
[266] See for instance: Statskontoret 'FN:s vägledande principer för företag och mänskliga rättigheter – utmaningar i statens arbete (2018:8)' (2018 Statskontoret) and Concord 'Hållbart företagande med respect för mänskliga rättigheter – Hur når vi dit?', (Concord 2019).
[267] Statskontoret (2018), page 45-46;
Concord (2019), page 3-4.

resources to implement human right due diligence will, at least in the short term, end up in an economic disadvantage compared to corporations which do not. It can impede companies' willingness to invest time and resources in countering and mitigating the human rights risks of its activities.[268] As long as there is no legal obligation for corporations to conduct HRDD, respect for human rights will be secondary compared to other competing interest, such as profits. A corporation's primary purpose is to maximize profits according to 3:3 Limited Companies Act [ABL].[269]

6. Concluding Discussion

6.1 Introduction

There are three purposes of this thesis: first to examine to what extent states' duty to protect human rights can be used to hold corporations accountable for their human rights violations in their global activities. In this context, the thesis examines to what extent states' due diligence obligations can extend to corporate nationals' extraterritorial activities. If states due diligence obligation is extended to extraterritorial activities, states would be more inclined to regulate corporate activities in order to avoid liability under international human rights law. Second, HRDD-legislation is brought to attention and exemplified as one way of regulating corporations' extraterritorial activities. Third, the thesis uses all previous information and examine to what extent Sweden is obligating Swedish corporations to respect human rights in their global operations.

6.2 The Issue of MNCs

It is clear that globalisation and privatisation have made state action alone less sufficient to guarantee the full enjoyment of internationally recognized human rights. However, all attempts to establish direct corporate responsibilities under international law have failed. It is argued that

[268] Statskontoret (2018), page 45-46.
Concord (2019), page 3-4.
[269] Rolf Skog, 'Om betydelse av vinstsyftet i Aktiebolagen' (2015) Svjt.

corporations cannot be bearer of human rights obligation due to the lack of international legal personality. As a result of this state-centered approach to international law, corporate compliance with internationally recognized human rights is, therefore, dependant on domestic legislation. The significance of the home state responsibility has been highlighted throughout the thesis. It is clear that the doctrine of home state responsibility plays an important role in order to increase corporate compliance with human rights, especially, since the lack of corporate accountability is mostly due to the host states' inability or unwillingness to protect. One could, therefore, argue that human rights infringements are not a result of the lack of international rules or obligations, but rather a failure on a domestic level of the host states to fulfil their existing duty to protect human rights. However, since states clearly lack in their obligation to protect human rights against corporate abuse, the international legal system might need to evolve and include a direct corporate responsibility in order to ensure corporate accountability.

6.3 States' Duty to Protect

Turning to the question of to what extent states' duty to protect human rights can be utilised to hold corporations accountable for human rights violations in their global activities. The duty to protect human rights includes a duty for states to refrain from violating human rights but also a duty to prevent infringements on individuals' human rights by private parties, corporations included. States' duty to protect human rights by regulating private actors' behaviour within their territory is well understood in international law.[270] States can fail their obligation to protect in two ways; (1) when the human rights violation committed by a corporate national is attributed to the state and (2) when the state has failed to protect individuals from human rights violations. One can see a clear distinction between the two ways for states to be responsible for human rights abroad. State responsibility will probably arise more frequently in relation to states' own wrongful acts since it the conduct is clearly attributed to the state to begin with.

[270] See chapter *3.1 States' Duty to Protect Human Rights Within its Territory.*

The thesis has shown that it is difficult to find a state responsible for human rights violations abroad through *state attribution*.[271] Mostly due to the high threshold of effective control set out in the *Nicaragua* case and MNCs independence. The relationship between MNCs and states are rarely close enough to invoke state attribution. The doctrine of state responsibility in regard to state attribution, contributes therefore only to a limited extent increased corporate accountability for extraterritorial human rights violations. However, one might come to another conclusion in regard to SOEs. Since state attribution might be easier to establish in regard to a SOE, a state's duty to protect human rights might contribute to a greater extend increased corporate accountability for extraterritorial human rights violations. This is important to conclude, since it would be unacceptable to allow states to commit human rights violations through a state-owned enterprise and not be held responsible.

However, in order to increase the role of state responsibility in holding corporations accountable for human rights violations, the threshold for attribution should perhaps be revised. To maintain the opinion that states need to exercise *effective control* over the private actor before state responsibility can arise will most likely result in a verdict of acquittal. This thesis holds the position that *overall control* will still uphold a high threshold of control which has to be met in order for a state to be responsible for another actor's conduct.

Moving on to when states can be held accountable for their actions due to *failure to protect human rights*. The duty to protect human rights includes a due diligence obligation, meaning that states need to exercise due diligence in order to prevent being held responsible for the corporations' human rights violations in the private sphere. This entails taking all *reasonable measures* in order to prevent future infringements, making sure victims of human rights violations have access to effective remedies, and conducting investigations in a serious manner. This is all established under international human rights

[271] See chapter *3.2. State Responsibility Arising from State Attribution*.

law.[272] What is debatable is to what extent states' duty to protect human rights applies to corporate activities abroad and if states can be held liable for failure to prevent corporate nationals from committing human rights violations abroad.

International human rights law does not prevent states from establishing jurisdiction over situations outside their territory. States have the competence to regulate corporate nationals' extraterritorial activities on the basis of *active nationality principle*.[273] But international human rights law is less clear whether states *have to* establish such jurisdiction under international law. States are under *an obligation* to protect human rights outside the state's territory under human rights treaties in three situations: (1) effective control over territory outside its own territory, (2) effective control over a person (including state agent) and, (3) effective control over activities.[274] However, as explained effective control over a corporation's activities is a high threshold which rarely is fulfilled.

There are some compelling arguments for recognizing an extraterritorial obligation for home states to exercise due diligence in preventing corporations, domiciled in the home state, from committing human rights violation abroad. Based on general international law and General Comments by non-judicial human rights monitoring bodies' one can argue that states due diligence obligation extends to extraterritorial situations. The *do not harm*-principle, formulated in the *Corfu* case, provides a strong argument for arguing that states have the responsibility to prevent human rights harm abroad which originates within their territory.[275] Furthermore, CESCR, CRC, and ICCPR have all recommended states to regulate MNCs' extraterritorial activities in order to fulfil their human rights obligations under the Covenants. For instance, CESCR stated in General Comment no. 24 that the obligation to protect human rights includes an obligation to impose legislation that requires corporations to carry out HRDD. Important to note is that ICESCR

[272] See chapter *3.1 States' Duty to Protect Human Rights Within its Territory.*
[273] See chapter *2.5.1 Asserting Jurisdiction.*
[274] See chapter *3.3.1 The Extraterritorial Application of Human Rights Treaties.*
[275] See chapter *3.3.2 States Responsibility Arising from a Duty to Control Corporate Activities (i. International General Law).*

does not refer to territorial jurisdiction, compared to other human rights treaties such as the ICCPR. That has perhaps allowed the CESCR to go further in pushing the notion of extraterritoriality. Nevertheless, the General Comments by CESCR are important for the recognition of states' extraterritorial obligations to protect human rights.

However, the ECtHR has yet to acknowledge the extraterritorial obligation to protect human rights and base extraterritorial jurisdiction on the active personality principle. Under the ECHR, States Parties are under an obligation to regulate and control private actors' activities to prevent human rights abuses that occur abroad when there is a jurisdictional link between the state and the victim (ex. present on the state's territory).[276] That is unlike the view presented by the non-judicial human rights monitoring bodies. These bodies have established that it is enough that the perpetrator, in this case a corporation, is domiciled within the state for the state to be under an obligation to prevent corporate-related extraterritorial harm. It is unclear whether the ECtHR can consider the jurisdictional link between the state and the individual (located outside its territory) to be established by the control the states have over the corporate national. If that was the case, the ECtHR's view and the human rights monitoring bodies' view would coincide. The discrepancy between the ECHR's and the non-judicial monitoring bodies' interpretation makes it hard to establish with absolute certainty that states have a general duty to assert extraterritorial jurisdiction over corporate nationals' extraterritorial activities.

In conclusion, states due diligence obligations can be utilised to increase corporate compliance abroad. In the context of economic, social and cultural rights the duty to protect contributes to a greater extent to corporate compliance compared to the duty following the ECHR. Since CESCR have on multiple occasions underlined states' duty to regulate corporate extraterritorial activities. The thesis, therefore, disagrees with the approach

[276] See chapter *3.3.2 States Responsibility Arising From a Duty to Control Corporate Activities (iii. ECtHR Case-Law).*

put forward by the UNGP[277] and aims to a certain degree to defend the extraterritorial obligation to protect human rights. Even if ECtHR has not established the extraterritorial obligation of states to regulate their corporate nationals' conduct, the non-judicial human rights monitoring bodies have developed a movement towards such duty in regard to economic, social and cultural rights which should be recognised.

Moreover, the UNGP would have been the perfect opportunity to express the opinion that states should aim to regulate corporations' extraterritorial activities. If the UNGP had managed to establish an extraterritorial obligation to protect (obligations to states to act with due diligence) the consequences of the state-centered approach to international law would be less harmful. States' duty to protect would therefore fulfil a "void" created by either the lack of corporate direct obligations under international law or by host states inability or unwillingness to afford effective protection. An extraterritorial duty to protect human rights is essential in order to counter the impunity gap created by increased globalisation, privatisation, and the state-centered approach to international law.

6.4 Swedish Corporations' Obligations to Respect

The importance of domestic legislation in the area of business and human rights has been underlined throughout the thesis. Even if one cannot determine that there exists a *general* duty for home states to *regulate* corporate nationals' extraterritorial activities, there are good reasons for arguing that states should. And perhaps, one could draw the conclusion that in regard to economic, social and cultural rights, states are under an obligation to regulate their corporate nationals' extraterritorial activities.

In regard to Sweden, there is no legal provision obligating corporations to respect human rights in their global operations. Even if Swedish law requires certain corporations to establish a sustainability report (identify the

[277] See chapter *2.4 A Closer Look at The United Nations Guiding Principles on Business and Human Rights.*

company's development as well as the consequences of its operation and prevent and mitigate adverse human rights consequences) several problems have been highlighted in this thesis. For instance, the lack of external examination of the report, the lack of sanctions if companies fail to submit the report to the Swedish Companies Registration Office and the lack of enforcement mechanisms. In order for the law to live up to its potential several improvements have to be done. For example, include mandatory external review in order to examine whether the company met the requirements of what a report should include. An adequate analysis of the effect the corporation has with respect to the four areas, human rights amongst them, should be included. Another improvement is the inclusion of sanctions if corporations fail to submit the report or if the report is found inadequate.

Sweden risks being portrayed as indifferent when not requiring Swedish corporations to respect human rights in their global operations. However, if Sweden is regulating extraterritorial situation host states might be offended and which could put Sweden in a difficult position. Nevertheless, as an advocate for human rights Sweden should be more proactive in their role as a human rights defender. As previously noted, only one out of three companies are voluntarily conducting HRDD (which only includes first-tier suppliers, which in itself is a problem).

6.5 The Way Forward

This thesis welcomes the new EU Regulation on conflict minerals as a step in the right direction of regulating corporations' extraterritorial activities. Nevertheless, the thesis recognises that the Regulation concerns a certain industry. In respect to the third chapter in this thesis, on states' duty to protect human rights extraterritorially, one could argue that States Parties to the CESCR should protect human rights in extraterritorial situation in regard to economic, social and cultural rights. CESCR even advocates for a HRDD in order for States Parties to fulfil their duty in General Comment no. 24. Even if the EU Regulation on conflict minerals is not limited to what kind of human rights risks, one could not argue that State Parties would fulfil their obligation

only through this Regulation. Since it does not cover other sectors that might have negative impacts on economic, social and cultural human rights. Thus, it will be interesting to see how the EU law on mandatory human rights and environmental due diligence for EU corporations' supply chains plays out.

Furthermore, this thesis advocates for a HRDD-legislation, similar to the Vigilance law, in order to regulate MNCs. The advantages of a HRDD is the fact that one can circumvent the issue of piercing the corporate veil. Structures within corporations and supply chains are today extremely complicated and liability for other entities' actions is to a great extent hard to establish. By introducing HRDD, parent companies have to conduct due diligence in relation to their supply chains to prevent human rights abuses, thus parent companies can be held responsible for their own failure to act due diligently. The parent company will then only be obligated to compensate for the harm which could have been avoided by implementing due diligence in accordance with the law. Moreover, by introducing HRDD-legislation one can also overcome the problem with hosts states inability and unwillingness to protect human rights. The parent company which is operating in the host state (either via a branch or subsidiary) will be obligated to make sure to act due diligently in relation to human rights regardless of the host states' human rights regulation.

In order for HRDD legislation to reach its potential to protect human rights, it is important that it includes certain features. For instance, such legislation must include means to enforce the law. The possibility of civil litigation in situations where corporations do not comply with the law, creates an incentive for corporations to fulfil its obligations to a greater extent compared to if enforcement mechanism was not in place. Civil litigation will also provide victims the right to seek redress and compensation for alleged violations. Moreover, the HRDD-legislation should include provision shifting the burden of proof onto corporations. This is because it is much easier for the corporation to prove that certain measures have been taken rather than for the induvial to prove that something has not been done.

Bibliography

Articles

Augenstein D, Dziedzic L, ‘State responsibility to regulate and adjudicates corporate activities under the European Convention on Human Rights’, (2017) EUI Department of Law Research Paper

Bartels L, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2014) European Journal of International Law

Berkes, A ‘A new Extraterritorial Jurisdictional Link Recognised by the IACtHR’ (2018) European Journal of International law

Brabant S, and Savourey E, ‘Law on the Corporate Duty of Vigilance: A Contextualised Approach’, (2017), 50 Revue Internationale de la Compliance et de l’Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

Choudhury B, ‘Balancing Soft and Hard Law for Business and Human Rights’ (2018) International and Comparative Law Quarterly

Cossart S, Chaplier J and Beau de Lomenie T, ‘French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) Business and Human Rights Journal, volume 2

De Brabandere E, ‘Human Rights & International Legal Discourse Human Rights and Transnational Corporations: Limits of Direct Corporate Responsibility’ (2010) Human Rights & International Legal Discourse, Vol. 4, Issue 1

De Schutter O, ‘Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations’ (2006) Catholic Univ. of Louvain & College of Europe

De Schutter O, ‘Towards a New Treaty on Business and Human Rights’ (2015) Business and Human Rights Journal

De Schutter O, Eide A, Khalfan A, Orellana M, Salomon M, Seiderman I, ‘Commentary to the Maastricht Principles on Extraterritorial Obligation of States in the Area of Economic, Social and Cultural Rights’ (2012) Human Rights Quarterly Vol. 34, No. 4

Mzikenge Chirwa D, ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights’ (2004) 5 Melbourne Journal of International Law 1

Fasciglione M, ‘Corporate Human Rights Responsibility, State’s Duty to Protect and UN GPs’ National Action Plans: Some Thoughts After the UK 2016 NAP Update’ (2016) European Papers

Mondragon A. M, ‘Corporate Impunity for Human Rights Violations in the Americas; The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice’, (2016) Harvard International Law Journal, Volume 57 [Online Symposium]

Krajewski M, ’The State Duty to Protect against Human Rights Violations through Transnational Business Activities’, (2018) Deakin Law Review, volume 23

O’Brien C M, ‘The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad; A Rebuttal’ (2018) Business and Human Rights Journal

Landau I, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’ (2019) Melbourne Journal of International Law

Sitepu A I, ‘Application of Extraterritorial Jurisdiction in European Convention on Human Rights (Case Study: Al-Skeini and Others v. U. K.)’ (2016) Indonesian Journal of International Law

Skog R, ’Om betydelse av vinstsyftet i Aktiebolagen’ (2015) Svensk Juristtidning

Radu M., ‘A gap in the corporate responsibility to respect human rights’, (2010) Monash university Law Review, vol. 36.3 pp 33-83 [pdf]

Wettstein F., ‘CSR and the debate on business and Human Rights: bridging the Great Divide’ (2012) Business Ethics Quarterly

Literature

Berkes A., ‘Extraterritorial Responsibility of Home States for MNEs Violations of Human Rights’, in Radi Y (eds), *Research Handbook on Human Rights and Investment* (2018) E Elgar

Brownlie I., *System of the Law of Nations. State Responsibility*, (1983) Clarendon Press

Clapham A., *Thinking Responsibly about the Subject of Subjects* (2006) Oxford University Press

Clapham A., *Human Rights Obligations of Non-State Actors* [Electronic research] (2006) Oxford University Press

De Schutter O., 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (eds), *Non-State Actors and Human Rights* (Oxford University Press 2005)

De Schutter O., *International Human Rights Law: cases, Material, Commentary*, (2019) Cambridge University Press, 3rd edition

Henriksen A., *International Law* (2017) Oxford University Press

Jägers N., *Corporate Human Rights Obligations: in Search of Accountability (2002)* Intersentia

Mares R., 'The UN Guiding Principles on Business and Human Rights - Foundations and Implementation' (2012) Martinus Nijhoff Publishers

Mares R., 'Legalizing Human Rights Due Diligence and the Separation of Entities Principle' in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rigths: Context and Contours* (2017) Cambridge University Press

Steinhardt R. G., 'Corporate Responsibility and the International Law of Human Rights: The New *Lex. Mercatoria*' in Philip Alston (eds), *Non-State Actors and Human Rights* (2005) Oxford University Press

Ryngaert C, *Jurisdiction in International Law* (2008) Oxford University Press

Sandström T., *Svensk aktiebolagsrätt* (2010) Nordstedt Juridik, 3:e upplaga

Vaughan L., *Sir Ian Brownlie, KT, CBE, QC (1932-2010),* (2011) British Yearbook of International Law, Volume 81 issue 1

Official Documents

UN Documents

Committee on the Rights of the Child (CRC), *General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16

General Assembly of United Nations, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA resolution 2625, 25th session, UN A/RES/25/2625 (24 October 1970)

International Council on Human Rights Policy (ICHRP), *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (2002)

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Corporations and Human Rights: a survey of the Scope and Patters of Alleged Corproate-related Human Rights Abuse, UN Doc. A/HRC/8/5/Add.2 (2008)

United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04 (UNGPs)

United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (revised version)' (2019) access:
<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>

United Nations Human Rights Council

United Nations Human Rights Council (UNHRC), 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) UN doc. A/HRC/8/5

United Nations Human Rights Council (UNHRC), 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009) UN Doc A/HRC/11/13

United Nations Human Rights Committee

United Nations Human Rights Committee, 'Concluding observations: Germany' (2012) UN Doc CCPR/C/DEU/CO/6

United Nations Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004)

Lilian Celiberti de Casariego v. Uruguay, CCPR/C/13/D/56/1979, UN Human Rights Committee (HRC), (1981)

Committee on Economic, Social and Cultural Rights

Committee on Economic, Social and Cultural Rights, *Concluding observations: China, including Hong Kong, China, and Macao*, UN Doc E/C.12/EHN/CO/2 (2014)

Committee on Economic, Social and Cultural Rights, *Concluding observations: Finland*, UN Doc E/C.12/FIN/CO/6 (2014)

Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art 11)* (1999)

Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000)

Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (Art. 11 and 12)* (2003)

Committee on Economic, Social and Cultural Rights, *General Comment No 24: on State obligation under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* E/C.12/60/R.1. (2017)

Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural rights*, E/C. 12/2011/1 (2011)

Swedish Official Documents

Prop. 2015/16:93 *Företagens rapportering om hållbarhet och mångfald*

Electronic Sources

Berthet A, ’Emerging Voices: Momentum Builds for Mandatory Human Rights Due Diligence’ (2019) OpinioJuris Available:

<http://opiniojuris.org/2019/08/13/emerging-voices-momentum-builds-for-mandatory-human-rights-due-diligence/> [accessed: 2020-03-10]

Business and Human Rights Resource Centre, *Business and Human Rights – A brief introduction,* available https://www.business-humanrights.org/en/business-human-rights-a-brief-introduction> [accessed: 2020-01-20]

Business and Human Rights Resource Centre, *EU Commissioner for Justice commits to legislation on mandatory due diligence for companies,* (2020) available <https://www.business-humanrights.org/en/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies> [accessed: 2020-05-05]

Business and Human Rights, *States' Obligations to Respect and Protect Human Rights Abroad Joint Statement on John Ruggie's Draft Guiding Principles*, available: <https://www.fidh.org/IMG/pdf/States_obligations_to_respect_and_protect_human_rights_abroad-2.pdf> [accessed: 2020-02-03]

Concord, 'Hållbart företagande med respekt för mänskliga rättigheter – hur når vi dit?', (2019) Available: <https://concord.se/wp-content/uploads/2019/05/positionspapper-foretagande-och-manskliga-rattigheter-concord-sverige.pdf> [accessed: 2020-03-30]

Cossart S, *What lessons does France's Duty of Vigilance law have for other national initiative*?, (2019) Business and Human Rights Resource Centre, available: https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives> [accessed: 2020-02-10]

Enact, *Företag och mänskliga rättigheter: Påtagliga brister och luckor i svensk lagstiftning. Rapport till Statskontoret*, (2018) Enact, Available: <http://www.statskontoret.se/globalassets/publikationer/2018/201808_bilaga-3.pdf > [accessed: 2020-03-30]

European Coalition of Corporate Justice, *French Corporate Duty of Vigilance Law – Frequently Asked Questions* (2017), available <https://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions> [accessed: 2020-03-02].

Europe Coalition for Corporate Justice, *Key Features of Mandatory Human Rights Due Diligence Legislation*, (2018) ECCJ Position Paper, avalible; <https://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf> [accessed; 2020-03-29]

European Commission, *The EUs' new Conflict Minerals Regulation: A quick guide if your involved in the trade in tin, tungsten, tantalum or gold*, (2017), available:

<https://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155423.pdf> [accessed: 2020-05-15]

European Commission, *Study on Due Diligence requirements through supply chain – final report,* (2020) available; <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> [accessed: 2020-05-05]

International Labour Organisation, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) 5th Edition (2017),* available < https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm> [accessed: 2020-03-17]

International Commission of Jurists, *Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility* (2008) International Commission of Jurists, available <https://www.business-humanrights.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf > [accessed: 2020-05-03]

Mannheimer Swartling, 'Promemoria till Utrikesdepartementet: Angående möjligheten för enskild att inför svensk domstol föra talan mot svenska bolag till följd av kränkningar av mänskligas rättigheter begångna utomlands' (Mannheimer Swartling 2015)

Max Planck Encyclopaedia of Public International Law, Daniel Thürer, *Soft law*, available <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469?rskey=fA2J1B&result=1&prd=MPIL> [accessed: 2020-04-17]

Max Planck Encyclopaedia of Public International Law, Timo Koivurova, *Due Diligence*, available < https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?rskey=dCL29O&result=1&prd=MPIL> [accessed: 2020-04-17]

Max Planck Encyclopaedia of Public International Law, Menno T Kamminga, *Extraterritoriality*, available <https://opil-ouplaw-com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=h2Rfuj&result=1&prd=MPIL> [accessed: 2020-04-17]

Office of the High Commissioner for Human Rights, Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (revised version) (2019) access: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> [accessed: 2020-2-30]

The Permanent Mission of Switzerland to the United Nations Office, *The Human Rights Council – A practical guide*, available <https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide_en> [accessed: 2020-03-17]

Brabant S. and Savourey E., *France's corporate duty of vigilance law: A Closer Look at Penalties Faced by Corporations*, (2017) Business and Human Rights Centre, available: <https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20-%20Penalties%20-%20Int%2527l%20Rev.Compl_.%20%26%20Bus.%20Ethics_.pdf>

Brabant S., and Savourey E., 'French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective' (2017) 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires, Avaliable: <https://www.business-humanrights.org/sites/default/files/Law%20on%20the%20Corporate%20Duty%20of%20Vigilance%20-%20A%20Contextualised%20Approach%20-%20Intl%20Rev.Compl.%20%26%20Bus.%20Ethics.pdf> [accessed: 28 February]

Svenskt näringsliv, *Vad innebär lagen om hållbarhetsrapportering?*, available <https://www.svenskhandel.se/contentassets/c368b07910fb43e0a2e941efcfbf67a5/faq-lag-om-hallbarhetsrapport.pdf> [access 2020-4-20]

Ruggie J, *Exploring Extraterritoriality in Business and Human Rights: Summary Note of Expert Meeting*, (2010) Harvard Kennedy School, USA, avaliable: <https://www.business-humanrights.org/sites/default/files/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf>

Statskontoret, *FN:s vägledande principer för företag och mänskliga rättigheter – utmaningar i statens arbete (2018:8)*, (Statskontoret 2018) [accessed: 2020-03-30]

Table of cases

ICJ

Corfu Channel Case (UK v. Albania), merits, judgement, ICJ Reports 1949
Gabčíkovo-Nagymaros Project (Hungary/ Slovakia) Judgement, ICJ Report 1997, p. 7
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), merits, judgement, ICJ Reports 1986, p.14

Arbitation

Trail Smelter Arbitration (United states, Canada) Report of the International Arbitration Awards (RIAA), Vol. III, pp 1965

IACHR

The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-American Court of Human Rights (15 November 2017), para. 104(h)
Velásquez Rodríguez v Honduras, merits, judgement, Inter-American Court of Human Rights series C, no 4 (July 29, 1988)

ICJ Advisory opinion

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports (2004), p 136
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (1), page 226
Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ. Reports 1949, p. 174

ECtHR

Al-Skeini and Others v. The United Kingdom (App no 55721/07) ECHR 07/07/2011
Hatton and others v. The United Kingdom (App. No. 36022/97) ECHR 08/08/2003
HLR v France (App no 24573/94) ECHR 29/04/1997
Osman v. UK (App no 23452/94) ECHR 1998-VIII 3124
Rantsev v. Cyprus and Russia (App no 25965/04) ECHR 7.1.2010
X v. Ireland, (App No. 14079/04) ECHR 15/12/2009