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(Transnational) Corporations and Human Rights

An Exploration into the Accommodation of Capital in International Human Rights Law

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I hereby certify that this material which I now submit for assessment on the programme of study leading to the award of Doctor of Philosophy (PhD) in the Sociology of Law is entirely my own work. I have exercised reasonable care to ensure that the work is original and does not, to the best of my knowledge, breach any law of copyright and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

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EXECUTIVE SUMMARY

There is empirical evidence that corporations, often in collusion with states, are involved in and directly connected to a variety of human rights violations. Despite this evidence, nation-states and the international community of states have been unwilling or unable to respond to these violations in any adequate measure. At the same time, the discourse of human rights has become integral to state legitimacy in a post-Cold War society. An analysis of the legal structure of the corporation and its omnipresence in the global political economy raises questions about the overarching framework of an international human rights law that protects corporations in analogous ways to physical persons. The extension of rights to corporations reveals a human rights paradigm that holds private property and capitalist accumulation at the core of its value system. This thesis scrutinises the association between human rights and corporations and raises questions about whether human rights law can be used to challenge corporate power.

The thesis is an empirically based inquiry into the perspectives of judges from the European and Inter-American Courts of Human Rights on the potential for human rights law to respond to corporate harms. As such, the thesis seeks to examine the role that human rights Courts play in using existing mechanisms of human rights law in cases involving corporate violations. The data was gathered from a detailed analysis of case law from these regional human rights systems, as well as fifteen interviews with judges from these Courts. It reveals that the open-texture of the law and the use of international human rights Courts in counter-hegemonic struggles is a strong indication of the possibility for alternative uses of human rights law. These alternative uses of law are illustrative of the potential to challenge the relative impunity afforded to corporations from within the very system that has been developed to protect them.

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
CCCs	Corporate Codes of Conduct
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
ESC	Economic, Social, and Cultural (Rights)
EU	European Union
FARC	*Fuerzas Armadas Revolucionarias de Colombia*
FTAA	Free Trade Area of the Americas
G7	Group of 7
G77	Group of 77 (UN)
G8	Group of 8
GC	Grand Chamber (European Court of Human Rights)
HRC	Human Rights Committee (UN)
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESC	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
IFI	International Financial Institutions
ILO	International Labour Organization
JSC	Joint-Stock Company
LLC	Limited Liability Company
MNC/MNE	Multinational Corporation/ Multinational Enterprise
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
N&TIMT	Nuremberg & Tokyo International Military Tribunals
OAS	Organization of American States
ODG	Observatory on Debt and Globalization
OECD	Organization of Economic Cooperation and Development
P1-1	Protocol 1, Article 1 European Convention on Human Rights
PMC	Private Military Company
PSC	Private Security Company
PSS	Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)
SRSG	Special Representative to the Secretary General (UN)
TNC	Transnational Corporation
TNI	Transnational Institute
TRIPS	Trade Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
USAS	United Students Against Sweatshops

UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UN *Norms*	United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
WG	Working Group (UN, on Business and Human Rights)

LIST OF DIAGRAMS

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Anyone who has gone or is going through the process knows that writing a thesis can be an isolating and sometimes demoralizing experience; however, it is rewarded by the support and encouragement of the people we love. A special thanks goes to two incredible scholars and my *compañeros* Pablo Ciocchini and Matías Cordero who make me laugh, but most of all who challenge me and help me challenge myself.

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It is time to turn the page and keep going.

Évian-les-Bains, 16th December 2013

S.K.

For Léa

INTRODUCTION

States are not moral agents, people are,
and can impose moral standards on powerful institutions.

- Noam Chomsky, 1998

I. Situating the Thesis in its Socio-legal Context

The modern corporation has been called "the dominant legal organisational form of capital" (Ireland *et al.*, 1987: 149) in contemporary capitalist societies. As such, it gives rise to highly conflicted standpoints because of its economic and political power and influence (see below at Section II; also Chapter 3). Ronan Shamir has described the reach of the modern corporation as the following,

> Multinational corporations dominate the global economy, accounting for two-thirds of global trade in goods and services. Of the one hundred largest world economies, fifty-one are corporations. The top two hundred corporations generate 27.5% of the world Gross Domestic Product and their combine annual revenues are greater than those of the 182 states that contain 80% of the world population. The combined sales of four of the largest corporations in the world exceed the Gross Domestic Product of Africa (Shamir, 2005b: 92).

Current debates and discussions on corporate accountability at the international level, and specifically at the United Nations (UN), have involved a variety of groups including governments, UN agencies, Indigenous peoples, non-governmental organisations (NGOs), academics, lawyers, and most recently corporations as part of the UN's "Ruggie Process" (2005-2011), discussed below at Section II, and further in Chapter 2.

On one hand, there is the argument that the corporation, as the economic paragon of neoliberal capitalism, is a vehicle capable of producing wealth and creating jobs within a 'deregulated' market. Positioning themselves within this line of thinking, John Mickelthwait and Adrian Wooldridge assert that,

> (…) [T]he most important organisation in the world is the company: the bass of the prosperity of the West and the best hope for the future of the world. Indeed, for most of

> us, the company's only real rival for our time and energy is the one that is taken for granted – the family (2003: 2-3).

On the other hand, there is the argument that corporations not only impact upon society as economic actors, but also have immense influence as social, political and cultural actors. This is a position that has incited grievances from a wide range of actors (including NGOs, community organisations, activists, academics, and Indigenous peoples) due to the lack of accountability for corporate harms. This thesis will argue that although corporations are indeed economic institutions, they are also political actors (see Chapter 3). It will point to the lack of international legal accountability for the role that corporations play in violations of human rights. The thesis will argue that this lack of accountability is symptomatic of the disregard of the corporation's position as a political actor nurtured and privileged by the state within neoliberal capitalist societies.

The thesis is located within the field of the sociology of law. It uses a trans-disciplinary approach drawing from the fields of sociology, law, criminology, international relations and political science. The thesis builds on already existing work on corporate accountability from the social sciences (e.g. Braithwaite, 1984; Gobert and Punch, 2003; Michalowski and Kramer, 1987; Pearce and Snider, 1995; Tombs and Whyte, 2003a, 2003c, 2006); and from legal studies (e.g. Alston, 2005; Clapham, 2006; de Schutter, 2005b; Glasbeek, 2002, 2003b, 2007; Haines, 2000; Ireland, 1984, 1996, 2010; Muchlinksi, 2007; Ratner, 2001; Shelton, 2002; Steinhardt, 2005; Weissbrodt and Kruger, 2005). It contributes to these bodies of knowledge by focusing on the gaps in corporate accountability for human rights violations with a particular focus on the way those gaps might be addressed at the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). The objective, discussed in more detail below, is to explore the case law and the viewpoints of judges from these regional human rights Courts and analyse them in relation to the overarching structure of human rights law. In this way, the results of this thesis seek to constructively contribute to current international policy debates on corporate accountability, as well as to the growing academic literature in this field.

Multiple actors have explored the centrality of law in shoring up particular forms of corporate power. Lawyers have been active in identifying and defining the legal problems and possibilities for corporate accountability predominantly through criminal and civil/torts law (e.g. Backer, 2006; Clapham, 2006, 2008, 2011; Glasbeek, 2002, 2003b, 2004, 2007; Jägers, 1999; Ireland, 1996, 2010; Muchlinski, 2007; Passas, 2005). Criminologists and sociologists have been interested in corporate crime for many years producing comprehensive analyses, identifying otherwise unrecognised criminalities including white-collar crime (e.g. Croall, 2001; Friedrichs, 1996; Gobert and Punch, 2003; Nelken, 1994; Pearce and Snider, 1995; Slapper and Tombs, 1999; Sutherland, 1940, 1985); sounding the alarm on other illegal forms of corporate behaviour often related to violations in occupational health and safety (e.g. Braithwaite, 1984; Pearce and Tombs, 1998; Tombs and Whyte, 2007, 2009); as well as warning us about the insufficiencies of Corporate Social Responsibility (CSR)[1] (e.g. Banerjee, 2007, 2008; Blowfield and Frynas, 2005; Glasbeek, 1987; Ireland and Pillay, 2010; Manokha, 2004; Shamir, 2004a, 2005b, 2005c, 2008).

Other actors have contested corporate power as part of a greater challenge to and growing dissent of the malignant effects of neoliberal capitalism. These protests have come from organisations such as CorpWatch, Greenpeace, Amnesty International, and Human Rights Watch, to name a few of the most well-known; but also activists, academics, and other concerned citizens who have demonstrated their disillusionment with neoliberal policies including at protests against the WTO in Seattle in 1999,[2] and more recently the *Indignados* and

[1] Ronan Shamir suggests that, "(…) the CSR field may be defined as the social universe where on-going negotiations over the very meaning and scope of the term social responsibility takes place" (2005c: 38). CSR is discussed further in Chapter 2.

[2] The WTO exists for purposes of liberalising trade across national boundaries. In other words, the WTO exists to remove governmental restrictions on the free movement of goods and services (Hartwick and Peet, 2003: 192). In 1999, governments met to discuss free trade at a WTO ministerial meeting in Seattle, USA during which explosive protests ensued in response to anti-democratic practices. The demonstrations were met by police brutality and massive demonstrator-security clashes. The 'Battle for Seattle', as it was later dubbed, demonstrated a reinvigorated interest in political and social issues across an important spectrum of civil groups concerned with growing social inequalities, environmental destruction, and resistance to the growing domination of TNCs. The Seattle protests also gained notoriety as an 'anti-globalisation' protest, although this is somewhat of a caricature of the events.

Occupy Wall Street movements of 2011.[3] The *Indignados* movement has embodied a growing dissent and popular disillusionment with neoliberal capitalism over the past few years. The movement has provided fertile grounds to call into question the power of the corporation and expose a malaise with its legal structure and its relationship with human rights (see Chapters 3 and 5). More and more cases of corporate violations of human rights are surfacing – not because they did not exist before, but because of an accrued interest and commitment to exposing corporate harms (Shamir, 2004a).

There is empirical evidence that corporations, as well as states, are involved in a variety of human rights violations (see for examples CRED, 2009). It is the relative impunity with which corporations have sustained their activities despite evidence of transgressions that has inspired the research in this thesis.[4] Examples of these human rights violations include analogous forms of slave labour (e.g. Unocal in Burma)[5]; cultural genocide, ethnic discrimination, and

[3] According to Charnock *et al.* (2012: 4) the *Indignados* movement began with *¡Democracia real YA!* (Real Democracy NOW), an internet-based social movement platform created by activists involved in the free culture movement and the struggle over a new Spanish law on intellectual property rights, which led to demonstrations that took place all over Spain beginning in May 2011 under its slogan 'Real Democracy NOW'. The movement was inspired by the Arab Spring and the ensuing demonstrations led to the idea of occupying public spaces in Spain, Greece (known as the *aganaktismenoi*), and later in other cities across Europe. The *Indignados* movement later spread globally with demonstrations being held in Israel, Chile and the USA, in what came to be known in the latter country as the Occupy Wall Street movement (Kaldor and Selchow, 2013). But the true origins of the global protests that began in 2011, which challenged social and economic inequality, and the perceived greed, corruption and influence of corporations on government, can be attributed to French resistance hero and public intellectual Stéphane Hessel. In 2010, Hessel published a 32-page pamphlet entitled "Time for Outrage: *Indignez-vous!*" (English version) in which he eloquently called for a 'peaceful insurrection' against the inequities of global capitalism. His call to action, sold millions of copies worldwide, and he has been called the inspiration for the global youth uprising of 2011 (Willsher, 2013).

[4] In a detailed argument on the on-going impunity with which TNCs operate globally, the Transnational Institute (TNI) together with the Observatory on Debt and Globalisation (ODG) launched a report at the Vienna+20 Civil Society Conference in June 2013. The report, entitled *Impunity Inc.*, produced as part of the "Global Campaign to Dismantle Corporate Power and Stop Impunity" focuses on what it refers to as the vast "Architecture of Impunity" that has been developed to serve the interests of transnational capital (see full report at http://www.tni.org/briefing/impunity-inc).

[5] *Doe et al. v Unocal Corporation et al.* (2000): In this case, the plaintiffs used the Aliens Torts Claims Act (ATCA) in the USA to seek redress for the human rights abuses associated with the Unocal pipeline project in Burma. The plaintiffs were Burmese peasants who suffered a variety of egregious violations at the hands of Burmese army units that were securing the pipeline route, including forced relocation, forced labour, rape, torture, and murder. Unocal eventually settled the claims out of Court, compensating the villagers who sued them in 2005.

violations of the right to a healthy environment (e.g. Texaco in Ecuador)[6]; conspiracy leading to widespread intimidation and murder/death of activists (e.g. Royal Dutch Shell in Ogoni, Nigeria)[7]; murder, extra-judicial killings, kidnapping, unlawful detention, and torture (e.g. Coca-Cola in Colombia)[8]; and culpable environmental disaster and wilful lack of observance for safety norms in the workplace (e.g. Union Carbide Bhopal in India;[9] AZF-Total in France[10]).

II. Operating Across Borders: the Relevance of the TNC in Debates on Human Rights Protection

[6] *Aguinda v Texaco Inc.* (2001): A coalition of Indigenous tribes and communities sued Chevron Texaco for the ecological damage due to oil exploitation in Ecuador on lands used for bathing, drinking, and fishing. The damages included water pollution, soil contamination, deforestation and cultural upheaval. There has also been a reported increase in cancer within the communities. The case started in 1993 in the USA using the ATCA, but was dismissed based on *ratione loci*. It resumed in Ecuador in 2003. The Ecuadorian Courts found in favour of the Indigenous tribes and communities in February 2011.

[7] *Kiobel v Royal Dutch Petroleum Co*. (2010); and *Wiwa v Royal Dutch Petroleum Co. et al.* (2000): The applicants charged the TNC and its subsidiaries with complicity in human rights abuses against the Ogoni people of the Niger Delta. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. The plaintiffs argued that in 1995 the oil company and its subsidiaries colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9, a group of activists. The case was settled out of Court in 2009.

[8] *Sinaltrainal v Coca-Cola Co.* (2003); A lawsuit was filed using ATCA by the Colombian National Union of Food Workers (Sinaltrainal). Sinaltrainal alleged that Panamco, a Colombian Coca-Cola bottling company, assisted paramilitaries in murdering several union members. The case was dismissed by the District Court in 2003 but allowed to continue by a Federal judge, only to be dismissed again in 2006. In reaction to the initial dismissal, Sinaltrainal launched its "KillerCoke" campaign calling for the boycotting of Coke.

[9] *Bano et al. v Union Carbide Corp. et al.* (2001): On 3 December 1984, a pesticide plant belonging to Union Carbide in Bhopal, India leaked methyl isocynate gas and other chemicals creating a dense toxic cloud over the region and killing thousands of people immediately. Thousands more died in the aftermath of the disaster. The plant was inadequately maintained by Union Carbide and was additionally poorly monitored by the Indian authorities. A number of factors exacerbated the calamitous effects of the disaster including a lack of information about the identity and toxicity of the gas at the plant, safety measures that malfunctioned and the location of the plant. A complaint was filed under the ATCA in New York (2d Cir 2001) but was dismissed in 2008 on the basis of a prior settlement of claims in India.

[10] *Ministère Public et Parties Civiles contre Biechlin, Desmarest, S.A. Grande Paroisse, Total S.A.* (2012): AZF, short for *AZote Fertilisant* or nitrogen fertilizer, was a chemical plant owned by the French oil giant *Total Fina Elf*. The plant exploded in Toulouse on 21 September 2001, killing 31 people and injuring thousands more, as well as causing serious environmental damage. The police and the Chief prosecutor initially asserted that the explosion was an accident, only later announcing that the possible responsibility of a terrorist attack was an avenue of investigation, although this was quickly abandoned as a reasonable possibility. The victims brought a civil suit against AZF and criminal charges were filed against the director of the plant. In the first trial, the Toulouse Court dismissed the charges, however this judgement was overturned on appeal. Despite the gravity of the "accident", Total was fined only €225,000 and the former manager of the plant, M. Biechlin, was sentenced to one year in prison.

This thesis maintains that the corporation is a vehicle for capitalist accumulation; but it asserts that though the corporation is powerful, it is not power in itself (see Chapter 3). The corporation is rather a particular way in which capitalists organise their wealth (Wood, 2005: 15).[11] Supporting this perspective, Harry Glasbeek has defined the corporation as a legal entity, which is designed as "an organisation for the accumulation of capital in order to maximize profits, in order to accumulate more capital, leading to more profits (…)" (1987: 373). What this definition emphasises is that the elemental condition and constitutive function of the corporation is capitalist accumulation above all else. An analysis of the legal structure of the corporation and its omnipresence in the global political economy can serve to raise questions about the overarching framework of an international law that protects corporations in similar ways to physical persons, notably through human rights (see Chapters 3 and 5). This fact brings to light a fundamental problem of a human rights discourse that holds private property and capitalist accumulation at the core of its value system, explored in Chapters 2, 3, and 5.

State laws define the legal architecture of the corporation and determine the framework within which it works (e.g. rules of incorporation, bankruptcy, etc.). This framework includes defining what the corporation, and its members, can and cannot do. Despite diversity in the types of corporations that exist (e.g. sole proprietorship, joint-stock companies, etc., discussed below), it has been argued by some scholars that there is a common denominator in all limited liability corporate structures that is built into their legal architecture. This common denominator is that the legal structure of the corporation *sine qua non* defines it

[11] Ellen Meiksins Wood offers a thought-provoking insight into the issue, arguing that
If we accept that the problem is not this or that corporation, nor this or that international agency, but the capitalist system itself, we are, of course, left with the problem of tracing capitalist imperatives to an identifiable source. No one can deny that this remains an intractable problem. But, at the very least, we can raise questions about whether the global scope of capital has put it so far beyond the reach of the national state that the state is no longer a major source of capitalist power, a major target of resistance or a potential instrument of opposition. (…) But the ultimate sanction that sustains the system as a whole belongs to the state, which commands the legal authority, the police and the military power necessary to exert direct coercive force (2005: 15-16).
The issue of the continued relevance of the state will surface throughout the thesis. The thesis supports the argument that the legal and institutional frameworks supplied by the state make it a primary actor for capitalism and therefore opposes what Susan Strange (1996) has called the "retreat of the state".

as a legally sanctioned, institutionalised site of irresponsibility (Glasbeek, 2007; Ireland, 2010; Muchlinski, 2010 in relation to extraterritoriality; see Chapter 3).

The corporation is a distinct corporate form with its own personality and I benefits from the protection of limited liability, discussed in detail in Chapter 3. Paddy Ireland "uses the terms 'corporation' and 'corporate' to refer to large public corporations" (1999: ftnt 1). He elsewhere notes that, "the term 'company' is essentially a diminution of 'limited liability company', denoting an enterprise of a particular *legal* status – one which has incorporated and become subject to the rules of company law" (1984: 239). The modern corporation, rather than a homogenous entity, can exist in a variety of different forms, such as limited liability companies (LLCs), joint-stock companies (JSCs), small business LLCs, sole proprietor companies, partnerships, trusts, non-profits, multinational corporations or enterprises (MNCs or MNEs), and transnational corporations (TNCs). [12] Colloquially, these different corporate forms are often called 'companies' or 'corporations', the latter being used here. 'Corporation' is thus an umbrella term that refers to a business entity or company composed of a group of people authorised to act as a single entity with a distinct legal personality and recognised as such by law. The term corporation maintains coherency with references to the TNC, further discussed below.

Ireland (1984) suggests that based on the lack of specificity that the term "corporation" entails, it can be contrasted with "partnerships", which are "*un*incorporated associations subject to a different body of legal rules, relating to separate personality, limited liability, agency, and so on" (Gower quoted in Ireland, 1984: 239; see Chapter 3). The meaning attached to the term 'corporation' has changed over the past two hundred years and with it the role of the corporation in our society. In the 19th century, Ireland (1984: 241) explains,

[12] Michalowski and Kramer (1987) point out the ideological distinction made between the terms TNC and MNC. They note that *transnationality* implies an entity existing above and beyond the state in which it operates, while *multinationality* suggests "only a business with operations *in* more than one country" (Michalowski and Kramer, 1987: ftnt 1, emphasis in original). For a detailed discussion see also Muchlinski (2007: 6). Despite the terms MNC/MNE and TNC often being used interchangeably, this thesis will refer to TNCs in part to maintain consistency and in part because it is the term that has been adopted at the UN.

the term corporation denoted an association of a particular *economic* nature with no reference to its legal form, whereas today it signifies an association of a particular *legal* status with few connotations as to its *economic* form (see Chapter 3).

Although the thesis will generally refer to the 'corporation' it will in some cases specifically reference 'TNCs'. TNCs operate in global or regional economic regimes.[13] The importance of referring to the TNC in particular is that it emphasises the *transnational* nature of an economic entity operating in more than one country and across borders beyond the constraints of any one nation's legal framework.[14] It is a corporation's *transnationality* that often underlines the existing gap in international law as it applies to the violations of human rights by corporations. The transnationality of TNCs emphasises the problem of accountability for corporate human rights violations because there are no international binding regulations on TNCs for human rights. David Weissbrodt, one of the authors of the UN *Draft Norms on the Responsibilities of Transnational*

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[13] In its 1983 *Draft Code of Conduct on TNCs*, the UN defined a TNC as an enterprise,
(…) [C]ompromising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others (UN, 1983: §1.a.)
The UN reiterated its preference for the term TNC in the Sub-Commission on the Promotion and Protection of Human Rights' April 2005 Report on the UN *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (UN *Norms*). It defined TNCs as,
(…) [referring] to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively" (UN, 2003: §20).

[14] In a thorough study on the MNC and international law, Peter Muchlinski (2007) identifies the first use of the term 'multinational' with a paper written by D.E. Lilienthal in 1960. The multinational corporation was there defined as a *uni*-national enterprise with foreign operations. Muchlinski (2007: 5) criticises this description because he asserts it ignores the existence of multi-national origin firms, for example the Anglo-Dutch corporations Unilever or Royal Dutch Shell. Economists, he continues, use the term multinational enterprises, which distinguishes between an organisation that engages solely investment (*portfolio investment*) and one that engages in investment with managerial control (*direct investment*). The international debate moved away from these more technical discussions and renounced both the terms MNC and MNE at the United Nations in the mid-1970s. This resulted in the UN's adoption of the term 'transnational corporation' (*ibid*: 6). The choice to use 'trans-' rather than 'multi-' was to emphasise the operation across national borders. G-77 countries asserted that the term MNC ought be reserved for enterprises that were jointly-owned and controlled by entities in several countries, which they claimed were not meant to come under UN scrutiny (*ibid*, 1999: 13).

Corporations and Other Business Enterprises with Regard to Human Rights (UN *Norms*) suggests that,

> Due to their economic and political power, as well as their ability to straddle national frontiers, TNCs often successfully evade government regulations that 'interfere' with the way they operate. When faced with the prospect of losing the economic benefits these businesses bring, governments are often cowed into ignoring the human rights abuses these businesses commit when they employ child labour, discriminate against certain groups of employees, fail to provide safe working conditions, dump toxic waste, etc. Some businesses actually encourage state violations of human rights when they utilise paramilitary forces to protect their installations and personnel (1998: 187-88; see also Chapter 6).

TNCs have the capacity to operate across borders and profit from all markets with few legal constraints, namely beyond the constraints of any one nation's legal framework, although remaining under the direction of a sole decision-making centre (Michalowski and Kramer, 1987; Weissbrodt and Kruger, 2003, 2005; Tombs and Whyte 2003c). Because of its transnationality the same corporation may employ different standards according to the country it is working in (e.g. safety standards at Union Carbide in Virginia, USA versus standards applied at Union Carbide in Bhopal, India), whilst simultaneously benefitting from globalised standards and trade agreements negotiated by states on their behalf (e.g. TRIPs).[15] Thus, despite incorporation in one state, the legal architecture of a TNC allows it to legally exploit its transnationality, "for the purpose of operating beyond the law and attempting to remain beyond the reach of the state" (Tombs and Whyte, 2003c: 9). Moreover, it does this whilst relying both on domestic Courts and the state's enforcement machinery as well as international tribunals, including human rights Courts (see Chapter 5) and arbitration mechanisms, in order to defend their claims.

[15] Karsten Nowrot (1993) observes that TNCs are influential participants from both economic and political perspectives. In his example, he cites the role corporations played in the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). He suggests, "[TNCs] are to a growing extent participating, albeit in most cases still indirectly, in the international law-making as well as the law-enforcement processes, thereby considerably contributing to the inherent heterogeneity of modern partnerships in international law-making and international law adjudication" (Nowrot, 1993: 1).

In his authoritative book on non-state actors and international law, Andrew Clapham suggests that "the term 'transnational corporation' emphasises that there is usually a single head company operating in more than one country, with headquarters and legal status incorporated in the national law of the home state" (2006: 199). Similarly, in an early discussion on the TNC and international law, Luzius Wildhaber, former President of the ECtHR, proposed that,

> A corporation may be called transnational if it has a certain minimum size, if it controls production or service plants outside its home state and if it incorporates these plants into a unified corporate strategy" (1980: 80).

Common to all of these definitions is that the TNC has a central decision-making body. This centralised body is otherwise considered diffuse and difficult to identify due to the globalised market and extensive sub-contracting agreements. For this reason, the particularity of the TNC gives rise to problems of jurisdiction, referred to here as issues of 'extraterritoriality', further discussed in Chapters 6 and 7.[16] Corporations generally, but TNCs in particular, are hubs of economic and political power (Ireland, 2010).[17] A consequence of the legal paradigm in which TNCs operate is that their transnationality gives these particular corporations the possibility to situate themselves between national and international legal

[16] International law has lagged behind in responding to jurisdictional gaps, a problem pointed out in the 1970s. In a lecture given in 1979, Theo Vogelaar argued that international law inadequately responded to the exponential growth of TNCs, firstly because it did not put the international activities of TNCs under international control by conceiving a *legal* framework for their operations; and secondly, international law lagged behind because it did not adequately set up mechanisms for dealing with conflicting laws and interests of home and host countries (Vogelaar, 1980: 72). Vogelaar straight-forwardly asserted that TNCs,

> (…) may benefit from jurisdiction *gaps* and, above all from *differences* in the legal, social and fiscal regimes by selecting the most suitable one. For this reason, national measures taken by host and home country governments separately appear inadequate (*ibid*).

His comments still resound today, with jurisdictional gaps, inadequacy between national laws dealing with the operations of TNCs in home and host countries, and the veritable absence of an international law framework to deal with corporate transgressions, and for what concerns this thesis, particularly in the field of human rights. In short, TNCs have remained globally unaccountable; because of this, important questions arise regarding the exercise of their power without due responsibility.

[17] Corpwatch's 1999 study found fifty-one of the one hundred largest economies in the world are corporations, whist forty-nine are countries. The combined sales of the world's top two hundred corporations are greater than a quarter of the world's economic activity (Anderson & Cavanagh, 2000; Jägers 1999; for a nuanced critique see Vazquez, 2005: 948, 947-958). In a more recent study from the University of Zurich, researchers identified 43 060 TNCs that formed a global web ownership between them. The researchers suggest 147 TNCs (mostly banks) formed a 'super entity' controlling 40 per cent of global corporate wealth – that is all or part of the other TNCs (Vitalli, Glattfelder & Battison, 2011; see also Appendix 4).

systems (Michalowski and Kramer, 1987), or even beyond the law in general, as is the case for human rights (see Chapters 5 and 6).

In today's hyper-globalised economies, TNCs are ubiquitous, and the Kafkaesque-style structure of their operations generates mistrust (Holzer, 2008: 84). Micklethwait and Wooldridge observe that,

> Corporations have always aroused suspicion – from national elites (who have seen them as threats to their rightful authority), from conservative populists (who have condemned them as agents of cosmopolitanism), and later from socialists (who have anathematized them as 'the highest stage of capitalism') (2003: 160).

But the contemporary distrust of the corporation, and even more so the TNC given its size and influence, is more potent than the suspicions pointed to by Micklethwait and Wooldridge. The economic dominance of the corporation coupled with its political power and influence in the global political economy have given it

> (...) decisive power to shape public policy, to encourage or bar legislative measures, to promote or discourage social reforms and to influence governmental action in key areas including employment, the environment and social and civil rights (Shamir, 2004a: 670).

Consequently, the empirical evidence of corporate transgressions, exacerbated in cases of TNCs, has heightened already-existent misgivings of corporations' potential for harm, particularly regarding human rights.

Michalowski and Kramer (1987) have argued that there are discrepancies in legal standards between national and international legal systems. They assert that these inconsistencies create a liminal space that is exploited by corporations in a way that has enabled them to generally evade responsibility for egregious violations of human rights. This regulatory gap compels scrutiny of the domestic and international legal climate that has allowed corporate violations of human rights to continue with relative impunity. Relatedly, there is a growing body of academic literature that identifies the lack of an international forum for the enforcement and supervision of eventual obligations on corporations, and

specifically TNCs, as one of the main obstacles to corporate accountability (Olivet, 2010; Nowak, 2007; Nowak and Kozma, 2009; Scheinin, 2009), an issue also raised during the interviews (see Chapter 7).

III. Corporations and Human Rights Law

Over the past 30 years, and particularly since the mid-1990s, significant debates in international law and policy have catapulted questions of corporate accountability onto the international scenes. The impunity with which corporations act and conduct their business has led to the proliferation of powerful global movements contesting this situation (Brecher *et al.*, 2002; Edelman, 2001; Klein, 1999).[18] The growing attention to corporate activities, particularly regarding human rights has become a globally acknowledged issue. One of the main debates has centred on the promotion of "hard law" versus "soft law" to confront corporate harms (see Chapter 2).[19] The recent strategy at the UN, with the Ruggie Process discussed in Chapter 2, has been to advocate consensus amongst all stakeholders by encouraging voluntary measures and the use of

[18] These contestations include anti-sweatshop movements (e.g. Clean Clothes Campaign, United Students Against Sweatshops, etc.); the Ogoni uprising against Shell in the Niger Delta, Nigeria; the Zapatistas movement in Chiapas, Mexico; Amnesty International Corporate Accountability; Human Rights Watch Corporate Accountability; CorpWatch, etc.

[19] According to Abbott and Snidal, "Hard law refers to binding legal instruments that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and delegate authority for interpreting and implementing the law" (2000: 421). Because hard law affects the realm of sovereignty by obliging commitment, the common currency in international law is soft law. Soft law refers to legal mechanisms that are non-binding. By applying soft law, states demonstrate a willingness to address problem areas collectively, although limit the constraints to which they subject themselves. According to one legal theorist,

(…) two main techniques are used by states and international organizations in the pursuit of these apparently conflicting goals. First, states will retain discretion over the definition of the obligations they undertake. Second, they will avoid legal obligations. (…) Provisions which use these techniques to achieve the goals of collective action and limited constraint can be described as 'soft law'" (Gruchalla-Wesierski, 1984: 39).

Gruchalla-Wesierski makes the distinction between 'legal soft law' (i.e. legally binding obligations with legal sanctions available) and 'non-legal soft law' (i.e. non-legal commitments subject only to political sanctions); this roughly corresponds to what the terms used here, that is 'hard law' and 'soft law' more generally. However, precision is not the main feature to distinguish soft and hard; rather it is the possibility to invoke hard law and its enforceability that distinguishes it from soft law. Hard law instruments are part of the recognised legal sources that bind officials and Courts; soft law is not binding in the same sense. Soft law can sometimes be more precise than hard law. The problem in international law is a question of enforceability. Another way to put it simply is hard law imposes obligations on addressees; in soft law the actors voluntarily accept the obligations.

existing law, whilst considerations of new international and legally binding norms for corporate accountability have been marginalised (Bittle and Snider, 2013; McInerney, 2006; Khoury and Whyte, *forthcoming*).

In 1999, at the Davos World Economic Forum, the UN Secretary-General Kofi Annan called for a "Global Compact among multinationals." This initiative, which was to become the *UN Global Compact* (UN, 2000b), had the explicit aim of harnessing "(…) the power of collective action in the promotion of responsible corporate citizenship" (Khoury and Whyte, *forthcoming*). The *Global Compact* was criticised by NGOs and other non-business, non-state actors, for its emphasis on voluntarism with the notable absence of supervisory or enforcement mechanisms. It was succeeded by the UN *Norms* (2003), which sought to move away from the voluntary process and engage in more meaningful obligations from states and corporations regarding their responsibilities for violations of human rights. The UN *Norms* were formally rejected in 2005. In its place, the UN appointed Professor John Ruggie as the Special Rapporteur to the Secretary General (SRSG), in what is referred to here as the "Ruggie Process" (2005-2011).

The Ruggie Process has effectively dismantled the attempt of the UN *Norms* to introduce binding norms on corporations by endorsing a strategy of "consensus and cooperation" amongst all stakeholders (Ruggie, 2006). Some critics have argued that the strategy adopted by the Ruggie Process was a business-friendly approach that brought together states, civil society, and corporations to essentially construct a compromise regarding corporate accountability that would be accepted by all stakeholders (see Khoury and Whyte, *forthcoming*; explained further in Chapter 2). In effect, the dismantling of the UN *Norms* was the tacit undercutting of previous efforts for supervisory mechanisms at the international level.

Initial proposals by academic lawyers and the UN Commission of Human Rights for the UN *Norms* were based on a radical rethinking of existing principles of human rights law. The UN *Norms* emphasised a non-voluntary strategy towards corporate accountability, which was a highly innovative proposal in international

law. However, after a few years of debate regarding the development of a binding agreement, support for the UN *Norms* dissipated and the discussion was replaced by a different agenda. In 2005, Ruggie began a three year mandate, which produced the *"Protect, Respect, and Remedy" Framework* (Ruggie, 2008). Ruggie eschewed the need for new law and placed emphasis upon existing law, policies, corporate codes of conduct (CCCs) and other voluntary measures.[20] His *Framework* emphasised consensus amongst all stakeholders and asserted a commitment to voluntary principles. Despite the abandonment of the *Norms* by the UN, many NGOs continued to emphasise the need for an overarching international legal framework to impose minimum human rights standards on corporations. Despite this emphasis, the *Framework* was warmly received at the UN and Ruggie's mandate was extended for a further three years. The Ruggie Process culminated with the *Guiding Principles* (see Ruggie, 2011), which are recommendations on how to implement the 2008 *Framework*. The thesis will later argue that the priority of non-binding norms and voluntary CCCs in the international sphere – despite empirical evidence of the continued violations of human rights – raises questions about the structure of an international law that serves capitalist imperatives. These questions are explored through the relationship between law, human rights and hegemony in Chapters 2 and 3.

A gap in Ruggie's research has been that it has proceeded without consulting or even considering the role of judges. In response to the dearth of information from the perspective of the judiciary regarding corporate accountability, this thesis explores the extent to which human rights judges from the ECtHR and the IACtHR are willing or likely to develop the law in ways that make corporations accountable. Interviews with judges from these Courts revealed that they have simply not been concerned by debates on corporate accountability. They have not been part of discussions with NGOs working to address issues of corporate accountability in human rights law nor for example during Ruggie's "period of consultations" with states, corporations and civil society groups that resulted in the 2008 *Framework*. Their knowledge on human rights has not been considered

[20] Where law is advocated, it is not human rights law, but the use of compensation and tort claims for human rights abuses (Ruggie, 2008).

relevant to issues of corporate accountability or key shifts in human rights law (see Chapter 7). In light of this, the thesis thus offers an inquiry into the important and otherwise unexplored perspectives of human rights judges with regards to the legal obstacles related to the development of corporate accountability for violations of human rights.

The analysis of the interviews, in Chapter 7, demonstrates that judges' perspectives can offer an important component to the corporate accountability debate. In this respect, the thesis does not adopt a strictly constructionist view that the judge does not *make* the law but applies the law. Instead, it takes its cue from Duncan Kennedy's (1996) analysis that there is an ideological element in judicial decision-making whether it is conscious, sub-conscious or unconscious (see Chapter 1). It questions whether there is space for corporate accountability in human rights Courts using the legal imagination and the interpretation of existing mechanisms (see Chapters 5, 6, and 7). Moreover, it considers the existing obligations of corporations in contrast with its legal rights under the paradigm of human rights. In what follows, the thesis will present a detailed empirical inquiry that seeks to assess the practicalities of developing accountability for corporations in human rights law.

IV. Outline of the Thesis

The viewpoints of human rights judges provide a specific perspective from which to consider the lack of accountability for corporate violations of human rights under human rights law. The investigation into the views of these judges will consider how the modern corporation and its place in the global political economy has impacted efforts to introduce more robust forms of corporate accountability through law. It will examine the status of corporations at the ECtHR and the IACtHR, as well as the mechanisms available to provide redress for corporate human rights abuses. By so doing, the thesis seeks to identify the lacunae within these systems and therefore problematize the causes and consequences of these gaps. In particular, it will examine how existing bodies of

law, existing judicial procedures, and processes of adjudication can address, or not, the lacunae in international human rights law. In other words, the thesis will highlight and scrutinise the impediments to developing human rights law that lie beyond the practicalities of legal procedure, and in this way it will raise questions about the possibility to use human rights law in alternative ways. In what follows, human rights will be considered in a way that invites the reader to understand rights as both sustaining existing forms of dominance and providing a powerful tool with which to challenge those forms (Evans, 1996, 1998, 2004, 2005a, 2005b; Stammers, 1993, 1995).

The methodology will be detailed in Chapter 1. The empirical data gathered for this thesis included semi-structured, elite interviews and an extensive analysis of case law from the ECtHR and IACtHR. The Chapter will address the unique challenges of researching the powerful, including gaining access and the power dynamics of elite interviewing. The Chapter will also consider the birth of transnational human rights culture amongst judges. To this effect, it will briefly address debates in legal theory on adjudication, ideology and politics.

Chapter 2 will address the complexity of the relationships between law, neoliberal capitalism, and human rights. It will begin by examining how the internationalisation of human rights coincided with the rise and legitimation of US-led neoliberal hegemony. It will argue that human rights law has been developed in a way that supports and reinforces neoliberal capitalism, which has resulted in capitalist imperatives dominating the discourse of human rights. The Chapter will provide the basis of the thesis' overarching argument that the construction of human rights law within a neoliberal paradigm has been an enabling factor that has contributed to the corporate evasion of responsibility for violations of human rights. The literature review will support this argument by demonstrating that the dominant human rights paradigm has been defined to complement market-friendly ambitions. The scrutiny of CSR will be instructive to this effect and will emphasise the compatibility of CSR with the accommodation of capitalism. Finally, this Chapter will raise questions about the potential for law

as a source of counter-hegemonic struggle for human rights with regards to corporate violations.

The legal development of the modern corporation and the impact this has had on human rights will be examined in Chapter 3. The Chapter will begin by outlining a Marxist theory of law. It will argue that Marxism remains a provocative and relevant theory with which to analyse present day circumstances, and in particular the rise of corporations and the structural inequalities that characterise capitalist societies (Hunt, 2010). The Chapter will analyse the development of the corporation through the 19th and 20th centuries, drawing attention to the corresponding rise of capitalism at that time. It will thus contend that the modern corporation, as a vehicle of capitalism, was developed *through* law as a political form within which social relations of production have been organised. The spread of capitalism and the entrenchment of the corporate legal form, i.e. corporate personhood and limited liability, as the dominant organisational form for capital accumulation are instructive of how the corporation became a shield against the responsibility of individuals, i.e. shareholders. The significance of these developments for international law will be addressed by examining the trials of corporations after the Second World War.

The origins and development of the European and Inter-American human rights systems will be summarised in Chapter 4. The Chapter will argue that the regional human rights systems can be traced to political economic imperatives primarily interested in bolstering trade and consolidating capitalism in the respective regions. It will draw out the institutional and procedural differences between the Courts, relating these primarily to the specific historical and political processes of each. By so doing, the Chapter will consider how similar legal principles work differently in diverse contexts and will reflect on how law is constantly constructed by the struggle between various norm-generating communities.

Chapter 5 will examine how the concept of a legal person has been used to benefit corporations at the IACtHR and the ECtHR. It will draw upon the case law from

both Courts to illustrate the protection of corporations through human rights law, albeit in different ways. The Chapter will demonstrate how human rights law has been constructed in a way that complements and endorses a specific mode of production. In particular, it will focus on how the regional systems have addressed property rights and most significantly the differences in the status of the legal person. The Chapter will argue that there is an inherent contradiction in extending *human* rights protections to non-human entities. It will contend that this contradiction can in large part be linked to the economic origins and market strategy of the political organisations that created and now administer the regional human rights regimes, i.e. the Council of Europe (CoE) and the Organization of American States (OAS).

Chapter 6 will focus on the existing mechanisms that address human rights obligations in the private sphere at each Court, and the subsequent attribution of responsibility for these violations. It will examine doctrine and case law from both Courts, specifically the doctrine of positive obligations, including the principles of horizontality and the due diligence standard, explored in detail in the Chapter. It will draw upon primary data analyses of key cases in the Courts to scrutinise the potential of existing legal mechanisms in cases concerning corporate violations. It will also raise questions about the significance of judicial interpretation for developing human rights law in ways that reflect present day circumstances. The cases will demonstrate how certain disenfranchised groups or individuals have used human rights Courts to bring their struggles to light. By so doing, these cases pique reflection on alternative uses of law and the potential for using human rights Courts counter-hegemonically.

Finally, Chapter 7 will analyse and discuss the interviews conducted with judges from both the ECtHR (9 judges) and the IACtHR (5 judges and 1 former judge). It will examine seven themes that surfaced during the interviews: (1) judges' appreciation and interest in corporate violations of human rights; (2) the

dynamic approach and its (mis)uses;[21] (3) the application of human rights to legal persons; (4) the awareness of the respondents with regards to international debates on corporate accountability for human rights violations; (5) the practical obstacles within each Court to considering corporate accountability; (6) questions of jurisdiction and extraterritoriality and the impact this has on corporate accountability; (7) suggestions from the respondents for ways to engage with law for corporate accountability. The Chapter will raise questions about the role of human rights law in corporate accountability debates by scrutinising the judges' commonsense understanding of the place of corporations in modern society and particularly in human rights law.

The thesis will conclude with reflections on the prospects of and limits to using human rights as a legal and social concept in struggles related to corporate accountability. The Conclusion will thus consider the value of using human rights law, which is a hegemonic concept, for counter-hegemonic struggles, such as corporate accountability for human rights violations. It will point out the differences between the Courts and the possibilities they offer for thinking about alternative formulations of law. The Conclusion will also reflect on the limitations of the thesis, briefly outlining potential areas for future studies in investigations into corporate accountability.

[21] The dynamic approach is a concept used to describe a general approach adopted by judges in both the ECtHR and the IACtHR. It is an interpretative practice that does not have the authority of the doctrine of positive obligations, for example.

CHAPTER 1: METHODOLOGY

I stand upon my desk to remind myself that we must constantly look at things in a different way.

- John Keating, Dead Poets Society, 1989

Introduction

This thesis relies on both primary and secondary data. Primary data included semi-structured interviews with judges from both the ECtHR and IACtHR over the period of several months in 2010 (see Appendix 1); as well as an extensive case law analysis from the ECtHR, European Commission of Human Rights (ECommHR), IACtHR and the Inter-American Commission on Human Rights (IACommHR). The case law research identified two critical aspects of the relationship between corporations and the Courts: firstly, the corporate use of human rights; and secondly, the defence of corporate rights by the Courts, either directly (i.e. at the ECtHR) or by proxy (i.e. at the IACtHR) (see Chapters 5 and 6). Official documents from both Courts and their establishing bodies (i.e. CoE and OAS) were also used to contextualise and shed light upon the decision-making processes at the Courts and the evolution of the case law.

The Chapter will begin by outlining the research agenda of the thesis, including the research aims and questions (Section I). It will then examine the specific methodological considerations associated with interviewing elites and the challenges therein (Section II). The methods of empirical research, including the analysis and data gathering process of interviews, case law, secondary literature, and documentation will be detailed in Section III. Section IV will provide some reflections on the analytic advantages of comparing the Courts and legal cultures. Finally, Section V will address the dynamic between adjudication and politics.

I. Research Aims and Questions

This thesis will examine the otherwise unexplored viewpoints of human rights judges at the ECtHR and IACtHR regarding the gap in international human rights law with respect to corporate violations of human rights. The following questions were devised to structure the aims of the research:

- To what extent can human rights law be used to challenge corporate power?
- What role can human rights Courts play in using existing mechanisms of human rights law in cases involving corporate violations of human rights?

A series of secondary research questions supported the investigation into the primary questions.

- How do the IACtHR and the ECtHR approach the relationship between corporations and human rights law?
- How can corporate violations of human rights be addressed in the decisions of those Courts?
- How far do recent developments in human rights law allow for corporate violations of human rights to be considered at the IACtHR and/or the ECtHR?

The interview questions were organised around a series of overarching themes (see Chapter 7). These were: the 'dynamic approach' to legal interpretation, referring to the subjective judicial decision-making process, discussed in Chapters 5, 6 and 7; the perspectives of the participants on the use of soft law versus hard law for corporate accountability of human rights violations; the role of human rights law in the corporate accountability debate; the participants' understanding of corporate violations of human rights; the potential to use existing mechanisms in international human rights law in cases involving corporate violations of human rights; the impact of the primacy of the state in international law and in the culture of corporate impunity for violations of human rights; the implications of the corporate veil and legal personality on corporate accountability; extra-territorial jurisdiction and the potential development of corporate human rights obligations by home states.

II. Studying 'Up': Researching the Powerful

This Section elaborates upon the specific challenges of conducting interviews with an 'elite' group of participants. It addresses the methodological difficulties that the researcher may face regarding gaining access to research sites and respondents, and the distinctive interview techniques required for elite interviewing. The Section will detail the methods of interpretation of the data generated, as well as address the ethical issues of conducting interviews, with specific attention given to the process of interviewing judges as one group of elites.

In an early examination of elite and specialized interviewing, Anthony Lewis Dexter (1970) defined elite interviewing not by the status of the interviewee but by the purpose of the interview. The term 'elite' did not sit well with Dexter, who noted other researchers' dissatisfaction as being,

> (…) not happy with the term 'elite' with its connotations of superiority. Yet ha[d] found no other term that is shorthand for the point [he] want[ed] to make, namely that people in important or exposed positions may require VIP interviewing treatment on the topics which relate to their importance or exposure (Reisman in Dexter 1970: 5).

Odendhal and Shaw explain that for Dexter, "an elite interview is one in which the interviewer is looking for instruction, thus the interview is framed with reference to the interviewee's knowledge which the interviewer is trying to access" (2002: 299). In another attempt to refine the methodology, Lilleker defined elites as "those with close proximity to power or policy-making (…) with access to an organization, institution, association, or government which the researcher is attempting to penetrate" (2003: 207). Lilleker's definition precisely describes the interview objectives of this thesis.

The definition of elites as a population with more "knowledge, money, and status" has been contested (Dexter, 1970; Odendahl and Shaw, 2002: 299; Smith, 2006).

These objections claim characterising elites through hierarchical superiority leads to a structural definition, whereby power is something appropriated by an individual or an organisation. The danger with this definition is that it may ignore or at least obscure other definitions of power. Michel Foucault argued that, "Power exists only when it is put into action" (1982: 788). Power, in this Foucauldian sense is not implicit, but rather is a technique with which individuals engage. In other words, power can be portrayed in a more fluid manner, as something exercised but not appropriated (Manokha, 2009: 435). The significance of Foucault's understanding is that he believed it was necessary to juxtapose resistance to fully understand power relations; in other words, where there is power, there is also resistance.

Karen Smith explored the usefulness of demarcating elites from non-elites commenting that "no one is removed from the effects of power in societies and all those involved in making or influencing important decisions are also affected by the decisions of others" (2006: 645). This may be true to some extent, however the recognition of elites and the challenges of the methodology associated with elite interviewing is important for research purposes where a neoliberal hegemonic order is increasingly defining research concerns and reconfiguring policy research (see Hill, 2004; Olssen and Peters, 2005; Tombs and Whyte, 2003c). Judges, as intellectual and moral leaders, reinforce the cultural hegemonic model of how to do things. Therefore, investigating human rights judges' perspectives on corporate accountability for violations of human rights offers a unique frame of reference. However, gaining access to judges is not without its challenges. Explored below.

There is a gap in the methodological literature relating to researching people in positions of power and authority (Ostrander 1993; Smith, 2006). This may have to do with some common difficulties researchers face when "studying up" (Nader, 1972). These obstacles can include securing access to places, information, or individuals (Desmond, 2004; Sabot, 1999; Tombs and Whyte, 2003a, 2006). Tombs and Whyte have commented that "there is no obligation in the first instance for the state or for the corporations to provide information on request"

(2003a: 33),[22] which creates practical obstacles to critical research. They go on to point out that the status of the researcher, as well as the backing of funding, can become a factor when attempting to gain access to elites (*ibid*: 34). In this way, issues of access range from securing interviews with elites, to practical problems of institutional gatekeepers, and financial limitations (e.g. including travel expenses, purchasing the required clothes, or means of entry to certain areas). Moreover, elites are perceived as being "better equipped to protect themselves and are better positioned to manipulate research results and dissemination" (Smith, 2006: 644), which can impede the production of research. In a study of elites, certain arbitrary exclusions of respondents are inevitable since some people are unlikely to be available or are not interested in participating no matter what technique is used and what sponsorship is obtained. Thus, a central obstacle in elite interviewing is *access*.

It has been established in the literature that gaining access to elites, such as senior members of the judiciary, can be difficult (Odendahl and Shaw, 2002; Smith, 2006). Accessing elites and documentation related to elites can be complicated in practice. Social science research on 'sensitive' topics, such as state and corporate crime, can pose obstacles to gaining access to information. Tombs and Whyte have suggested that "in the current political climate, the barring of access to sources of data (…) [is] severely limiting the ability to conduct critical research" (2003a: 217). Access to the sources of data needed for this thesis benefitted from already-existing relationships with key gatekeepers established during my Master's thesis. A gatekeeper is "[the] individual (…) that [has] the power to grant or withhold access to people or situations for the purpose of research" (Burgess, 1984: 48). Nonetheless, practically, it is important to recognise that when researching elites barriers may result from the respondent's physical location (e.g. often behind guarded doors) or because gaining entry to an elite milieu requires certain personal efforts, which may include purchasing

[22] In the UK, for example, there exists the Freedom of Information Act (UK, 2000), which in theory gives every person irrespective of their age, nationality or ethnicity a right to access information held by public sector bodies. However, the state can withhold information either through an Absolute Refusal, where information is exempt from the Act, or a Qualified Refusal, which is subject to the public interest test. Moreover, fees apply and can be dissuasive.

different clothes to blend in to the unspoken dress code (Burnham *et al.*, 2004: 237-238). It is sometimes necessary to convince the potential elite respondent to accept the interview, which may entail moderating how much information is shared prior to or even during the interview, both about the research and/or about the researcher. The question of limiting information about one's research does raise some ethical debates about social research and codes of conduct more generally (see Whyte, 2011).

The specific group of respondents targeted for this thesis, i.e. judges, meant a break from conventional social science methodology with its tendency to study the relatively powerless (Hughes, 1996: 77) – or as Nader (1972) has called it, "studying 'up'". The aim here was to raise questions about the disregard for corporate human rights violations in human rights law and Courts. It is frequently believed that judges are reluctant to grant interviews (Pierce, 2002). Indeed, more than half of the judges contacted for this thesis did not even bother to respond to the preliminary interview request letters or to the follow-up emails. Pierce (2002), based on his experiences interviewing judges in Australia, suggests the hesitancy of judges to grant interviews may have to do with norms and expectations about the judiciary's role:

> Some hesitate because they believe (or say they believe) in a mechanistic model of judicial decision-making: ascertain the facts, find the relevant law, and apply it to the facts. The judge simply pulls legal levers. Consequently, talking to judges about their decisions and processes is a waste of time because 'the law' – not the judge – shapes outcomes. The belief that they must remain neutral and above politics also explains why judges often refuse interview requests. Interviewers' probing might jeopardise their non-political, neutral stance. Finally, judges may not grant interviews because they fear that what they say could bring unfavourable or sensationalised attention (Pierce, 2002: 132).

When negative responses were given, refusals to the interview requests were most often justified as due to a lack of time or busy scheduling. Although two judges did admit that they were simply completely uninterested in the topic.

If the research is controversial in some way, some authors suggest it may be necessary to couch the request in fairly broad terms (Dexter, 1970). Scholars who

interview elites stress the importance of outlining their projects only very generally when first contacting respondents (*ibid*). It may be necessary to provide broad areas rather than specific questions and highlighting the potential participant's "influential role within (…)" whatever organization, rather than asking the individual's position on one particular subject. Specifications could eventually be fitted into the interview if the subject appears receptive (Lilleker, 2003: 209). Also, a particularity of elite interviews is that "under normal circumstances you only have one opportunity to interview the individual" (*ibid*: 210). And often, as was the case here, the time allotted for the interview is limited and controlled by the respondent.

For this thesis, the project was only briefly and very generally outlined in the interview request letters. The letters were standardised with only minor changes made for each participant's invitation. Dexter (1970) noted the importance of broadly describing a research project when contacting elites for interviews. Accordingly, when contacting judges at the ECtHR and IACtHR, the thesis description was intentionally limited to a few sentences. Indeed, the letter of request was quite short, including the strict minimum description of the thesis and the credentials of the researcher (e.g. University affiliation and a prestigious research grant). In fourteen of the fifteen interviews only one participant granted a follow-up meeting. This experience confirmed Lilleker's (2003) point that interviewing elites can often result in only one chance to question the respondents.

III. Empirical Research Methods

Two types of primary data were collected. Firstly, in-depth, semi-structured interviews; secondly, extensive case law from the Courts and Commissions. These included 60 cases from the ECtHR, 8 cases from the E.Comm.H.R., 43 cases from the IACtHR and 20 from the IACommHR. Interviews were conducted at the ECtHR and IACtHR with current and former judges. The thesis focused on these Courts as opposed to the still-new African Court of Human and Peoples Rights because of

their more extensive case law and long political and institutional histories. The decision was also pragmatic since accessibility was simplified through already-existing relationships with key gatekeepers. Section 3.1. details the process of interviewing, whilst Section 3.2. focuses on the case law.

3.1. Interviews at the ECtHR and IACtHR

For this research, initial contact with the respondents was made in two ways. All of the judges from both Courts were cold-contacted through a brief letter requesting an interview. At the ECtHR, interviews were gained through persistently contacting judges over the course of several months. Personal reasons bring me to Strasbourg regularly, so the organisation of the interviews was easily done at the convenience of the respondents. This was not the case for the IACtHR and the physical distance from the Court presented some initial obstacles to gaining access to the judges. However, during research conducted for my Masters dissertation in 2008 a few good contacts were made at the ECtHR, which I was able to draw upon to snowball interviews for this thesis. Contact with the IACtHR was thus facilitated through these key gatekeepers from the ECtHR.

The interviews spanned a period of eight months requiring several trips to Strasbourg (France), one trip to San José (Costa Rica), and one trip to The Hague (Netherlands). Since the ECtHR is a permanent institution, meaning its judges are required to live in Strasbourg, this facilitated sometimes-lengthy negotiations and convincing of judges to meet. However, the IACtHR is a non-permanent body, meaning the judges are only together for one to two week periods at extensive intervals during the year. This made access even more difficult, particularly due to their busy work schedules when in session, and the limitation of having only one visit to San José. All of the interviews were held in the offices of the respondents at both Courts accentuating a certain control or desired control over the interview itself. Although in Strasbourg only a few interviews were slotted between meetings, all the interviews at the IACtHR were squeezed between

sessions, allowing little time to delve into issues and requiring a more diligent steering of the interview.

Approximately 25% of judges at the ECtHR answered the request letter within the month it was sent, with 80% of those accepting or eventually accepting the interview request. Those who did not accept declined due to scheduling difficulties and despite being re-contacted several months later, maintaining a negative response. Similarly, in the context of his study of judges, Pierce has commented that "some doubtless declined because they feared jeopardising the public's belief in their impartiality, because they wanted to remain out of public view, or because they disapproved of the research" (Pierce, 2002: 135). The other 75% of judges who had not responded were re-contacted by mail and some by email. It was not possible to contact the judges by telephone directly. Those judges failed to respond upon the follow-up requests.

While the majority of judges who responded did so personally, facilitating later persuasion where they were hesitant, some judges' assistants served as gatekeepers. Contact with these gatekeepers was helpful and positively affected participation rates. In the other 75% of cases where there was no response, the follow-up letters/emails were ignored. In at least two situations, the judges admitted that they accepted the interview based on my persistence although insisting they did not think they would be able to answer my questions or be of much help for the research. This experience echoes what Stedward suggests is necessary for elite interviewing, namely "be prepared, polite and persistent" (1997: 154).

At the IACtHR, the judges were contacted in the same way, however all the interviews were negotiated through an office manager who acted as the gatekeeper at the Court. She was a permanent staff member who evidently received mail for the judges in their absence from the Court and contacted them directly. She was very helpful in securing interviews with a majority of the judges at the IACtHR. In both Courts, the majority of judges who accepted interviews were or had been involved in some way or another with the academic community

either as professors or lecturers, or who currently continued to occasionally lecture in universities as special guests. This suggests judges affiliated with the academic community are more likely to encourage and support research, even when they may not have a particular interest in the topic. A few judges accepted to be interviewed only after the interview topics were more explicitly outlined; certainly either to determine their personal interest in the subject (i.e. whether it was worth their time) or to better gauge the political sensitivity of the subject (i.e. whether they were willing to discuss the issue).

Interviews were conducted at the ECtHR between February and September 2010 in Strasbourg. Nine of forty-seven judges accepted the invitation (roughly 20%). Interviews at the IACtHR were conducted during its November 2010 session in San José. Five of the seven judges from the IACtHR accepted interviews. Additionally a former judge from the IACtHR was interviewed in April 2010 at The Hague.[23] Of the fifteen judges interviewed, no judge shared the same nationality. The interviews from both Courts provided a representative number of respondents for the research. Interviewing international human rights judges from these two Courts involved using three languages: English, French, and Spanish.[24] As a Québécoise native English speaker, I learned French from a very early age. I now live in France and am fluent in both languages. Moreover, having an Argentinean mother and a father who also speaks Spanish, I was also able to communicate fluently in Spanish, which proved highly beneficial for gaining access to the judges at the IACtHR through administrative agents, as well as the interviews themselves.

The practical organisation of interviewing was relatively simple. A personal letter on university letterhead was directly addressed to each judge in both Courts. This was important in gaining access because it conveyed institutional support of the research. In other words, judges were able to connect the research to an established organisation rather than a single individual interest. Judges were

[23] More detail of this encounter (e.g. the location of the interview) is withheld to protect the anonymity of the respondent. This respondent will be assimilated to an IACtHR judge throughout the thesis.
[24] All interviews were conducted, transcribed, and translated by the author.

invited to respond by telephone, email, or post. Fifteen responses were obtained from the ECtHR, 9 of which accepted interviews.

Only one judge from the IACtHR responded directly, with the other 5 interviews scheduled through the gatekeeper when on-site in San José. It was important to remain available between hearings because it was those (sometimes very brief) moments when the judges accepted to meet. This opportunity required lengthy waiting times at the IACtHR with the hopes of being slotted-in to meet with a judge during a break. In practice, this meant arriving at the Court at 8:00 am and leaving at around 5:00 pm when the judges left the building. Given the intensity of these interviews, it would have been preferable to conduct only one interview per day. However, given the hectic Court schedule, interviews often followed a start-stop schedule, meaning that an interview would start and after about ten minutes it would stop and then perhaps later in the day it would pick up again or another interview would take place. This fragmented interview process required a lot of focus and organisation, and it proved to be a taxing experience.

The time allotted for each interview at the IACtHR was often very short and unpredictable. The judges did not know when they would be called into session. This meant for each interview the themes and questions had to be prioritised and balanced with what had been discussed during the other interviews. Moreover, the customary niceties that help 'break the ice' had to be curtailed. This was unfortunate because these discussions had proved fruitful at the ECtHR, often facilitating the conversational flow that was aimed for. Moreover, the preambular discussions often helped incite interest in the judges, as well as give them the opportunity to communicate their knowledge by providing materials or suggestions for either cases or journal articles to consider – and sometimes, although only rarely, even other judges to contact. At the IACtHR, since there was so little time, it was particularly important to control the interview as best as possible, which was difficult in some cases. Although all of the judges allowed audio recordings of the interviews, jotting down notes afterwards became important to return to specific observations during the analysis phase.

The interviews were semi-structured, covering a series of core topics. The approach to the interviews was conversational, allowing for a comfortable and easy flow in the discussion. Topics were divided into themes and prioritised, which as mentioned above was particularly helpful on occasions where there was a limited timeframe. This facilitated the analysis process because these themes later served as the basis for the coding schema. On some occasions, it was necessary to reorder, reword, or return to questions as the interview unfolded in order to maintain a conversational flow and ensure my understanding of the responses. Open-ended questions were helpful for approaching issues the respondents may not have been thinking about (e.g. the UN *Norms* and the subsequent Ruggie Process) and aided in gauging the importance they attributed to a particular phenomena or subject. More tailored questions were used for topics the respondents were known to be familiar with (e.g. the horizontal effect or case law).

All of the interviews were recorded with the permission of the respondents, who wished their comments to remain anonymous and their identity confidential. Once the recorder was initiated, confirmation of permission to record was requested and confidentiality and anonymity were reiterated. About half of the respondents asked about the participation of their colleagues: How many? Who? How long were the interviews? etc. Although in the first few interviews notes were also taken, it became clear that this hindered the conversational style that I hoped to privilege. The respondents would speak slower and were acutely aware of the pad and pen, whilst with the audio recorder the interviews became, in some cases, almost informal discussions. And evidently, an audio recording allowed for verbatim transcriptions that facilitated following-up on comments or suggestions and crosschecking information during the analysis period. Importantly, it provided a verifiable report of the data with an exact transcript of the interview. I could return to the recording if necessary, as well as provide accurate quotes. I made a concerted effort to stop recording whenever the interview was interrupted, either by a judge's assistant or a telephone call, which was in one case specifically mentioned in appreciation. This helped in gaining confidence during the interview.

Interviews with judges addressed the jurisprudential aspects of the research (the limits on judicial decision-making, the respondents' reading of the development of law, the scope of human rights law, and so on). Once transcribed and translated into English, the interviews were analytically coded to generate 20 categories of data (e.g. human rights applicability to legal persons; willingness of the Court to consider corporate accountability, etc.). These were then organised and regrouped into a set of larger themes (e.g. horizontality, positive obligations, state-centred approach, etc.). These larger themes then served as the basis for the theoretical narrative and analysis of the interviews (see Chapter 7).

In her research interviewing Nobel laureates, Harriet Zuckerman observed that, "members of elites likely do not want their time wasted, and thus intensive preparation is important before the interview" (1972: 163-65). This was particularly relevant with regard to the case law in this study. For example, there was a noticeable development in the discussion (i.e. flow, openness, etc.) when it became clear to the respondent that the interviewer was well acquainted with the case law from the judge's Court and other international jurisprudence. Although in Zuckerman's experience with elites, she found it critical to tailor her interview schedules to the qualifications of each respondent, this was not the case here. Although the personal backgrounds of the respondents were for the most part not particularly relevant, in a few interviews the judges were experts in a particular field that was significant for the thesis; for example, an expertise in horizontality or a background in commercial or corporate law. In these situations, it was helpful to have prior knowledge of their expertise and to therefore be able to focus on particular topics or explore certain themes in more detail.

Despite intensive preparation, there were times (generally earlier in the interview process) when respondents referred to particular cases or legal doctrine with which the interviewer was unfamiliar. The difficulty lay in deciding whether to stop the discussion for clarification or to feign familiarity and continue the interview. Pierce, commenting on his experience with High Court judges in Australia, points out the "obvious advantage to admitting ignorance and

getting clarification is a gain in understanding. But the downside is interrupting and side-tracking the judge's train of thought" (2002: 138). In most situations throughout the interview process, it was better to feign familiarity and acquire knowledge afterwards, for two reasons. First, stopping the discussion for an explanation or definition risked taking the interview in another direction, and with time being of the essence, this was not ideal. Second, there was the risk of detracting from the frankness of the respondent if s/he felt an incapacity for the interviewer to follow the discussion, particularly given the age and status as a junior researcher. Of course, in some situations it was crucial to stop certain discussions so that important details were not missed or to develop particular issues.

Some wording used in the interviews acted as blocking points, such as "judicial activism", and were changed or reworded in order to continue the interview. In one such situation, a respondent from the ECtHR took offense to the term "judicial activism" because he explained it suggested a political motivation that for him was inappropriate for a judge (see Chapter 7).[25] After discussing this point, the question was reworded and the interview continued. In most cases, what seemed to be a potential blocking point in the form of awkward silences was actually quite useful because these pauses were important for the respondents to think over the questions and consider their responses. Similarly to Pierce's (2002) experience, more than a few questions elicited a first response of something like "I had never thought of that before" or "That is a difficult question", for which the respondents took the time to ruminate over.

The difficulty during the interviews was in gauging when to break the silence and how to either repeat the question or move on. In these cases, it was important to take note of the physical indicators of the respondent, for example a stroke of the

[25] Judicial activism is a judicial decision-making process that conspicuously and purposefully implicates the judge's personal or political considerations. It is contrary to the notion of judicial neutrality, which holds that judges should be politically neutral. Some judges are offended by this term because they consider judicial activism undermines the democratic process since, it is claimed, it denotes that judges make decisions based on personal preferences rather than the law. However, other judges that were interviewed declared themselves judicial activists and promulgated their position on the importance of that activism, particularly in an era of increasing executive power.

chin or tap of the pen on the table in thought. In cases where they eventually decided not to respond, the participants often commented it was because they either needed more time to consider the question or because they were too unfamiliar with the topic to adequately respond. These are both valid, but indicate cautiousness from this elite group to engage in a discussion or pronounce on a potentially sensitive subject without having all the elements to their satisfaction. This, it appeared, was because every comment is weighted and there is an expectation that the judge should be in control. In other words, there were very few judges willing to speculate or spontaneously answer a question if it was not based in fact or law. This was difficult because whilst not wanting to undermine the confidence of the respondent, I also wanted to ensure that I understood their comments and responses, and that the interview generated as much data as possible, especially their personal opinions. When this occurred the question was often reworded or an attempt was made to present the same issue in another question. This sometimes succeeded, sometimes did not.

During several interviews, the respondents turned the tide asking my personal opinion on the discussion at hand. Although a concerted effort was made to avoid this, when interviewing elites such as judges, they generally do not accept a simple attempt to rebound the spotlight on them. In the end, it was a judgement call based on how the interview had developed. Burnham *et al*., have noted, "striking the right balance [is] one of the most difficult tasks in elite interviewing, given the balance of authority between the interviewer and the respondent, and the fact that respondents tend to do most of the talking" (2004: 214). In some cases, it was useful to be more upfront with respondents, and it was useful to push the interview questions further and perhaps get more frank, personal responses. However, in other cases, it was not useful for the interview and the questions addressed by the judges were sidestepped or responded to as vaguely and as neutrally as possible.

3.2. Case Law

Researching statutes and case law is often done using legal databases such as WestLaw or LexisNexis. However, the case law research here has not used these more traditional legal databases because neither WestLaw nor LexisNexis provide blind case law searches for the ECtHR or IACtHR. WestLaw does not have any materials on the IACtHR, although it does have some material on the IACommHR. Because of this gap in WestLaw's database, it was more convenient and efficient to search directly on the Inter-American websites using the same practice. Moreover, both the ECtHR and the IACtHR publish their case law on their websites, providing comprehensive and user-friendly databases, which will be expanded upon below. I was familiar with some leading cases from my Master's thesis, which provided an important foundation for embarking upon searches on the ECtHR website.

The case search had both quantitative and qualitative elements. Firstly, it aimed to uncover the maximum number of cases involving corporations. Secondly, it sought to evaluate these cases by exploring the context (e.g. a corporation claiming its rights, or an individual or group of individuals claiming their rights against the state for a corporate harm). It also served to examine the legal reasoning behind the decisions, paying particular attention to Dissenting and Concurring Opinions written separately by the judges. The ECtHR's database is called *HUDOC*[26], whilst the IACtHR and the IACommHR case searches are attached to their respective websites. All three databases allow Boolean searches, which was helpful in narrowing the results. An exploratory search was initially done using broad terms in all three languages. It was important to search in all three languages for two reasons: firstly, not all cases are printed in each language, especially at the IACtHR; and secondly, there were some cases where the translations did not convey exactly the same meaning, again especially at the IACtHR.[27]

[26] Available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.

[27] For an example, see *Matter of Pueblo indígena de Sarayaku regarding Ecuador*, the Opinion Judge Cançado-Trindade (Spanish) and a version of his Opinion in English. In the original Spanish version Judge Cançado-Trindade mentions specifically "individuals or companies incorporated in commercial companies" (§14, author's translation), whilst the English version refers only to private individuals.

3.2.1. The European Court of Human Rights

In 2008, I completed my Master's thesis on a similar but different issue that explored direct and indirect approaches to corporate accountability at the ECtHR. This served as a pilot study for my PhD and it was an important steppingstone. Initial contact with the ECtHR (i.e. judges, librarians, lawyers, etc.) was made and in this way access was gained to key gatekeepers and an important base of case law was gathered at that time. Access was granted to both Courts' libraries without any hesitancy or difficulty. The respective librarians were extremely helpful and generous with their time. They were very helpful with the case searches and statistical information. A good relationship was established and the librarians were regularly contacted throughout the thesis, particularly during the initial research phase.

One potential drawback of using the Courts' databases is that not all of the documents are translated into English. The ability to read in English, French, and Spanish was therefore a real advantage. It facilitated the research process for obvious reasons of comprehension, direct evaluation, and analysis. I was able to access the documents myself, without using a translator, which was a time-gain; and, when writing up those cases I had control over the formulation of phrases that I considered most appropriate in English, as opposed to relying on a translation. The advantage of reading in the original language was evidenced when comparing some cases from the original version and the translation, where important but occasionally subtle discrepancies were present.

Good quality data on the ECtHR case law is easily available since cases are accessible by Internet through the Court's internal database *HUDOC*. The IACtHR and Commission have also published their Judgements, Decisions, and Advisory Reports online, which we return to in the next section. The case search at the ECtHR began with this secondary literature to identify relevant materials and was later used to inform the interviews. The sheer volume of books and articles dealing with the Court's case law can be helpful but also daunting. To refine the

search certain terms were chosen to represent overarching themes relevant to the inquiry. These terms were defined by a preliminary identification of some issues dealt with at the ECtHR, which could be extended to corporate accountability (e.g. the 'living instrument' doctrine / dynamic approach of the Convention; the positive obligations doctrine; the horizontal effect / public-private sphere; ESC rights). The themes were identified by their prevalence in the literature, including works by the judges themselves. These were often descriptive, analytical, and in some cases even quite critical of the Court's decisions. This was helpful in identifying gaps and getting a sense of the interpretation of the Convention through the case law.

Using the ECtHR library's catalogue, a search was done using terms associated with the themes. The Court's library was particularly helpful because it assembles documents relating or relevant to the Court, and has copies of most of the literature written by former and current judges. Discussions with the librarians and suggestions from them helped restrict the search and made it more efficient. Moreover, previous research facilitated the case search by providing a core of already-familiar cases. Additional cases were collected by snowballing from those cited in the decisions and judgements as well as through suggestions from the interviews.

The ECtHR has delivered more than 12 000 judgements since 1959 (Council of Europe, 2010) and has received over 150 000 petitions as of 2012. To collate this data, the Court created the *HUDOC Database*. Given the large quantity of ECtHR cases, *HUDOC* is an efficient and systematic tool to search the ECtHR's case law because it archives all materials related to the Court (and now defunct Commission). It was the primary database used to collect information on the ECtHR cases studied for this thesis. *HUDOC* contains the case law of the European Convention on Human Rights (ECHR), as well as Decisions, Judgements, and Advisory Opinions of the Court; Reports of the European Commission of Human Rights (until 31st October 1999); and Resolutions of the Committee of Ministers. These documents are available in one of the two official languages (English and/or French) and are often available in HTML, PDF and/or Word format.

HUDOC also includes (1) Case Law Information Notes, published monthly with summaries of cases of particular importance or social relevance; (2) Communicated Cases, which includes weekly lists of cases communicated to respondent states and which are considered of particular jurisprudential interest. *HUDOC* also archives all press releases (since 1st January 1999) with summaries of Judgements and Decisions delivered by the Court, information about cases-pending and the Court's activities.

Initially, a wide search through the entire database of the respective Courts was done to acquire a general idea of the quantity of potential cases. At the ECtHR, this meant searching the entire *HUDOC Collection* using its database, which quickly and efficiently yielded results. Searches can be done in the complete text using keywords and by ticking the option 'HUDOC Collection'. The search at the ECtHR produced several hundred results – a notable difference from its sister Court. However, given the difference in the number of cases adjudicated by each Court, it is not surprising that the number of results from the IACtHR was significantly restricted in comparison. Moreover, further discussed in Chapters 5, 6 and 7, the ECHR grants rights to legal persons and so opens the ECtHR to complaints by corporations.

The search was repeated in English and French to maximise the results. At the time of the search, the English terms used were 'corporation' (493 results), 'company' (5276 results), 'multinational' (34 results), 'transnational' (17 results), and 'enterprise' (650 results). In French, analogous terms were used: '*société*' (8569 results), '*entreprise*' (2195 results), '*corporation*' (113 results), and '*multinationale*' (15 results). To narrow down the results at the ECtHR, the search was restricted to only Judgements, producing 162 results, and then again further to Judgements from the Grand Chamber (GC) at the ECtHR, since this Chamber sits for particularly litigious and significant cases. Judgements from the GC are often landmark cases carrying particular weight for the Court's jurisprudence.[28] For example, the search for 'corporation' in English produced 16 results in the GC

[28] The ECtHR's Grand Chamber consists of 17 judges: the Court's President and Vice-Presidents, the Section Presidents and the national judge, together with other judges selected by drawing of lots.

as opposed to 493 results when searching the entire *HUDOC* database. These 16 cases were read in detail to evaluate the context – that is whether the corporation was the applicant or whether it was an individual claiming his/her human rights from the state against violations by a corporation – as well as to identify other relevant cases mentioned in the Judgement in order to expand the search.

The more fruitful method was to carry out a general search by keyword in the entire *HUDOC* of all cases using the research themes. Using these categories made it more manageable to navigate through the copious case law in a way that helped identify relevant cases. The search was conducted in English and French, although most documents on *HUDOC* have been well translated into both languages. To confirm the translations, cases were read in both French and English. Searches were done using translations of the same terms to ensure a comprehensive search. The search was reproduced in the same manner for all categories: the terms 'living instrument', 'dynamic approach' or 'evolutive approach' in English; and '*instrument vivant*', '*approche dynamique*', and '*approche évolutive*' in French. This search produced 40 cases, which was still significant. So, it was refined to only Judgements delivered by the GC, producing 18 results. These were systematically read to determine the context and relevance. Once established as relevant, based on the thesis' aims, the snowballing technique was used to identify references to other cases within the Judgements.

Additionally, new cases were occasionally introduced during the interviews, and particularly in informal conversations with some key relationships with judges. Indeed, one judge who showed particular interest in the research was keen to forward judgements he thought might be relevant (around 25 in total). This was extremely helpful in the process of wading through the case law and of remaining up to date. After several interviews at the ECtHR, I was given summaries of the case law that were not in the public domain. These summaries were helpful because it gave an official and concise résumé of some of the cases of interest for the thesis, and allowed for a quick discernment of whether they were relevant or not.

3.2.2. The Inter-American Court of Human Rights

The Inter-American system was initially approached in a slightly different manner due to the opportunity to meet with a former judge at the Court quite early into the PhD. An initial literature review was helpful to familiarise myself with the Court as well as to identify potentially relevant cases for that first interview. This meeting was a key juncture in the research of case law because it provided direction to the search. The respondent was very open to the research topic and made several suggestions regarding the case law that were supplemented by more in-depth secondary literature to distinguish some of the most relevant cases. This led once again to a snowballing of references to other cases and was invaluable for the efficiency of the case search. Although the IACtHR and the IACommHR each has its own database, neither parallels *HUDOC* in terms of providing a methodical search. The IACtHR and IACommHR databases do not allow for the same kind of systematic search as *HUDOC*. Despite this, the IACtHR and IACommHR websites remained the most accessible and efficient search methods for the purposes of this thesis.

Extensive secondary literature was consulted to create a substantial knowledge base before beginning the case law search, which provided a good foundation from which to begin. Corporate violations of human rights were most often cited in literature related to the Indigenous peoples of the Americas. Many of the cases have become international struggles with global notoriety (e.g. the Awas Tigni against the Nicaraguan government's timber cutting license to Sol de Caribe S.A. (SOLCARSA); the Yanomami against the Venezuelan and Brazilian governments regarding gold mining on sacred lands; the U'wa struggle in Colombia against Occidental Petroleum); these cases are discussed in Chapter 6. The literature on these struggles often referred to the cases at the IACtHR and IACommHR (e.g. Amiott, 2002; de Bakker, 2003; Gupta, 2005: 62, 105; Gedicks, 1994: 37; Shelton, 2010; Raisz, 2008). With a general idea of the most significant cases, the search was then refined within the case law.

The IACtHR has delivered 259 Decisions and Judgements since 1988 (as of March 2013).[29] The English cases are all translations from the original Spanish. The Court heard the majority of the cases more than once either on the Merits, for Reparations and Costs, for the Interpretation of the Reparations and Costs, or for Preliminary Objections. Since its inception, it has also delivered 21 Advisory Opinions (available in English and Spanish) and 111 Provisional Measures (available in English and Spanish). Some of the cases in the Provisional Measures are available in the Judgements and Decisions. The IACtHR's website search engine is accessible by Decision and Advisory Opinion, searchable by keyword. The IACtHR and IACommHR have posted all relevant internal legal materials on their respective websites, providing a comprehensive collection. Documents are in English and/or Spanish, however, unlike at the ECtHR, the translations are not always precise. Thus, reading in the original language made a significant difference in understanding the judges' emphases on certain points. Similarly to the ECtHR search, queries were launched in both English and Spanish to ensure the maximum number of results.

The comparatively small number of cases at the IACtHR also meant that the task was less daunting than at the ECtHR. The kind of sweeping search done with the ECtHR case law was not possible at the IACtHR due to the way its database is set up. Given the limited number of cases in the history of the IACtHR, I was able to go through the results individually. The search was done in English and Spanish. The English terms used were 'corporation' (9 results), 'company' (14 results), 'multinational' (2 results), 'transnational' (1 results), and later 'enterprise' (3 results). In Spanish, '*empresa*' (31 results), '*sociedad*' (3 results), '*sociedad multinacional*' (0 results), '*establecimiento comercial'* (2 results), '*sociedad comercial*' (0 results) or '*corporacione'* (2 results).

The IACtHR posts its case law directly on its website, dividing the search into *Decisions & Judgements*, *Advisory Opinions*, *Provisional Measures*, *Compliance with*

[29] The Inter-American Court delivered 21 Decisions and Judgements in 2012 compared with 1954 at the ECtHR for the same period.

Judgement and *By Country*.[30] Judge's Opinions are always included as separate documents. The Court has an "Advanced Search" option that allows a search by date and country, which is more efficient than searching by one of the above divisions if the case name is already known. An advanced search by "topic" or "word in content" is not available. The direction given by the former judge during the preliminary interview provided a good start to a few key cases that then allowed for use of the snowballing technique. The IACommHR posts its publications as Annual Reports (since 1970), Country Reports (of which there are 19), and Resolutions (of which there are 11).[31]

Conducting case searches on the Inter-American websites was slightly more laborious than on the ECtHR website given the less formal structure of its search engine, as mentioned above. Umbrella searches using key words were used to supplement these cases, for example by simply typing in "company" as the query. The main themes used in the ECtHR search were used again in the "Advanced Search" for the IACtHR and IACommHR to target specific cases: the 'living instrument' doctrine / dynamic approach of the Convention; the positive obligations doctrine; the horizontal effect / public-private sphere; ESC rights; and to a lesser extent, extraterritoriality. Snowballing was also used with reference to other cases cited within the Decisions, Judgements, Advisory Opinions, and Country Reports. Judges' separate Opinions (i.e. Dissenting and Concurring Opinions) in already-identified cases gave further examples of possibly relevant case law and were used to connect with other materials (see Appendix 2). The strategy of snowballing cases mentioned during the interviews was also applied to the IACtHR and were followed up in the case search.

3.3. Literature and Documentation

Since the purpose of primary research is to fill gaps in the knowledge base using empirical methods, it is important to have an understanding of that base before beginning. Hence, the importance of secondary research in helping to "define the

[30] Available at http://www.corteidh.or.cr/index.cfm.
[31] Available at http://www.cidh.oas.org/publi.eng.htm.

agenda for subsequent primary research by suggesting which questions require answers that have not been obtained in previous research" (Stewart and Kamins, 1993: 4). This was certainly the case where an extensive review of the literature and relevant documents reinforced the research design by drawing attention to the gap in the knowledge base on the viewpoints of judges on the lack of accountability for corporate violations of human rights in human rights law, as well as their opinions on the status of the corporation within their respective Conventions.

Gathering literature and relevant documents was done primarily in several libraries across Europe. These included Università degli Studi di Milano (Milan, Italy); the University of Liverpool (Liverpool, England); the Bibliothèque Nationale Universitaire de Strasbourg (Strasbourg, France); the United Nations Library (Geneva, Switzerland); the Oñati International Institute for the Sociology of Law (Oñati, Gipuzkoa); the ECtHR library (Strasbourg, France); the IACtHR library (San José, Costa Rica); and, the International Court of Justice's library (The Hague, Netherlands); McGill University Library (Montréal, Québec). Access to these libraries was either public – generally the case for university libraries – or was established through requests to the librarians, which were granted without any problems or any negotiation needed. The Internet was an important tool and used extensively for access to online databases for journal articles, particularly through Google Scholar and via proxy from the University of Liverpool. Another less conventional form of accessing secondary sources was through Google Books. These were useful tools because I was able to consult journals and books I did not have access to at some points throughout the research. Google Books also meant that I could peruse a book remotely before accessing it at the library or purchasing it.

Official documents from the Courts or their governing bodies are generally presented as neutral documents that are without political context. They therefore require a cautious reading supplemented by extensive background research to understand their socio-economic and political contexts.

IV. The Birth of Transnational Human Rights Culture Amongst Judges

This thesis is situated within the context of a comparative study between the ECtHR and the IACtHR (see e.g. Cowell, 2013; Hawkins and Jacoby, 2010; Letsas, 2007; Menski, 2006; Nelken, 1997; Okere, 1984; van Hoecke and Warrington, 1998 for more on comparative studies). The value of engaging in a comparative exercise in the context of this work is that it has allowed for an understanding of different interpretations of human rights law through the lens of legal pluralism.[32] Both human rights and TNCs are given meaning and have impacts locally. But, they also both act globally and are understood as concepts, and within organisations or institutions that affect national and international law. In this way, investigating the case law and the perspectives of high-ranking judges in two distinct but interrelated spheres provided a frame of reference with which to analyse the response, or lack thereof, of human rights law to the violations of human rights by corporations.

David Nelken suggests that, "legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes" (2004: 1). In other words, legal culture is the culturally defined, institutionalised processes that govern a certain group's attitudes, values and behaviour in regards to law. For the purposes here, legal culture is introduced to try to understand the role of law within given societies as it relates to violations of human rights by corporations, and specifically TNCs, and by association to the role of the rule of law (discussed below at Section V). Investigations into legal culture can also have policy implications since the interest is in examining *how* the law is perceived and lived rather than in establishing universal truths about the nature of law (*ibid*). This understanding of legal culture coincides with the particular interest here regarding legal interpretation.

Coordinating efforts to address corporate accountability within human rights

[32] Legal pluralism can be considered the recognition of the existence of normative orders other than state law.

Courts compels further discussion on issues of legal pluralism as they relate to international law, particularly with reference to the regional human rights system. Legal pluralism has been defined as "the idea that there is more than one legal order or mechanism within one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state" (F. von Benda-Beckam, 2002: 37). Sally Merry Engle has described legal pluralism in her seminal article as, "a situation in which two or more legal systems coexist in the same social field" (1988: 870). In other words, legal pluralism can be defined as the existence of overlapping normative and legal orders within the same society or community. In the case of the ECtHR and the IACtHR, the judges are constantly faced with these overlapping legal orders since they are incontrovertibly dealing with multi-tiered laws (e.g. local, national and international law) and juggling competing legal categories with human rights law (e.g. criminal or commercial law with human rights law) in their decision-making process; but the judges are also informed by other normative orders, foreign legal precedents, socio-cultural evolutions, and public expectations (see Chapters 6 and 7). These elements nurture both the subjective interpretation of each individual judge as well as the general legal culture at each Court.

V. Adjudication and Politics

In his influential work on the development of international law by the Courts, Hersch Lauterpacht insisted that, "judicial law-making is a permanent feature of the administration of justice in every society (…)" (1982: 155). Lauterpacht highlighted the fact that although by definition in our modern democracies the judge cannot legally make law, she nonetheless does so through what he called "judicial legislation". He points out that judges will vehemently defend there judgements as interpretations of existing law or treaties. However, the decision to apply one law or another or interpret a treaty in one way or other in effect changes the law or can introduce a new norm. Although Lauterpacht respects the separation of powers, he argues that, "judicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law, is a phenomenon

that is both healthy and unavoidable" (*ibid*: 156).

Although Lauterpacht is most often considered within the tradition of legal theory, it has been argued that he has had a profound influence on international relations (Jeffrey, 2006). Judicial legislation, or judge-made law, has been largely developed by the Legal Realists who maintain that adjudication is inherently subjective. Boaventura de Sousa Santos has referred to this phenomenon as "the judicialization of politics or expansion of judicial power" (2002b: 351). It is a view that has garnered much criticism, for example from legal theorist Brian Tamanaha who claimed that, "the judicial politics field was born in a congeries of false beliefs that have warped its orientation and development" (2008: 4). Tamanaha asserts that the political aspect related to judge-made law is characterised by "a distorting slant" (*ibid*: 3), which leads scholars "to exaggerate the influence of politics in judging" (*ibid*: 4). Despite criticisms, this thesis will argue that judicial ideology is in fact an important determinant of judicial behaviour (see Chapter 7), and judicial behaviour has or can have a significant impact on policy.

Human rights judges play a role in effecting change in national policy where member states' laws are incongruent with their respective regional human rights treaties: judgements from the ECtHR or the IACtHR can oblige states to modify or enact legislation (see Chapter 4 and 6). Judges are implicated in policy-making if only by counteracting executive overstepping.[33] Mary Volcansek argues that,

> Judicial policy-making (…) punctuates the role of Courts in the political system, for judicial decisions are frequently crucial catalysts directing social change. (…) [C]ourts make policies through even the simple act of choosing between competing interpretations (1992: 1).

[33] As an example, during an interview, one respondent suggested the 'new' role of judges to counter illegal or increasingly undemocratic counter-terrorism legislation from the executive (e.g. at the ECtHR see *Saadi v Italy*, 2008). In this case, under the auspices of national security and international terrorism, the UK and Italy called into question the appropriateness of the ECtHR's existing jurisprudence on the principle of "non-refoulement" (Article 3 ECHR). The ECtHR unanimously reasserted its existing jurisprudence and noted that involvement in terrorism did not affect an individual's absolute rights under Article 3.

Judges are compelled to interpret the law and sometimes create a norm where none exists. In other words, judges cannot be completely politically neutral. At some point, they must make decisions that have political implications. The influence of judicial decision-making on policy can be seen through the decisions of high Courts throughout the world of modern democracies, including the ECtHR and the IACtHR.[34] The authority of these high Courts increased dramatically in the latter half of the twentieth century, as their role expanded beyond dispute resolution to the creation of public policy (Tate and Vallinder in Weiden, 2011: 335).

The rise in prominence of international Courts has shifted the political role of judges into the international system. The success of the ECtHR,

> (…) became possible only through major reforms of the Strasbourg machinery in the late 1980s. Now all 47-member states of the Council of Europe have accepted the jurisdiction of the Strasbourg Court. And so, you find a good number of examples for the increasing role of the international judge and the usual consequence is that the international judge becomes more inclined to accept his new role. He has to decide cases and thereby influences the development of the international legal order. (…) Nonetheless, I am not always convinced that the larger states are prepared to accept this role and I do not exclude counter developments (Bernhardt, 2007: 7).

The politicisation of judges at the ECtHR has received much criticism, particularly from the UK. Lord Hoffman has repeatedly attacked the ECtHR for "aggrandising its jurisdiction". He argues the ECtHR interferes in the domestic "details and nuances of member states" (2009: 26), an opinion supported by other British critics, such as Lord Sumption who has berated the ECtHR for making political decisions (Sumption, 2011).

Although, it is argued here that judicial power cannot be separated from politics, it is not interchangeable with executive power and thus has an important and distinct perspective vis-à-vis the possibilities for human rights. The separation of

[34] European Court decisions, for example, are binding on Member States. This means, if the Court considers the state's legislation inadequate for the protection or guarantee of the European Convention on Human Rights, the state is obliged to modify its legislation in consequence.

powers is relevant because, particularly in the last decade with the 'War on Terror', judges – and specifically human rights judges – have sometimes played an important role in balancing against executive and legislative 'counter-terrorist measures', e.g. *Saadi v Italy* (2008).[35] This case demonstrates the potential for human rights Courts to be used by individuals in order to call into question the actions of the executive and legislative powers (see Chapter 2 and Conclusion). Taken in this light, judges may be considered as part of an institutional process that can develop a range of possibilities and mechanisms for counteracting political excesses. Nonetheless, the politicisation of the judiciary remains a contested and contentious issue (Malleson and Russel, 2006). The liberal tradition of Western democracies, rooted in Montesquieu's division of power in government rests on the three-pillared state, including the independent and 'apolitical' judge. Because of this, many judges are not (explicitly) willing to go too far in questioning the law.

Many judges will vigorously maintain that their role is to interpret the law, not re-write it (Lauterpacht, 1982: 155). Santos has described this position as one that concedes that "the judiciary is a reactive institution with no enforcement powers, which must apply the pre-existing law when asked to do so by disputing parties" (2002b: 337). In a democratic society, it is the role of the legislature to 'make law' and the role of the judge to enforce it. The assessment of a good or bad law is not for the judge to make, a point that was repeated enthusiastically during the interviews. But if law is made by a legislature within a neoliberal paradigm (as is the case for most – if not all – modern democracies), then the interpretation

[35] In this Case, the Grand Chamber unanimously endorsed its case law (*Chahal v UK*, 1996) reaffirming its position that deportation in the circumstances of the case breaches Article 3 ECHR (against torture and inhuman or degrading treatment). In both *Saadi v Italy* (2008) and *Chahal v UK* (1996), the Court deemed that in cases where there is substantial reason to believe that the person in question is at risk of torture in the receiving country, the principle of non-refoulement stands regardless of the individual's conduct. Although these examples exist, counter-examples abound. Most recently, the ECtHR decided in favour of the UK on a case on the use of 'kettling' during protests in Case of *Austin and Others v UK* (2012). Kettling is a police tactic for controlling large crowds during demonstrations or protests. Judges Tulkens, Spielmann and Garlicki produced a Joint Dissenting Opinion noting that kettling can be a deprivation of liberty. The dissenting judges highlighted the wording of certain statements made by the majority that "appear dangerous (…) in that it leaves the way open for carte blanche and sends out a bad message to police authorities" (§7).

of that law is necessarily influenced by capitalism. This reality forces us to question the impact this may have on judicial decision-making.

5.1. Reflections on Judicial Decision-Making in Capitalist Social Orders

The law, within the neoliberal state, has developed in a way that secures private property rights, and favours the rule of law and the institutions of freely functioning markets and free trade (Harvey, 2006: 64). In other words, neoliberal law has developed in a way that is compatible with and ultimately seeks legitimacy for capitalist social orders (see Chapter 2). This section will argue that the rule of law influences the process of adjudication since it is a leading feature of the international human rights framework that has emerged as part of an overarching and hegemonic neoliberal law.[36] Judges are expected to make their judgements within this neoliberal (and ultimately capitalist) legal paradigm. This context gives rise to questions about whether judge-made law can be explained as responsive to and legitimating the needs of a market system or the structural requirements of particular stages of capitalist development (Kennedy, 1996: 265).

5.1.1. The Impact of Neoliberal "Rule of Law" on Adjudication

One of the defining elements of neoliberalism is the 'rule of law', which is a notion that has been theorised at length in legal studies and legal philosophy (e.g. Dicey, 1915; Dworkin, 1986; Fine, 1984; Hart, 1961; Hayek, 1960; Heyderbrand, 2001; MacCormick, 2005; Raz, 1977; Tamanaha, 2004). The definition of the rule of law varies according to different nations and legal traditions. However, for the purposes of the discussion here, the rule of law can be generally understood as a legal-political regime under which the law is assumed and expected to provide protection from the discretionary rule of the state through "laws that are publicly

[36] In his appeal to reconsider the rule of law, Cameron Stewart (2004) highlights E.P. Thompson's (1977) considerations of the potential for the rule of law as a mitigating tool that provides a way to even the odds of class access to the law. The application of the rule of law may be irregular, but there is some foundation from which to challenge the legitimacy of a legal system tangled in its own web of contradictions.

promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" (UN Security Council, 2004). The rule of law governs the interference of the state in the private sphere through three fundamental principles: generality, certainty and equality (Raz, 1977).[37] The expression "the rule of law" has gained currency outside of the legal sphere and is now part of dominant political and cultural discourses, on the agendas of private and public actors, and revered by NGOs and activists (Mattei and Nader, 2008).

Mattei and Nader (2008), in their critique of the rule of law as a tool for the justification of plunder, have argued that it is a Western legal construct with a dominating corporate media rhetoric and is presented as universal although it is a culturally specific concept. They assert that although the rule of law is almost never carefully defined as a concept, it is today inextricably linked to the notion of democracy and has consequently become "a powerful, almost indisputable, positively loaded ideal" (Mattei and Nader, 2008: 11). They argue that the rule of law has become "a powerful political weapon (…) closely connected with the diffusion of Western political domination" (*ibid*). The rule of law and neoliberalism have become well-acquainted bedfellows. The rule of law is sponsored and promoted by the international financial institutions (IFIs) as a condition of their loans and has thus become an integral feature of the US-led campaign to spread and nurture neoliberal capitalism. One of the key elements of the rule of law in global politics has been an attempt to define the context of legitimacy and secure a hegemonic capitalist social order (see Chapter 2).

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[37] Some feminists have criticised the liberal definition of the rule of law for emphasising a definition of equality as 'sameness', which does not recognise the particularities of each individual or group. Iris Marion Young criticises the liberal principle of equality for not recognising the innate differences amongst people, which can lead to disadvantage and oppression. She has argued that even though

(…) citizenship rights have been formally extended to all groups in liberal capitalist societies, some groups still find themselves treated as second-class citizens. … [The] extension of equal citizenship rights [in liberal capitalist societies] has not led to social justice and equality" (Young, 1989: 264).

One of the problems with the principle of 'generality', according to Young, is that it either forces homogeneity in the public discourse it lead to the exclusion of groups not willing to adopt the general view (see Young, 1989).

David Harvey explains that according to neoliberal theory, "the state should favour strong individual private property rights, the rule of law, and the institutions of freely functioning markets and free trade" (2009: 64). Harvey's explanation of neoliberalism reflects the Weberian model that describes the market as a calculable sphere that requires legal rationality, i.e. the principle of certainty in the rule of law. The emphasis on the rule of law in contemporary politics has been made consistent with the ideals of neoliberalism, a complementarity which was described by Friedrich von Hayek in his assertion that the rule of law,

> (…) means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge (2005: 112).

In other words, Hayek argued that the role of the (neoliberal) state is to maintain a contract with its citizens that sets out certain foreseeable rules that ensure individual choice rather than the pursuit of a collective goal, e.g. social justice, welfare, etc.[38] In this way, the rule of law is a limit to governmental and judicial power, but embraces economic freedom, which is consistent with the argument that particular legal institutions are necessary for economic growth (World Bank, 1996).

In Marxism, law is the embodiment of market relationships (Mandel, 1986; Pashukanis, 1925) and the liberal construction of the rule of law reflects the logic of the market as a highly individualised and inequitable paradigm (see Chapter 3). According to Marxists, there is an inherent contradiction in the endorsement of the rule of law as a value congruent with freedom and autonomous legal

[38] Classical liberals defended policies of 'least' government as the only way to secure liberty and sustain a 'free' society. Foucault asserts that the 'state phobia' of the eighteenth century was later substituted for the 'rule of law'. He uses this as a reference point to support his conclusion that neoliberalism 'breaks' with classical liberalism by doing away with this *laissez-faire* attitude (discussed in Chapter 2). Neoliberalism demands government intervention, albeit at the level of the conditions of the market (Foucault, 2008: 138) and in the form of the 'rule of law', or formal economic legislation, and on 'social factors' (*ibid*: 141).

individuality since these are values that mirror commodity relations. Gary Teeple has argued that,

> (…) given that the law in a capitalist society is the codification of the property relations that produce enormous material inequalities, the principle of the rule of law in this system [of liberal law] stands as another means to perpetuate that inequality (2005: 11).

Teeple explains that according to Marxism, law in a capitalist society is inherently contradictory. This contradiction is seen, for example, in one of the core principles of the liberal rule of law, which is 'equality before the law'. This principle does not take into consideration the structural inequalities inherent in a capitalist legal system.

Through the neoliberal development model, and neoliberal capitalism more generally, the relationship between private and public institutions has been reorganised, calling for "a new legal framework for development conducive to trade, financing, and investment" (Santos, 2002b: 316).[39] Since the end of the Cold War, there has been a consensus of support for a new, ethical and morally committed world order, established on the basis of protecting and promoting human rights (Chandler, 2006: 2). There is an international consensus on human rights, which has influenced and transformed the international legal and political spheres, and part of this transformation has been a growing reliance on Courts and judicial means for articulating and determining core political issues. This reliance has been exacerbated by a concerted effort from Western states to uphold the post-1990 obsession with spreading democracy globally, which has included the 'universal' approach to human rights.[40]

[39] David Nelken has argued that although the rule of law is suggested to provide certainty and keep the state in check, it appears increasingly out-dated for the regulation of international commercial exchange by computer between multinationals, which he argues are sometimes more powerful than the states with which and within which they trade (2004: 7).

[40] David Chandler convincingly argues the concept of universality, inherent in the human rights approach reflects the shift in political focus towards global concerns away from the constrictions of the territorially bound nation-state (2006: 3-4). For example, to be a member of the European Union, states must have ratified the European Convention of Human Rights and accepted the jurisdiction of the European Court of Human Rights.

Santos points to the crucial role of the judicial system in achieving the rule of law in liberal democracies, claiming that "a well functioning judiciary in which judges apply the law in a fair, even, and predictable manner without undue delays or unaffordable costs is part and parcel of the rule of law" (2002b: 316). The political interest in establishing the human rights conventions and their supervisory Courts mid-20th century included the complementary outcomes of regional cooperation for security, trade, and the buttressing of economic relationships (see Chapter 4). International human rights judges are an integral part of the dissemination of neoliberal ideology with its particular emphasis on the rule of law and human rights.

Harvey has argued that neoliberal theory is concentrated on the rule of law and a strict interpretation of constitutionality, which means that conflict must be resolved in the Courts (2009: 66). The importance of mediation through the legal system and the rise of adjudication has arguably been one of the major outcomes of neoliberalism that has led to an increase in the power of judges since 1990. The growing power of the Courts and the inherent position of judges as elites, addressed above in Section II, means that they generate consent through a legitimating discourse of a hegemonic neoliberal ideology *through* law that ultimately pacifies or disciplines society (Litowitz, 2000; see Chapter 2). Law is thus a prime example of a hegemonic instrument. Douglas Litowitz argues that law "induces passive compliance in large measure through its function as constitutive of social ontology" by providing "rules for the proper construction of authorized institutions and approved activities, such as setting up corporations (…)" (2000: 517). For example, at the international level, the law recognises and regulates people who form corporations or limited partnerships, but the international community stands by refusing to regulate human rights violations by corporations with binding legislation (Chapters 3 and 5). Law has a potentially transformative role in subjecting corporations to certain rules, however the influence of corporations and particularly IFIs on the political system cannot be denied (for examples in the USA see Ryan *et al.*, 1987). Strong lobbying groups can affect legislatures, which in turn vote in laws that are implemented and upheld by the Courts.

There is an assumption that judges within capitalist social orders will adjudicate in ways that are compatible with the liberal legal paradigm that today espouses a neoliberal ideology. Judges are thus in a certain capacity limited to this liberal legal paradigm. In other words, the judicial claim to impartiality is not always irrefutable. Whether they want to or not, judges are, to a certain extent, bound by (neoliberal) law and often declare and apply rules that are not necessarily what they consider to be the right rules, or at least not ones that they would enact if they were legislators (Kennedy, 1996: 275; see Chapter 7). In this way, judges show that they are not 'neutral' and demonstrate a real difference between the law made by a judge and the law made by a legislator. What this also reveals is that although judges can sometimes interpret the law in ways that align with their ideological perspectives, the law itself must be considered within its social, economic, and political context. In this thesis, the context refers to a neoliberal framework for the ECtHR and the IACtHR generally, with distinct regional and national characteristics (see Chapters 4 and 5).

It can be argued that judicial decision-making framed within the paradigm of the rule of law creates a social order suitable for capitalist accumulation.[41] But this brings us full circle to the question outlined at the beginning of this Section regarding the role of judge-made law in legitimating market principles. The analysis of the case law (Chapter 6) and the interviews (Chapter 7) will argue that it is impossible to deny the contradictions in law, which can serve to *challenge* the overarching structure of neoliberal law, although it is unlikely that it is able to *change* it fundamentally. However, the optimism that is conveyed in a handful of interviews in Chapter 7 is that despite the existence of some laws that are grounded in neoliberal capitalist structures that petrify (or exacerbate) existing inequalities, there is room to question and even challenge them through judicial interpretation and public expectations for change.

[41] Harry Glasbeek (2007) has argued that in a capitalist political economy, law strives to satisfy capitalism's need to allow individuals to accumulate socially produced wealth, including through coercion and exploitation by the powerful of the powerless.

Conclusion

This Chapter has detailed the methods used throughout this thesis. It has developed the methodical approach to the case law and has underlined the particularities of 'studying up', including the difficulties related to accessing elite respondents in general and the challenges of interviewing judges in particular. The Chapter has demonstrated that despite some difficulties and necessary adaptations, researching the powerful remains an important and practicable endeavour for socio-legal scholars. The Chapter has articulated some aspects of the general approach used in this thesis, as well as the rationale for studying the IACtHR and the ECtHR in a comparative perspective. The justification for this comparative approach, as well as interviewing judges at IACtHR and the ECtHR is the recognition that there are firstly, inherent contradictions in law that secondly, produce spaces for legal interpretation and ways to raise questions about corporate power. The following Chapter continues to frame the research by establishing the conceptual and theoretical orientations of this thesis.

CHAPTER 2: LAW, HEGEMONY, AND HUMAN RIGHTS

The basic dialectic can be summarised as follows: the more the public domain is privatised, the more that the private is politicised and becomes a matter of public concern. Boaventura de Sousa Santos articulates this dialectic in arguing that neoliberal hegemonic globalisation, "While propagating throughout the globe the same system of domination and exclusion, has created the conditions for counter-hegemonic forces" to engage in various emancipatory social projects.

- Ronan Shamir, 2004a

Introduction

This Chapter examines the relationship between law, neoliberal hegemony and human rights as part of the theoretical framework of this thesis. The Chapter will critique the dominant discourse of human rights.[42] The point is not to reject the *purpose* of human rights, which Evans has pointed out "is to create the conditions for individuals and peoples to lead a dignified life" (1998: 2). Its objective is rather to show how human rights are compatible with neoliberal capitalism. The Chapter will emphasise the role of human rights in legitimising US-led hegemony in international law. By so doing, it will seek to reveal that this bid for legitimacy makes international human rights law both an instrument of power and an obstacle to its exercise.

The Chapter will begin by analysing how human rights have been essential to the legitimacy of US-led, Western hegemony in Section I. It will discuss the impact of the normalisation of rights with reference to "market discipline" (Gill, 1995a). These discussions will be followed by an analysis of the correlation of human rights and neoliberal capitalism in Section II. The limits of human rights are explored in Section III, with specific attention given to the role of CSR in buttressing neoliberal capitalism. The section examines the neoliberal shift in contemporary CSR that has "de-radicalised" the movement (Shamir, 2004a).

[42] Evans makes a useful distinction between *critique* and *criticism*. With reference to human rights, he argues that criticisms do not challenge accepted norms and standards. He explains, "while criticism is confined to arguments about particular theories, philosophies, beliefs, ideologies, and regimes, critique is more concerned with an investigation into the ways in which these claims to truth are achieved, legitimated, and presented as the authoritative guide for action" (Evans, 2005a: 1049).

Despite the seemingly defeatist accounts in the first three sections, the final part of the Chapter will raise the question of the potential value of the concept of human rights for counter-hegemonic struggles in Section IV. One way of exploring the counter-hegemonic potential of human rights for struggles that exist outside of legal institutions is by exploring the extent to which hegemony can be challenged from within those same institutions. As such, this Chapter will point out that human rights, as a hegemonic project, is about a bid for legitimacy which makes it a powerful tool by which to challenge and uneven undermine state legitimacy.

I. Discourses of Legitimacy: Human Rights and US-led Hegemony

Throughout the long history of the concept of rights there has been a consistent association of the notion of rights with property, e.g. the Roman's *ius naturale* (Alonso-Lasheras, 2011: 113),[43] Locke's (1991) notion of a trilogy of natural rights,[44] the development of the modern corporation and corporate rights in the 19th-20th centuries (see Chapters 3 and 5), and the link between the market and human rights espoused by neoliberal capitalism (Falk, 2000: 46-49). As such, rights have always played a role in upholding a particular form of property

[43] The Western European origins of the modern human rights regime have had a major impact on the role and use of human rights in international politics and law. The Roman notion of *ius naturale* evolved into the notion of natural rights during the Enlightenment, which placed great value upon the individual and the ability to reason. However, in *Leviathan*, Hobbes (1588–1679) argued that natural right would lead to a chaotic 'state of nature' since it was the entitlement "(…) To use [one's] own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own judgement, and Reason, he shall conceive to be the aptest means thereunto" (1991, XIV: 91). Hobbes insisted upon the need for laws to oblige people in order to avoid the anarchy inherent in the 'state of nature'. His interpretation implied that laws (obligations) mediate rights. In other words, that rights are brought forth *through* law rather than the Enlightenment's notion of inalienable natural rights.

[44] Locke (1991) famously developed his notion of natural rights as a trilogy of life, liberty and property. In the 17th century, John Locke (1632–1704) developed Hobbes' (1588–1679) theory of the 'state of nature' and expanded on the concept of the 'social contract'. Whereas for Hobbes natural rights were the outcome of the state of nature as social constructions that mitigated chaos, for Locke natural rights were inherent to humanity and thus came before the state of nature itself. Locke's definition of natural rights limited the role of government. Locke's liberalism strongly impacted both the development of rights (i.e. the American and French Revolutions and the institutionalisation of their respective 'rights' documents) and the advancement of capitalism (Wood, 2005; developed further in Section II). Locke developed a theory of property, which showed some relationship between labour and economic value (Vaughn, 1978: 311).

relations. Institutionalised human rights as a legal concept[45] emerged at the same time as neoliberalism and both gained momentum with the decline of Keynesianism in the 1960s and especially the 1970s.[46] The compatibility of human rights law and neoliberal capitalism has been emphasised by some scholars who point out that neither has adequately, if at all, addressed the structural causes of many human rights violations (e.g. Chandler, 2002; Chomsky, 2009; Evans, 1996, 2001, 2005a, 2005b; Freeman, 2006; Hunt, 1990; Rajagopal, 2006; Santos, 2002a, 2007b; Stammers, 1993, 1999; Teeple, 2005).

Neoliberalism is distinguished by a state that is strong in ways not necessarily advertised or promoted by its pundits.[47] David Harvey has defined neoliberalism as,

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[45] The Enlightenment concept of natural law gave way to positive rights with the institutionalisation and internationalisation of human rights that emerged after the Second World War with the Universal Declaration of Human Rights (UDHR) in 1948 (Donnelly 1986; Krasner 1982). Natural rights – problematized during the Enlightenment as a political and philosophical concept – were legislated and transformed into public international law. In this way, human rights became a *legal* discourse (Evans, 2005a; see Section 1.2.). Regional human rights treaties emerged in the tradition of the UDHR in the subsequent years after the War, i.e. the ECHR (1951) and the American Convention on Human Rights (ACHR) (1969), further discussed in Chapter 4.

[46] Keynesian economics introduced a new role for government in buttressing the economy (Harvey, 2007: 27-28). To ensure domestic peace and tranquillity post-1945, some sort of class compromise between capital and labour had to be constructed (Harvey, 2005: 10). Harvey argues that there was an "acceptance that the state should focus on full employment, economic growth, and the welfare of its citizens, and that state power should be freely deployed, alongside of or, if necessary, intervening in or even substituting for market processes to achieve these ends" (*ibid*). It was the age of Keynesianism, also known as welfare state liberalism and sometimes dubbed 'embedded liberalism' (*ibid*: 11; see Ruggie, 1983). Harvey goes on to explain that the fiscal and monetary policies associated with Keynesianism were widely deployed to dampen business cycles and ensure reasonably full employment. Keynesianism remained the principle economic theory in the West until the 1970s. The transition to neoliberalism coincided with a variety of 'crises' (e.g. 1974 oil crisis, the Vietnam War, decolonisation, etc.) that saw the undoing of the Keynesian welfare state.

[47] In the neoliberal paradigm the market is not something produced spontaneously (as was the belief of the classical liberals), but is the effect of an internal logic: competition is at once the result of lengthy efforts from the government and its objective (Gramsci, 2005; Foucault, 2008; Polanyi, 2001). Harvey's definition of neoliberalism is thus a politico-economic theory distinct from classical liberalism (see also Bourdieu, 1998a, 1998b; Chomsky, 1999). Michel Foucault described the neoliberal principle that "government must accompany the market economy (…) one must govern *for* the market rather than because of the market" (2008: 120-121, emphasis added). Foucault's thesis parallels Polanyi's earlier point that "social protection was the accompaniment of a supposedly self-regulating market" (2001: 211), or an effect of what Polanyi called the "double movement". Polanyi identified that government interventions are not necessarily directed at economic processes, but are centred on complementing policies, namely social factors, an idea later applied to neoliberalism by Foucault. In other words, the intervention in society or social policies is to ensure competitive mechanisms that lead to a general or overarching regulation of society by the market. Similarly, Gramsci also asserted that "*laissez-faire* too is a form of state 'regulation', introduced and maintained by legislative and coercive means. It

> (…) a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks, the state should not venture. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit (2005: 2).

In other words, although neoliberalism promotes a minimalist government, the state remains a vital actor since "neoliberalism cannot function without a strong state and strong market and legal institutions" (Harvey, 2005: 117; also Tombs and Whyte, 2003a; Wood, 1998a).[48]

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is a deliberate policy, conscious of its own ends, and not the spontaneous, automatic expression of economic facts" (1971: 160).

[48] Ellen Meiskins Wood (1998a) has also commented on the continued importance of the state in capitalist social orders, in opposition to theories such as Strange,s (1996) that claim the state is no longer the defining power (Strange, 1999). Wood has argued that,

Contrary to much conventional wisdom today, "globalization" has made the state not less but more important to capital. Capital needs the state to maintain the conditions of accumulation and "competitiveness" in various ways, including direct subsidies at tax-payers' expense; to preserve labor discipline and social order in the face of austerity and "flexibility" to enhance the mobility of capital while blocking the mobility of labor; to administer huge rescue operations for capitalist economies in crisis […] – operations often organized by international agencies but always paid for by national taxes and enforced by national governments. Even the imperialism of the major capitalist states requires the collaboration of subordinate states to act as transmission belts and agents of enforcement. "Neoliberalism" is not just a withdrawal of the state from social provision. It is a set of active policies, a new form of state intervention designed to enhance capitalist profitability in an integrated global market (Wood, 1998a).

It is a convincing argument that encourages us to bear in mind that the continued role of the state in the market (see also Tombs and Whyte, 2003a). Geoffrey Underhill has also cautioned against dismissing the role of the state in the market. He notes, "the nature and scope of markets are the subject of on-going political controversy, and […] it is difficult to separate market forces from the political decisions which unleash them" (Underhill, 1991: 221). The state intervenes in the market and therefore has a responsibility with regards to the human rights transgressions committed by corporations themselves existing because of laws ratified by the state. The state is responsible for enacting, implementing and enforcing laws. It is through particular legislation that the corporation exists and so it is worth thinking imaginatively about those laws and concepts within

The implementation of neoliberal policies, and the global expansion of neoliberal capitalism post-1990, has been legitimised through "the assumption that human rights are inherent to democracy itself" (Falk, 2000: 47).[49] These policies have been designed and operationalized with the guidance of US-led, Western states (see Falk, 2000; Klein, 2007) also referred to as the "G7 nexus"[50] (Gill, 2003, 2013). Evans has argued that since 1945 and increasingly post-1990,

> The project for universal human rights was intended to provide a normative context that supported the emergent post-war political and economic order. Although the attempt to create a human rights regime was often punctuated by conflict, disagreement and discontent, the politics of rights was often masked by the creation of international law, which suggested global consensus and steady 'progress' towards a rights-protected global society (2005b: 35).[51]

In this way, the bid for legitimacy through human rights law promotes a particular conception of rights that is elitist and which has been integral to the pursuit of US-led hegemony. At the same time, this bid for legitimacy can be a source for undermining the state by empowering activists and other individuals to challenge particular forms of disempowerment by appealing to human rights (see Rajagopal, 1999 for an analogous discussion; see also Section IV). In other words, one way of exploring the potential for human rights struggles that exist

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law. Corporations make use of the law to their benefit, including in cases of human rights, and so it is important to think creatively about law and explore the creativity of key legal actors to scrutinise the gaps in human rights law for corporate violations.

[49] Various IFIs have been responsible for large-scale privatisations, deregulation and the global expansion of free trade through the imposition of legal rules in domestic economies and economic restructuring (Douzinas, 2000).

[50] Gill (2003; 2013) defines the "G7 nexus" as the political elite responsible for agenda setting and policy-making processes globally, generally revolving around the interests of the USA. He earlier argued the importance of critically studying the role of the G7 since "it supplanted the US-USSR summits and defines the conditions necessary for entry into the 'core' institutions in the global power structure" (Gill, 1992: 158).

[51] Marie-Bénédicte Dembour comments, "the idea that human rights are universal flies in the face of societies which are based on social, political and ethical premises completely foreign to the liberal – and possibly market – logic of human rights" (2006: 3; see also Evans 2005b). Similarly, Mutua (2002) critiques the human rights corpus and its emphasis on 'universality' as a fundamentally Eurocentric paradigm and unabashedly Western ideological construction. Mutua argues the liberal democratic definition of democracy postulated by the human rights doctrine is reductionist and based almost exclusively on the right to vote. He describes human rights as expressed through images of the 'saviour' overthrowing the 'savage' to restore human rights to the 'victim'.

outside of the legal institutions is to explore the extent to which hegemony can be challenged from within those institutions and by using the law.

Evans has commented that, "any assessment of the dominant idea of human rights must include an analysis of interests, power, and hegemony" (1998: 1). Indeed, the doctrine of human rights has been entirely consistent with neoliberalism, and as will be shown below, it produced a particular hierarchy of rights that marginalised many of the rights affecting the day-to-day lives of most of the world's population (see Section 2.1.). The question of legitimacy is thus integral the US-led hegemonic project since states that rely only on coercion or individual payoffs are generally considered to be unstable (Gilley, 2006: 499). International law continues to underscore a 'global consensus on human rights', addressed with relation to the Ruggie Process in Section III. However, as Khoury and Whyte (*forthcoming*) point out "at best, a notion of consensus is maintained at a level removed from the public sphere, and has taken on the character of an intra- as opposed to inter-class consensus".

Santos and César Rodriguez-Garavito (2005) have commented on the methodological contributions made by socio-legal analysts using the concept of hegemony, particularly in empirically grounded accounts of,

> (...) complex transnational mechanisms whereby elite lawyers and economists in the North and the South, NGOs, US foundations, state officials, and transnational economic elites have interacted to spread 'new legal orthodoxies' around the world" (2005: 9).

Examining the relationship between law and hegemony provides a framework with which to scrutinise the inability of the international community of states to adequately address corporate violations of human rights. Drawing on Gramscian notions of hegemonic moral leadership, this Section will argue that the dominant human rights paradigm seeks a particular consensus consistent with US-led neoliberal hegemony.

1.1. Law and Hegemony

Litowitz (2000) asserts that hegemony is a relevant concept to analyses of law. He contends that hegemony "deserves broader consideration from the legal academy because it is a critical tool that generates profound insights about the law's ability to induce submission to a dominant worldview" (Litowitz, 2000: 516). Hegemony, in the definition given by Italian Marxist Antonio Gramsci,

> (…) includes firstly the 'spontaneous' consent given by the great masses of the population and secondly the apparatus of state coercive power which 'legally' enforces discipline on those groups who do not 'consent' either actively or passively" (2005: 12).

Thus, according to Gramsci, hegemony requires both consent from the general population as well as the coercive power of the state. Evans, inspired by Gramsci, has defined discipline[52] as

> (…) a mode of social organisation that operates without the need for coercion. (…) It is a modernist power that imbues the individual with particular ways of thinking, knowing, and behaving, thus instilling modes of social consciousness that make social action predictable (2005a: 1054).

In this way, discipline determines or moulds commonsense[53], further discussed below.

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[52] The development of the concept of discipline can be attributed to Michel Foucault (e.g. 1995, 2003, 2008). Foucault described discipline as a mechanism of power, which regulates the behaviour of individuals within any given society or group. He identified this power through the regulation of space, time, and people's behaviour. Foucault famously connected the concept of discipline to systems of surveillance (see *ibid*). Noteworthy was Foucault's emphasis that power is not discipline but rather discipline is one way through which power is exercised, for example in establishing hegemony, explained later in the Chapter.

[53] Gramsci's 'commonsense' is "the traditional popular conception of the world – what is unimaginatively called 'instinct', although it too is in fact a primitive and elementary historical acquisition" (Gramsci, 2005: 199). Commonsense refers to the processes of socialisation through daily routines that lead to the acceptance and internalisation of the dominant ideology by the masses.

Foucault developed the argument that together, consent and coercion constitute elements of a disciplinary society, through both self-discipline and surveillance (see for example Foucault, 1995, 2003, 2008).[54] Foucault's concept of discipline has been used by Gill (1995a) to explain what he calls "market discipline". Market discipline stresses economic growth and development, deregulation, the free market, the privatisation of public services and minimum government (see Gill, 1995a; also Evans, 2005b: 41-51 for a discussion). It is "a set of normative relationships with global reach, supported by discourses of truth, and widely accepted as 'commonsense'" (Evans, 2005b: 43-52).

The role of law in society, in Gramsci's analysis, corresponds to two axes of power: physical force and hegemony. Gramsci reasoned that,

> If every State tends to create and maintain a certain type of civilisation and of citizen (and hence of collective life and of individual relations), and to eliminate certain customs and attitudes and to disseminate others, then the Law will be its instrument for this purpose (…). It must be developed so that it is suitable for such a purpose – so that it is maximally effective and productive of positive results (2005: 246).

Gramsci argued that by ensuring an acceptance and compliance with a dominant set of practices and institutions *without* having to resort to physical force, the dominant group's beliefs and practices would become part of the commonsense; and, thus serve to legitimate the state. In other words, hegemony is achieved when the dominant group's perspective is taken for granted as universal and natural. The dominant group must therefore exert not only physical power but also moral and intellectual leadership.

Bob Jessop (1990: 51) suggests that key to intellectual, moral and political leadership is creating a common worldview that is adequate to the needs of social and economic reproduction. This common worldview is created, in part, through a complex system of ideological apparatuses, within which Gramsci (2005)

[54] Foucault's analysis of law has been critiqued for displacing law as a disciplinary mechanism (see Hunt and Wickam, 1994; Santos, 1995; for an opposing view see Tadros, 1998). In Hunt's (1992) analysis, he argues that Foucault claimed that although law was the predominant form of power in pre-modern societies it was superseded by discipline and governmentality and was thus debased (or replaced) from its dominant role in disciplining society.

includes the Church, trade unions, schools, mass media, (political) parties, but also through the pervasive role of intellectuals. For Gramsci,

> (…) [the] juridical problem is a problem of education of the masses. This is precisely the function of the law in the State and in society; through 'law' the State renders the ruling group 'homogenous', and tends to create a social conformism which is useful to the ruling group's line of development. (…) The general activity of law (…) involve[s] directing civil society, in those zones which the technicians of law call legally neutral – i.e. in morality and in custom generally. In practice, this problem is the correspondence 'spontaneously and freely accepted' between the acts and the admissions of each individual, between the conduct of each individual and the ends which society sets itself as necessary – a correspondence which is coercive in the sphere of positive law technically understood, and is spontaneous and free (more strictly ethical) in those zones in which 'coercion' is not a State affair but is effected by public opinion, moral climate, etc. (1971: 195-196).

Maureen Cain (1983) expands on Gramsci's brief discussion of law, arguing that hegemony transpires with the achievement by the dominant class of both political and ideological control. She explains that, "Political control is not *by definition* gained until consent or ideological control is achieved" (Cain, 1983: 99). Law, Cain argues, is a crucial element to the creation of the political and ideological elements of hegemony because it serves to unify the emergent dominant class and its allies, as well as to ensure conformity and consent by the masses (1983: 101; see also Chapter 3).

Evans suggests that hegemony in the post-1945 period "has implied the existence of a single, dominant state possessing both the material capability and will to maintain world order in its own interests" (1998: 5). He argues that the USA mobilised public support for its new global economic and political role post-1945 by promoting human rights as the moral foundation for the post-war era.[55] In this

[55] Evans (1998) contends that the USA emerged as the hegemon after the Second World War in part because of its material capabilities – the War was fought in Europe and Asia, leaving the USA mainland unscathed. Evans explains that because it possessed 70% of global financial assets and maintained a high rat of industrial production, the USA was able to devote resources to establishing a stable world order safe for American exports of goods and capital. In order to achieve its aims to secure its dominant economic position, the USA needed to develop strategies that protected its access to natural resources, cheap labour and markets (*ibid*: 6). The USA thus promoted human rights as a universal principle related to ideas of individualism, freedom and the creation of a global free market economy.

way, the discourse of human rights has been a source of legitimacy for US-led hegemony. As we have seen, any attempt to establish hegemony in the Gramscian sense requires not only coercive force but also a legitimation of rule through popular consent. However, the concept of human rights remains a disputed notion, exemplified by discordant and competing understandings of rights, e.g. collective rights demanded by Indigenous populations (see for example Newman, 2007).

There are oppositions to the doctrine of human rights defined by elites who are often far removed from the general population. These competing understandings of rights may offer the possibility for counter-hegemonic struggles to challenge the bids for hegemony from what Sklair (2002: 144) calls the "transnationalist capitalist class" (see Section IV).[56] Khoury and Whyte (*forthcoming*) argue that despite the appearance of this "transnational capitalist class" that is capable of developing bids for hegemony, it still does not have the structure that is necessary for securing popular consent. This deficiency, they argue, indicates that power is reproduced by elites in *fora* at the international level that are relatively separate from other sections of civil society and are certainly operating in spheres removed from the general population (see for example Section III on the Ruggie Process).

The next Section further explores the connection between human rights and US-led hegemony. It briefly examines the impact of the end of the Cold War on the theory and practice of human rights and reviews the evolution of the legal paradigm of human rights from a set of moral principles to a vehicle of neoliberal hegemony.

1.2. Human Rights: The Legitimation of US-led Neoliberal Hegemony

[56] The "transnational capitalist class" consists of four interconnected groups: "those who own and control the major corporations and their local affiliates, globalizing bureaucrats and politicians, globalizing professionals, and consumerist elites" (Sklair quoted in Khoury and Whyte, *forthcoming*).

During the 20th century, human rights gained political purchase as a source of legitimacy for global expansion and became the crux of ideological power struggles. During the Cold War, the capitalist West reified human rights. Western definitions of human rights became synonymous with democracy and freedom. The Soviets argued that human rights served a Western capitalist and imperialist agenda.[57] With the dissolution of the Soviet Union in 1990 there was a transfer of the ideological 'truth' of human rights to the Western credo of democracy and freedom. Costas Douzinas argues that the disintegration of the Soviet bloc and the 'triumph' of Western democracy has meant that, "human rights have become the symbol of superiority of Western states, a kind of mantra, the repetition of which soothes the painful memory of past infamies and the guilt of present injustices" (2000: 153-54). The development of a global human rights regime coincided with the global expansion in the 1990s of the neoliberal framework known as 'the Washington Consensus'.[58] The values of human rights law manifest significant contradictions since, as some critics point out, these are values espoused and promoted by the same states and organisations that perpetrate human rights violations (Chomsky, 1999; Santos, 2007b; Teeple, 2005).

The emblematisation of human rights as a product of the new democratic world order enabled the dissemination of the neoliberal zeitgeist of equality, rationality, individuality, liberty, and private property, which has allowed for an accommodation of capitalist values above any other.[59] Neoliberals champion a

[57] The imperial/neo-colonial view of human rights has resurfaced amongst critics who argue that military interventions aimed at overtaking or creating new markets are justified using the discourse of human rights (e.g. Chandler, 2002; Chomsky, 2003; Falk, 2000).

[58] The policies of the Washington Consensus included deregulating and liberalising trade. It required that states implement market-friendly policies and it created privatised economies amenable to foreign direct investment in the newly 'democratised' states. In his critique, Harvey comments that,

It has been part of the genius of neoliberal theory to provide a benevolent mask full of wonderful-sounding words like freedom, liberty, choice, and rights, to hide the grim realities of the restoration or reconstitution of naked class power, locally as well as transnationally, but most particularly in the main financial centres of global capitalism (2005: 119).

In the already capitalist, democratic states, neoliberalism has been exercised as a hegemonic project to enforce transnational trade rules and dis-embed capital from the constraints of the Keynesian system (Harvey, 2005) otherwise referred to by John Ruggie (1982) as 'embedded liberalism'.

[59] These principles are premised on the notion that law can equalize: no one is naturally subordinate to anyone else. A popular thread of moral philosophy in the liberal tradition denies

selection of human rights that correspond to these values, promoting civil and political rights over economic, social and cultural rights (see Section II). Evans explains that these civil and political rights "emphasise the freedom of individual action, non-interference in the private world of economics, the right to own and dispose of property, and (…) free trade" (2005b: 80). Human rights law thus defines a notion of freedom, which has been promoted as the absence from external constraints in the market. In practice, this has meant the guarantee of market 'freedom', i.e. minimum state regulation of the economy (Douzinas, 2013).

The end of the Cold War was said to mark the beginning of a period where the international community matured from an agenda of standard setting to an agenda concerned with methods for implementing human rights (Evans, 2005b: 25). The post-1990 world has witnessed the disappearance of the Soviet bloc as an obstacle to ideological consensus. However, Evans presents the argument that power and interests define the dominant conception of human rights in any historic period and therefore the problems of human rights remain unchanged despite changes to world order (2005b: 26).[60] Evans' position is grounded in a reflection on the conditions and complexities that have emerged with globalisation,[61] new understandings of hegemony, and questions about the legitimacy of an international juridical order.[62]

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systemic inequalities stressing solutions to injustice through 'distributional equality' (Dworkin, 1978) or 'distributive justice' (Rawls, 1971; 1999).

[60] Philip Alston has argued that the causes of the UN's failure to fulfil the promise of human rights have not changed in the post-Cold War world: the failure to afford economic and social rights parity with civil and political rights; the failure to acknowledge the limitations of international law; the failure to develop new techniques for preventing violations; the failure to come to terms with a dynamic international system, and the failure to confront the tensions between universal and particular claims (Evans, 2005b: 26).

[61] References throughout this thesis to 'globalisation' imply 'neoliberal globalisation', which Gill defines as "a single, increasingly integrated and universal world economy largely operating across state frontiers ('transnationally') and therefore increasingly across the frontiers of state ideology." Thus, he goes on, "globalisation is part of a broad process of restructuring of the state and civil society and of the political economy and culture. It is also largely consistent with the world view and political priorities of large-scale, nationally mobile forms of capital" (Gill, 1995a: 402). Although there are arguments in favour of the positive benefits of economic globalisation (job creation, stimulation of economic activity, increased numbers of women in the labour force etc.), this thesis contends that the positive aspects of economic globalisation are ephemeral and without sustainable development and social justice policies their benefits cannot be considered as outweighing the damages.

[62] Robert Cox (1995) contends that the post-1990 hegemony exists in the *nébuleuse*. He describes the *nébuleuse* as a group of formal and informal institutions that exist without democratic constraints (see also Gill, 1992). The *nébuleuse* includes organisations like the IFIs (World Bank,,

Evans constructs his critique as an analysis of the *politics* of rights. He contends that the hegemony of legal discourse in human rights marginalises the political discourse. Political discourse, he suggests, "seeks to contextualize the prevailing values expressed in law and philosophy" and "is therefore concerned with questions of power and interests associated with the dominant conception of human rights and the expression of those interests as legal and philosophical 'truths'" (Evans, 2005a: 1052). The outcome of the hegemony of legal discourse, Evans (2005b: 54) elsewhere argues, is the support of a particular conception of rights that acts to mask power relations and stifles the possibility of engaging in critique. He positions himself from a standpoint that seeks to unmask the political narrative of human rights in order to raise questions about the hegemony of international human rights law. In this way, Evans aims to show that "international law, institutions and regulations associated with human rights transmit a set of ideas associated with notions of freedom *and* a set of ideas that reflect relations of power and dominance" (2005a: 1068).

Stephen Gill (1992) has argued that since the end of the Cold War, capital accumulation has become a global process with a 'reconstituted' form of hegemony that may remain located in core countries (US-led, G7 global political power structure) but seeks to integrate periphery countries into a global capitalist social order. Gill has dubbed this phenomenon the 'new constitutionalism', which he defines as the political project of attempting to make neoliberal capitalism the sole model for future development with elements that add to a further disciplinary aspect of the post-1990 world order (Gill, 1995a; 1995b; 1996).[63] The effects on the state of globalisation and the 'new

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the IMF, the WTO, the Trilateral Commission, Davos meetings and the G7); according to this theory, "rather than understanding hegemony as a state-centric core-periphery phenomenon, hegemony describes a complex of non-territorial, core-periphery social relations that generate and sustain new patters of economic growth and consumption" (Evans, 2005:26-27).

[63] Gill draws on Foucault's notion of 'discipline' to define the increasing marketization of social relations as driven by a set of disciplinary practices (see for example Foucault, 1995, 2003, 2008). He calls this "disciplinary neoliberalism" which he defines as "institutionalised at the macro-level of power in the quasi-legal restructuring of state and international political forms: the 'new constitutionalism'" (Gill, 1995a: 412). Gill goes on to explain that this 'new constitutionalism' "is the imposition of discipline on public institutions" (*ibid*). Thus, part of disciplinary neoliberalism is an effort to define the public system of regulation and governance through a system of policy

constitutionalism' are significant for human rights. For one, the imperatives of the principles of free market capitalism are driving forces that continue to marginalize economic, social and cultural (ESC) rights at the expense of civil and political freedoms (see Section 2.1.).[64]

The dominant human rights discourse, with its strong emphasis on the protection of individual liberty and private property, is a source of legitimation for neoliberal practices (Evans, 2005b). However, the logic of neoliberalism is contradictory and is open to critique.[65] Symptomatic of this contradiction is the failure of neoliberalism, as a political and economic project, to deliver its promise of sweeping economic growth. Instead, there has been an increasing polarisation between the poor and the wealthy both within countries and between them. Harvey has pointed to the "universal tendency to increase social inequality and to expose the least fortunate elements in any society (…) to the chill winds of austerity and the dull fate of increasing marginalization" (2005b: 118). Referring to human rights as "global moral and civil rules" Douzinas (2008) asserts that they "are the necessary companions of neoliberal capitalism". Neoliberalism has thus formulated an organic link between the spread and anchoring of the market-economy in global economic relations and the internationalisation of human rights.

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appropriation and surveillance mechanisms in the form of transnational and international institutional frameworks (e.g. IFIs, UN, OECD, NATO, etc.).

[64] The post-1990 conditions of globalisation and the dominance of a neoliberal human rights paradigm has perpetuated and amplified a tradition of individualism – including a system of individualised responsibility (e.g. criminal responsibility for human rights violations). One outcome has been to deflect attention from the structural causes of violations (Evans, 2005b: 30). Evans expands on the impact of the socio-economic and political structures that support the interests of particular groups, noting that,

[…] Investigations into the causes of human rights violations seldom go beyond the assumption that all violations can be explained by reference to the wilful acts of evil, brutal, despotic and cruel individuals, excluding the possibility, for example, that the principles of international politics, the rules that govern world trade, or the principles of the global economic order itself may also lead to human rights violations (2005b: 31).

He points out that raising questions about the systemic and structural causes of human rights implies scrutinising the implementation of human rights. The reason being that a system focussed on individual responsibility does not consider the structures that may be responsible for the causes of violations.

[65] Gill points out that neoliberalism is contradictory because "it promotes global economic integration (and hence the need for global public goods), but also generates depletion of resources and the environment, as well as undermining traditional tax base and the capacity to provide public goods" (1995a: 419).

The next Section explores in more detail the correlation between human rights and neoliberal capitalism. It will argue that the contradictions in human rights law are attributable to the position of human rights within the context of neoliberal capitalism defined by market discipline.

II. The Intimate Association of Human Rights Law and Neoliberal Capitalism

The dominant human rights regime upholds the principles of equality, liberty, individuality, and private property. These principles are manifested through civil and political rights and have been operationalized through human rights law in ways that support the private accumulation of capital. This Section argues that there has been a deliberate construction of human rights law to complement capitalist social orders. Post-1945 there was an ideological struggle between the liberal West and the Soviet bloc. This struggle manifested at the UN as a campaign to define rights and came to a head with the "hierarchization" of rights[66] along the lines of a private/public sphere divide, explored in Section 2.1. The institutionalisation of the hierarchy of rights is critiqued within the purview of the normalisation of a neoliberal human rights discourse discussed in Section 2.2.

2.1. Constructing a Hierarchy of Rights

ESC rights were highly debated during the Cold War due to the ideological rivalry over their status – the Communist bloc wanted them included as operative human rights, the capitalist West did not (Donnelly, 1998: 7).[67] However, "with

[66] The Franco-Czech jurist, Karel Vasak proposed the division of human rights into three 'generations' in 1979. He divided human rights according to the three watchwords of the French Revolution: Liberty (civil and political rights), Equality (ESC rights), and Fraternity (collective rights) (Fernando, 1999).

[67] The UDHR was adopted as a set of non-binding, 'universal' norms and principles with a more or less inclusive gamut of rights. It is an international "declaration", which indicates that it was intended to exert moral and political influence rather than constitute a legally binding instrument (Steiner, Alston and Goodman, 2008: 135). Evans (2005b) has noted, the UDHR was only accepted by the USA because of its non-binding character. He suggests that as the debate at the UN turned to the creation of legally binding international law, the USA sought to debase the importance of

the end of the Cold War and the transition of most of the former socialist countries to capitalism, the structural incompatibility between individual rights and their socio-economic systems disappeared" (Manokha, 2009: 437). The ideological division between the 'private' (economic) and the 'public' (political) sphere was maintained. The rhetorical justification for the priority given to civil and political rights is that they require only that states *abstain* from violations (Donnelly, 2013). The rationalization of the 'cost' of ESC rights – and collective rights – has been that because they extend into the domain of the so-called 'private' sphere, ESC rights require state intervention to ensure their protection and guarantee. The argument is thus that negative rights require "nothing more than that the state refrain from incursions on personal liberty and bodily integrity" (Donnelly, 2003: 30). However, with minimal scrutiny one can identify weaknesses in that line of reasoning, namely that the means to guarantee negative rights is positive action. Civil and political rights require a legislature, police, a legal system, prisons, Courts and taxation system, which involve state allowances (see Evans, 1999: 32; also Dembour, 2006: 79). Concretely, arguments against ESC rights are rooted in the belief that their protection and guarantee require active state intervention in ways that interfere with the 'freedom' of the market (Evans, 1999).

The international human rights regime has served to embed the separation of civil and political rights from ESC rights in law through its institutional framework. In this way, human rights has become dominated by a legal regime that focuses on civil and political rights, whilst marginalising the philosophical

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the formal human rights debate and attempted to use its hegemonic power to assert a conception of human rights that supported its own interests within the post-war political economy (Evans, 2005b: 24). Exemplifying the USA's exertion of hegemonic force, during the negotiations for the UDHR, Eleanor Roosevelt, the American Representative before the General Assembly, reminded Member States that,

[The United States of America] has made it clear in the course of the development of the declaration that it does not consider that the economic and social and cultural rights stated in the declaration imply an obligation on governmental action. (…) This in no way affects our whole-hearted support for the basic principles of economic, social, and cultural rights set forth in these articles. In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations (Roosevelt, 1948).

and political discourses of rights. Thus, as Evans (2005b) explains, the international human rights regime eschews the possibility to problematize rights by confining disagreements within a framework that seldom attracts critique. Evans points out that the result of this is that "inasmuch as the politics of rights is considered at all, what passes for politics is framed within a set of rules that are incontrovertibly accepted, while the framework itself remains unquestioned" (*ibid*: 49). Elsewhere, Evans has argued that "the move to a global political economy, which is in part legitimated by a particular conception of human rights, has seen the creation of a regime for supporting rights associated with particular interests rather than the interests of all" (2011: 18).

The privileging of civil and political rights over ESC rights by the dominant states, i.e. Western, US-led liberal democracies, is symptomatic of an international human rights regime that supports market discipline and the expansion of corporate rights (see Chapter 5). This hierarchization of rights has provided the structure in which human rights law can be used to legitimately promote a market perspective that offers moral and normative justifications within the current global political economy (Evans, 2011: 52). Human rights law is promoted as the solution to violations but it does not call into question the systemic causes of those transgressions. The silence of human rights law on the causes of violations is part of the normalisation of a specific discourse of human rights. The next Section addresses the consequences of the normalisation of human rights within a neoliberal paradigm.

2.2. The Normalisation of Human Rights

The post-1990 discourse of human rights has produced a global norm that informs the actions of agents based not on aspirations of mitigating inequalities but on keeping a status quo that enables market freedom. This discourse of human rights has provided the premise for reputable Business campaigns[68] and

[68] A plethora of corporations have adopted CCCs (e.g. Walt Disney Company and Affiliated Companies; Starbucks Coffee Corporation; Occidental Petroleum Corporation; as well as a slue of

the justification for unilateral and collaborative interventions into other states[69] all in the name of the defence and protection of rights. The human rights euphoria has stimulated a kind of aggrandisement of endorsing global human rights, which has had a curious effect on various stakeholders. It has become increasingly evident that sometimes agents (state leaders, civil society activists, business executives, academics, journalists, etc.) find it necessary to alter their behaviour and/or declare their adherence to human rights without coercive force.[70] Ivan Manokha (2009) proposes that in the late modern world, human rights constitute a global norm with reference to which agents are evaluated and increasingly evaluate themselves. In other words, there has been a 'normalisation' of human rights. In this way, human rights fulfil a disciplinary role by constituting a body of norms that construct equality, liberty, rationality, individuality and the free market.

Evans (2005a) explains that the normalisation of the hierarchy of rights within human rights law is compatible with the objectives of neoliberal hegemony. He argues that human rights treaties offer a legal response to public demands for human rights that do not challenge the prospect of achieving economic growth and development, since governments are first and foremost accountable to market forces (e.g. debt structures, structural adjustment plans). The political dominance of neoliberalism since the end of the 20th century has defined and endorsed a specific set of human rights, which – as Marx and Engels (1999) suggested about capitalism generally – "represent its interest as the common interest of all the members of society". To appear as representing society, the discourse of human rights "(…) has to give its ideas the form of universality, and

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companies in the U.S. apparel industry). Public campaign examples include The Body Shop's on-going contributions ranging from joint campaigns with Greenpeace (1985) to an international campaign to raise awareness of the plight of the Ogoni people in Nigeria (1993) to its latest contribution to 'Break the Silence on Domestic Violence' (2008) (The Body Shop, Internet). Finally, examples of direct action include the chief executives of Reebok, Levi Strauss and Phillips sending a joint letter to Jiang Zemin, the President of China in April 1999, in which they expressed their concern "about the arrest and detention of Chinese citizens for attempting peacefully to organise their fellow workers or to engage in non-violent demonstrations" (Manokha, 2009: 443).

[69] Numerous examples can be cited: American intervention in Somalia, 1993; NATO in the former Yugoslavia, 1999; the War in Afghanistan, 2001; the Iraq War, 2003-present.

[70] This point is contrary for example to the realist assertion that human rights are complied with only when they are in the interest of a hegemon or a few powerful states, which coerce less powerful states into accepting the regime and complying with it (Hathaway, 2002: 1944-47).

represent them as the only rational, universally valid ones" (Marx and Engels, 1999: 65-66). Thus, the normalisation of the discourse of human rights fulfils its role in the legitimation of US-led hegemony by constituting a body of norms that the dominant states have attempted to make commonsense. Legal discourse normalises the status quo by promoting the belief that the momentary disruption, i.e. the violation, can be resolved through the law; by so doing, it obfuscates the *causes* of these violations.

The normalisation of human rights law has shored up market discipline, i.e. privatisation, deregulation (and re-regulation [71]), economic growth and development, minimum or 'least' government, and the creation of free trade zones (Evans, 2005a: 1056; Gill 1995b). Evans explains that,

> (…) within the remit of market discipline (…) human rights are conceptualized as the freedoms necessary to maintain and legitimate particular forms of production and exchange. These are a set of negative rights associated with liberty, security, and property, which offer a moral and normative foundation for justifying actions within the current global political economy (2005b: 43-44).

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[71] The process of *reregulation* refers to the transition from deregulation – a process of removing or reducing state regulations – to a phase of reregulation – a period of introducing new regulations to a deregulated sector. The process of reregulation is employed to maintain the legitimacy of the capitalist economy. In other words, rather than the state removing itself from the market (re: *laissez-faire*) and leaving the 'invisible hand' to work its magic, the state remains integral to sustaining the market and capitalism through regulatory mechanisms that favour its expansion. David Whyte points out,

> […] economic systems cannot exist without reference to systems of rules (for example, rules that establish the infrastructural conditions for participation in markets and regulate relationships between competitors). This is well illustrated with reference to the ascendancy of new forms of property rights (such as intellectual property rights and the patenting of biological material), which depend on the creation of new bodies of law (2007: 179).

This process of reregulation is notable for state intervention to create an order suitable for capitalist accumulation. Within this order, corporations and corporate leaders are at the forefront influencing economic, social, and even cultural policies to the benefit of capital. Whyte continues,

> […] early twenty-first-century capitalist social orders are characterized by a contradiction between a practical need to observe the laws that structure, and place restrictions upon, economic activity on the one hand, and, on the other, an ideological impulse which places the values of 'free enterprise' above values of law observance (2007: 180).

In the case under consideration here, the problem is a gap in human rights law representing one such liminal space, where corporations have exploited the lack of regulation to ensure capital accumulation. The problem is a process of reregulation in the human rights field whereby rather than setting rules for corporations to follow, they and other business actors have been invited to contribute to the creation of the framework of the rules meant to regulate them (e.g. the Ruggie process).

In this way, the international human rights regime masks structural inequalities characteristic of market discipline.[72] Critics argue that the subjugation of human rights to market discipline poses a dilemma for guaranteeing human dignity (Evans, 2005b; Falk, 2000). The argument is that although international human rights law may have the capacity to redress some consequences, it cannot address the causes of violations (Evans, 2005b: 53; see also Chinkin, 1998; Tomaševski, 1993). Evans argues that, "this suggests that we should exercise caution if we are to avoid confusing the 'sites' of violations with the 'causes' of violations, a confusion that the dominant legal discourse of rights encourages" (2005b: 53). In sum, Evans contends that the dominance of a neoliberal discourse of human rights law acts as a barrier to investigating the causes of human rights violations, many of which are attributable to market discipline. The next Section will explore the limitations of the international human rights regime. It will pay particular attention to the CSR movement (Section 3.1.) and the Ruggie Process (Sections 3.2. and 3.3.)

III. The Limits of Human Rights Law: Neoliberal Hegemony and CSR

International human rights law has offered only limited solutions to some human rights violations. The limitations of international human rights law are intensified when considered in relation to the incapacity of the international community, represented by the UN, to respond to corporate violations of human rights. Philip Alston (1994) has argued that the causes of the UN's failure to fulfil the promise of human rights are due to a series of non-fulfilments, which can also apply to the failures regarding corporate accountability. Alston points to i) the failure to afford economic and social right parity with civil and political rights; ii) the failure to acknowledge the limitations of international law; iii) the failure to develop new techniques for preventing violations; iv) the failure to come to terms

[72] According to critics, market discipline implies that "profit for investors [is] the supreme human value, to which all else must be subordinated" so that "human life has value as far as it contributes to this end" (Chomsky in Evans, 2005b: 44).

with a dynamic international system; and, v) the failure to confront the tensions between universal and particular claims. This section will argue that the contemporary CSR movement generally accepts the tenets of the neoliberal agenda, which has crippled its capacity to challenge corporate power. It will analyse the compatibility and consequences of the Ruggie Process to this effect.

3.1. The Compatibility of Neoliberalism and CSR

Paddy Ireland and Renginee G. Pillay (2010) have traced the origins of the CSR movement to the 1920s and 1930s.[73] They have commented that the original CSR movement was defined by a radical rethinking of the principle of shareholder primacy and the reconceptualization of the corporation as a *public* institution (Ireland and Pillay, 2010: 77).[74] Reflections on the social responsibility of corporations and concerns over corporate harms continued to interest commentators after the Second World War (e.g. H.R. Bowen, 1952), voiced principally by trade unions in the USA (Stoerman, 1975; Segerlund, 2010), "whose members were becoming increasingly worried about the loss of jobs to low wage economies and the relative conditions of labour exploitation in the periphery nations" (Khoury and Whyte, *forthcoming*).[75] Unions continued to express concerns throughout the 1960s, and debates on the role of business in society became a topic of academic literature and critical discussion. By the 1970s, the concept of CSR came into common use in conjunction with the "stakeholder" theory of the firm (Windsor, 2002: 85).

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[73] The early literature of the 1920s and 1930s reflected on the legal and economic impacts on society of the modern corporation. For example, A. Berle and G. Means (1932) argued that in the modern corporation the legal owners have been separated from the control of the company, i.e. through the creation of the legal fiction of the corporation as its own legal entity. Another example is J.M. Clark's (1926, revisited 1939) consideration of social control as relevant to the economic and social problems created by the new industrial world.

[74] Briefly, shareholder primacy is the idea that a corporation's primary responsibility is to maximise the wealth of its shareholder and thus that social considerations should not interfere with its business operations (see Friedman, 1962).

[75] Lisbeth Segerlund (2010:46) points out that despite this concern, some unions, such as the International Metalworkers Federation were in favour of structural changes and free trade, particularly due to growing fears of the possibility of developing nations starting to trade with communist countries. Nevertheless, she points out, this trade liberalisation was seen to undermine the general standard of living of workers. In light of this, the need to promote responsibility in investment policies was identified as an imperative countermeasure against what the International Metalworkers Federation labelled "economic cannibalism".

The expansion of global corporations operating transnationally in the 1960s and 1970s gave rise to fierce debates challenging the harmful effects of TNCs, led by periphery nations including the G77[76] at the UN. However, with the proliferation of neoliberal orthodoxy in the 1980s and 1990s, discussed in earlier sections of this Chapter, the CSR movement took another direction. There was a shift from the notion of CSR invoked by consumer groups and environmentalists to convey the normative expectations of corporations (Klein, 1999) to the contemporary CSR movement – one that has become synonymous with a transnational, voluntary regulatory movement promoted by corporations and states (Shamir, 2011, see also 2004a). Manokha argues that one of the implications of CSR and voluntary 'ethical' business practice has been the development and consolidation of a kind of morality that is compatible with the existence of global capitalism (2004: 62). Similarly, Khoury and Whyte (*forthcoming*) argue that the voluntarism that has defined the contemporary CSR movement has been a major obstacle to any significant challenge to corporate power.

A key feature of the contemporary CSR movement, since the 1980s, has been the general acceptance of the principles of neoliberalism, e.g. minimalist government, the free market, privatisation, deregulation (Ireland and Pillay, 2010). As such, CSR is in fact complementary to and even constitutive of neoliberalism. For example, the self-regulation of private market actors through voluntary CCCs coincides with the neoliberal credo that aims to preserve freedom in the market and limit – or control – state intervention, discussed in more detail below. The contemporary CSR movement's emphasis on the need for consensus with all stakeholders is symptomatic of its role in reinforcing the hegemony of the G7 nexus. Moreover, the emphasis on consensus, particularly with the business community, highlights CSR's role in shoring up neoliberalism by seeking to reframe corporate responsibility to be monitored by private market actors rather

[76] The G77 is a caucus group at the United Nations established in 1964 by seventy-seven developing nations signatories of the "Joint Declaration of the Seventy-Seven Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. It was initiated as a challenge to the hegemonic power of the core nations at the UN and a means for developing nations to promote their collective interests.

than regulated by the state.[77] Section 3.2. will return to the issue of consensus with a discussion on the Ruggie Process.

In his analysis of the impacts of neoliberalism in occupied Iraq, David Whyte maintains, "A key effect of neoliberal hegemony building is the subjugation of the norms of international law to the norms and values of the 'free' market" (2007: 191).[78] This statement resonates in the context of the CSR movement where corporate strategies have used international debates on CSR to stay the development of law (Shamir, 2004a; see also Glasbeek, 1987; Utting, 2005). Shamir insists that,

> Capitalism (…) has always relied on critiques of the status quo to alert it to any untrammelled development of its current forms and to discover the antidotes required to neutralize opposition to the system and increase the level of profitability within it (Boltanski and Chiapello in Shamir 2004a: 670)

The success of the corporate 'regulatory capture'[79] of CSR is a strategy that has influenced international public policy debates *against* the development of law in support of voluntary mechanisms; Section IV will return to the issue of 'capture'. The success of this corporate strategy at the international level is illustrative of international law's subjection to the norms of the nation-state. As such, some authors have argued that, "we must shift the problem of changing the world order back from international institutions to national societies" (Cox, 1993: 64; for a discussion see Khoury and Whyte, *forthcoming*).

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[77] Evans argues that no global consensus exists and therefore questions the role of international law. He contends that,
In taking the centre stage within the discourse of human rights, international law obfuscates the distinction between legal rules and normal social practice. While on one hand international law is presented and promoted as the solution to problems of human rights, on the other, the practices of market discipline continue to provide the context in which human rights are violated. International law might therefore be seen as a "mask" that conceals the true cause of many human rights violations (2005a: 1067).

[78] Post-1990, human rights have been used to justify humanitarian interventions. They are cited without scruple as the reason for various interventions, which have more to do with gaining access to markets than defending 'human rights' (see Chandler, 2002; Chomsky, 2003, 2007).

[79] Regulatory capture is the "process by which special interests affect state intervention in any of its forms" (Bó, 2006: 203; see also Ayres and Braithwaite, 1991).

Ireland and Pillay reinforce this perspective in their analysis of CSR in a neoliberal age. They convincingly argue that,

> (…) while the contemporary CSR movement's general acceptance of the tenets of the neoliberal orthodoxy enhances its political acceptability both to states and corporations, it also limits what it is likely to achieve (Ireland and Pillay, 2010: 78).

The underlying notion embedded in the contemporary CSR movement that corporations are capable of policing themselves has gained currency with policy-makers. Consequently, rather than moving towards binding regulations, there has been a rise in the institutional endorsement of voluntarism at the international level. Shamir (2007) argues that underlying voluntarism and the complementary soft law approaches to corporate responsibility is a motivation to reconfigure the regulative role of the state. He contends that the state becomes the "facilitator of a multi-stakeholder approach to regulation (…) involving civic and commercial players alongside state-based organs and international bodies" (Shamir, 2007: 33).[80]

Shamir (2004a) calls attention to what he identifies as a "remedial gap". He highlights the fact that whilst international law has provided the framework and enabled regulatory structures for corporate advantages (e.g. TRIPS agreement of the WTO protecting intellectual property rights in all member states), it has proven incapable of stipulating the human rights obligations of corporations (Shamir, 2004a: 672). International law has thus failed to provide the necessary regulatory mechanisms for corporate conduct in the field of human rights. Examples include the International Labour Organisation's (ILO) *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977);[81] the UN *Draft Code of Conduct on Transnational Corporations* (1983);[82]

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[80] Shamir argues that, "the field of corporate social responsibility is not a mere derivative of new [public] pressures. Rather, it is corporate response to such pressures that eventually allows for the emergence of a field" (2005b: 94-95). He suggests, "the field of CSR thus functions not simply as a buffer against corporate-bashing, but more generally as a constitutive force in shaping the relationship between business and society in contemporary global capitalism" (*ibid*). For Shamir, CSR is one strategy designed to prevent the politicization of the market and inhibit counter-hegemonic struggles.

[81] According to its website,

the UN *Global Compact* (2000);[83] the Organisation of Economic Cooperation and Development's (OECD) *Declaration on International Investment and Multinational Enterprises* (1976), and the more recent *Guidelines for Multinational Enterprises* (2000);[84] as well as the European Union's (EU) *Promoting a European Framework for Corporate Social Responsibility – European Commission Green Paper* (2001) (see UN, 2005).[85] All of these proposals, declarations and frameworks cite the recognition of the importance of social and environmental sustainability, but they

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The principles laid down in this universal instrument offer guidelines to MNEs, governments, and employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations. Its provisions are reinforced by certain international labour Conventions and Recommendations, which the social partners are urged to bear in mind and apply, to the greatest extent possible. (…) Today, the prominent role of MNEs in the process of social and economic globalization renders the application of the principles of the MNE Declaration as timely and necessary as they were at the time of adoption. As efforts to attract and boost foreign direct investment gather momentum within and across many parts of the world, the parties concerned have a new opportunity to use the principles of the Declaration as guidelines for enhancing the positive social and labour effects of the operations of MNEs (ILO, 2012).

[82] Although it was never adopted, the purpose of the Draft Code of Conduct was to provide either mandatory requirements or voluntary guidelines for transnational corporations. It sought to encourage contribution to the development goals and objectives of the countries in which they operated. The Code also attempted to facilitate inter-state co-operation on issues relating to TNCs and to address difficulties derived from the international character of TNCs and the resulting diversity of laws and cultures. Even in this early document, particular attention was given to the rights of corporations especially so that the eventual obligations would not undermine their economic capacities (see U.N. 1983).

[83] The UN advertises its Global Compact as "(…) a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption". It claims, "by doing so, business, as a primary driver of globalization, can help ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies everywhere" (UN, 2011). It boasts as the largest voluntary initiative in the world.

[84] The 1976 Declaration is "a policy commitment by the governments of OECD countries on International Investment and Multinational Enterprises to: improve the investment climate; encourage the positive contribution multinational enterprises can make to economic and social progress; minimise and resolve difficulties which may arise from their operations" (OECD, 2012a). The 2000 Guidelines "are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation" (OECD, 2012b).

[85] The Framework acknowledges "Corporate social responsibility should nevertheless not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of appropriate new legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed" (EU, 2005). Nonetheless, it parallels the others in its approach to CSR, which is a partnership with business. The European Commission issued a second communication in 2006, which the European Parliament responded to by voting a resolution, which urged the EU executive to extend legal obligations to some key aspects of corporate accountability. The resolution was passed by a majority vote, although MEPs called on the Commission to rethink its position on CSR and involve all stakeholders in the process. In 2007, the EU executive reaffirmed its position that CSR is uniquely a voluntary measure that should not be regulated at the EU level (Euractiv, 2012).

also share something indicative of the correlation between CSR and neoliberal hegemony. The contemporary CSR movement is a *non-coercive* strategy that has integrated non-state actors (e.g. commercial and civic entities) into shaping policy. Social and environmental norm making was heretofore the public domain of the state. As a result, Shamir (2011) argues, private non-state actors, and specifically corporations, increasingly perform tasks that were once considered reserved for the state, e.g. human rights, labour, the environment, social welfare, etc.

Most recently, the accommodation of capital has transpired with the definite failure of the UN *Norms* (2003), discussed in the Introduction to this thesis. The UN *Norms* were drafted by the Working Group (WG) on the Working Methods and Activities of Transnational Corporations commissioned by the UN Sub-Commission on Human Rights to, "contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights" (UN, 2001). The WG drafted the UN *Norms* advocating direct and indirect responsibility on a *non-voluntary* basis, i.e. with legally binding measures. The novelty of the UN *Norms* was the promotion of international supervisory and monitoring mechanisms. It was an innovative document that was received only tepidly at the UN and was highly criticised by the business community.

The UN *Norms* represented an emerging international consensus from civil society that corporations should bear legal responsibilities with regards to human rights under national and international law. It did not seek to necessarily build consensus with the business community. Concretely, the UN *Norms* indicated an organised international initiative that considered the international legal order an appropriate forum for establishing some form of corporate accountability (Miranda, 2007: 165). Despite promising momentum, the UN Sub-Commission rejected the UN *Norms* in 2003, opting instead to elect Professor John Ruggie as SRSG in 2005 to further probe the issue. The next section explores how the fate of the UN *Norms* and the so-called triumph of the Ruggie Process were determined in large part by the hegemonic rise to dominance of

neoliberalism within the UN and the global political system (see Khoury and Whyte, *forthcoming*).

3.2. The Ruggie Process: Entrenching Neoliberal Human Rights

Ruggie began his first mandate (2005-2008) in the wake of the UN *Norms*, with intense opposition from the business community and strong NGO support. His aim was to "build meaningful consensus amongst all stakeholders" (UN, 24 March 2011). NGOs requested that the UN elaborate a "universal normative framework (…) that also identifies the direct obligations of business with respect to human rights (…) in all countries" (GermanWatch, 2006: 2), to "move beyond existing frameworks" and consider the question "'what the law should be' (…)" and "elaborate legal standards" (*ibid*: 1). In response, the SRSG affirmed the status quo at the end of his first mandate.

In 2008, he proposed the *"Protect, Respect, Remedy" Framework for Business and Human Rights* (*Framework*) to the Human Rights Council (HRC). It consisted of three principles: i) a state duty to protect against human rights abuses by corporations; ii) a corporate responsibility to respect human rights; and iii) a need for more effective remedies for corporate human rights abuses. Ruggie distinguished his approach from the UN *Norms* claiming that their "exaggerated legal claims" were untenable (Ruggie, 2006: §59).[86] Instead, he explicitly advised against creating new international law to achieve the *Framework*. Ruggie asserted that there was no need to make any changes to existing law, suggesting what was needed was only a better understanding of it (Ruggie, 2008).[87] Ruggie dismissed

[86] Khoury and Whyte (*forthcoming*) point out that "Ruggie was to note in his interim report to the 66th session of the UN Human Rights Commission that: 'the norms exercise became engulfed by its own doctrinal excesses' (…) '[i]ts exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers'". Irene Khan, Amnesty International's general secretary said at the time that she was concerned that Ruggie was "underestimating the need for legal principles" (Williamson quoted in Khoury and Whyte, *forthcoming*).

[87] Ruggie's criticisms of existing law in no way question the legal framework or the actual law itself, rather as some critics have pointed out, these criticisms "are commonly concerned with refining, polishing and elaborating accepted norms and standards, in an attempt to make the regime more elegant, sophisticated, imposing and magisterial" (Evans, 2005b: 35; see also Chandler, 2002). So although Ruggie has advanced some criticisms of existing international law,

the UN *Norms* and promoted instead a consensual framework that would integrate the interests and outlooks of all stakeholders, including Business. The opposition from the business community dissipated. The Ruggie Process was amenable to business leaders who voiced their support for the UN's approach. The HRC adopted the *Framework* and extended Ruggie's mandate (2008-2011) charging him with the task of determining how best to operationalize the *Framework*.

In 2011, Ruggie culminated his mandate with the *Guiding Principles on Business and Human Rights* (*Guiding Principles*), which focused on the implementation of the 2008 *Framework*. The *Guiding Principles* outline what steps states should take to foster business respect for human rights. Its aim was to provide a blueprint for corporations to know and show that they respect human rights, and reduce the risk of causing or contributing to human rights harm. In other words, the *Guiding Principles* constitute a set of benchmarks for stakeholders to assess business' respect for human rights. Like the *Framework*, the *Guiding Principles* emphasised a restatement of existing law rather than the creation of new law. The draft *Guiding Principles* were criticised by civil society organisations that complained in a Joint Statement that the *Guiding Principles* presented,

> (…) A more regressive approach in relation to improving the human rights obligations of States and the responsibilities of non-state actors than authoritative interpretations of international human rights law and current practices (Amnesty International, 14 Jan. 2011: 1).

NGOs continue to criticise the *Guiding Principles* (Blitt, 2012: 52, 57; Amnesty International *et al*., Jan. 2011). The Ruggie process and the HRC's ultimate endorsement of the *Guiding Principles* have left many NGOs feeling "defeated" (UN HRC 17th Session, Geneva, Personal Communication, 16 June 2011; UN WG on Business and Human Rights, Geneva, Personal Communication, 8 Dec. 2011).

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he has not critiqued it – a difference that Evans notes since critique is concerned "to expose the interests served by the production and maintenance of particular truths, and the processes that enable some forms of knowledge to be accepted as complete and legitimate while other forms are labelled partial and suspect" (2005b: 36).

The business community and states, on the other hand, applauded the success of Ruggie's mandate and the triumph of establishing consensus.

Ruggie's rejection of the UN *Norms* and advocacy for voluntary norms and existing law for corporate accountability has reinforced the neoliberal hegemony of how law is deployed on a global scale. Ruggie redirected the emerging international consensus on corporate accountability implied in the UN *Norms* to a corporate compromise on the limits of international law. The Ruggie Process' emphasis on voluntary agreements and CCCs placed the corporate accountability debate outside of the immediate scope of human rights Courts. Ruggie did not address the 'remedial gap' in international law, but rather contributed to anchoring a neoliberal approach to international human rights marked by "soft law" and private self-regulation. In this way, the Ruggie Process has contributed to the elision of the economic sphere with the social sphere, a key element of neoliberalism (Lemke, 2001). Furthermore, the outcome of the Ruggie Process has ultimately been the legitimation of the global political role of corporations, and the business community more generally, from within the UN. In short, Ruggie's mandate has skilfully accommodated the international corporate responsibility movement to the hegemony of global capital.

3.3. Accommodating Capital: The Effects of the Ruggie Process

Although, it is still too early to know what the exact impact of the *Guiding Principles* are, the immediate outcome of the SRSG's mandate can be called into question, and the process that preceded its adoption by the UN provides some insight (see Bittle and Snider, 2013; Khoury and Whyte, *forthcoming*). In their critical evaluation of Ruggie's mandate, Bittle and Snider argue that there is little evidence that either the *Framework* or the *Guiding Principles* have transformed or will transform the behaviour of TNCs (2013: 182-186). They convincingly assert that Ruggie's work "posits an almost seamless alignment between individual human rights and the goals of global corporate capitalism" (2013: 187). Bittle and Snider explain that one of the major weaknesses of Ruggie's mandate is that

> Without legal obligations empowering authorities to investigate allegations of corporate wrongdoing, issue punishments and/or remedies, and independent verification to ensure that corporations amend their policies and practices accordingly, corporate promises are easy, no-cost gestures (2013: 182).

Thus, the facility with which Ruggie's *Framework* was adopted and accepted, particularly by the private sector, is not surprising given that his recommendations sought to establish agreement between the international community of states and the business community.

A precarious aftereffect of Ruggie's enthusiasm for consensus building is that his mandate has consolidated a formal means for corporations to act politically within the international human rights regime. Corporations and the business community have been welcomed into the fold of the UN as integral 'stakeholders', formalising and legitimizing a capitalist logic of human rights. The contradictions of this process have been ignored, and by inviting corporations to participate in the policy-making of *their* human rights responsibilities there is a conflict with the objective of those policies. Moreover, the prerogative of states to negotiate binding regulations is unduly thwarted by the importance placed on consensus with private market actors. Another weakness of Ruggie's work is that the *Guiding Principles* do not address "the structural contradictions between the corporation's legal obligation to maximise profits for its shareholders and its non-mandatory human rights obligations" (Bittle and Snider, 2013: 188). These structural anomalies are explored in Chapter 3.

It will be important to continue following the progress of the WG on Business and Human Rights to monitor the new phase in international responses to corporate accountability. Even so, it remains relatively certain that without binding initiatives it is unlikely that corporate accountability debates will evolve in a way that can ensure the supervision of both corporations and states. The Ruggie Process' emphasis on working with already-existing laws (also adopted by the WG) ignores the problematic around these existent norms, namely that they are constructed in a way that often results in the protection of the corporation and its shareholders, or in the very least the facilitation of their ability to evade

accountability. Ireland and Pillay eloquently summarise this point, commenting that "the 'soft' law of CSR is no match for the 'hard(er)' law protecting shareholder interest" (2010: 79).

Despite this seemingly defeatist overview, it is worth remembering that, "whilst there has been a growth in the structural power of capital, its contradictory consequences mean that neoliberalism has failed to gain more than temporary dominance over our societies" (Gill, 1995a: 401-2). The contradictions in neoliberalism create spaces for counter-hegemonic struggle. The next section considers the impact of counter-hegemonic challenges to the neoliberal discourse of human rights.

IV. Counter-Hegemony: Responses to Neoliberal Human Rights

Some authors have argued that human rights, although a hegemonic construct, can simultaneously create space for counter-hegemonic challenges (e.g. Evans, 2005b; Rajagopal, 2006; Santos 2002b). This section introduces these claims to the counter-hegemonic potential of human rights.

Counter-hegemonic practice must deal with neoliberal responses that attempt to "silence, evade, oppose, and co-opt such unwarranted political pressures" (Shamir, 2004a: 670).[88] Santos argues that neoliberal hegemonic globalisation, "while propagating throughout the globe the same system of domination and exclusion, has created the conditions for counter-hegemonic forces" (2002b: 446) to engage in various emancipatory social projects. Counter-hegemonic responses to the dominant discourse of human rights challenge its *status quo,* i.e. including its definition, its law, its institutions, its practice and application (Santos, 2002b),

[88] In their analysis of the perversion of the rule of law in the act of plunder by Western powers, Ugo Mattei and Laura Nader (2008) argue that state law, within a neoliberal paradigm, creates a 'legitimate' corporate capitalism based on such legal truisms as the rule of law and the discourse of human rights. Analogous to Shamir's discussion of CSR, Mattei and Nader point out, that the rule of law can favour oppression but it can also produce empowerment of the oppressed, which can lead to counter-hegemony. They go on to suggest that,
(…) This is why powerful actors often attempt to tackle counter-hegemony by incorporating harmonious 'soft' aspects aimed at disempowering potential resistance from the oppressed by limiting their use of adversary Courts" (2008: 18).

which helps create the moral climate necessary to underline the contradictions within the neoliberal definition of human rights.[89] In what follows, the Section will raise questions about whether a reimagined concept of human rights *can* be counter-hegemonic. It will suggest that a reconceptualised notion of human rights can be useful in abrading "the ideology and coercive institutions that sustain and naturalise the hegemony of the dominant global social order" (Santos and Rodriguez-Garavito, 2005: 18).

4.1. Human Rights: the Potential for an Emancipatory Discourse

A notable paradox of human rights is that it is at once a site of domination and a site of empowerment (Evans, 2005b). The idea of human rights retains an important relevance in both local and global struggles. It continues to be invoked in the struggles of social movements and can provide a focus for victims. In this way, multiple and intersecting groups condemn the dominant discourse of human rights for its hegemonic structure, but also appeal to the idea of human rights in counter-hegemonic struggles and strategies. Some scholars argue that there is a valuable potential for human rights to be counter-hegemonic, or at least to be used counter-hegemonically (Rajagopal, 2006: 781; Santos, 2002b, 2007b). Santos asserts that human rights can be non-hegemonic if it is,

> (…) radically different from the hegemonic liberal [framework] (…) [and] only if such a politics [of human rights] is conceived as part of a broader constellation of struggles and discourses of resistance and emancipation rather than as the sole politics of resistance against oppression (2007b: 3).

[89] Mutua addresses the lack of attention given to the issue of power by the human rights corpus, stating that "it is equally important that [human rights] address deeply lopsided power relations among and within cultures, national economies, states, genders, religions, races and ethnic groups, and other societal cleavages" (2002: 45). According to his analysis, the cultural differences amongst people in the world are too considerable for any universalist claim to find validity since they are necessarily rooted in neo-colonial and imperialist paradigms. Mutua's "strong cultural relativism" (Donnelly, 2003: 90) is tempered by Santos' (1997; 1999; 2002b: 282) distinction between "universal human rights" and – a homogenous set of rights that apply in the same way to everyone – as opposed to the "universality of human rights" – referring to a more subjective notion of rights and freedoms.

Santos (2002b) has elsewhere argued for the necessity to create new forms of global advocacy and reconceptualise the use of law. From this standpoint, an important difference can be made between the critique of the dominant, neoliberal discourse of human rights and the ideal of human rights that struggles towards a new 'commonsense' (Santos, 2002b; Chomsky, 2009).

Santos has described the potential for human rights to be an "emancipatory script" (2002a, 16-19; 2002b: 281-311, 465-471). He suggests that a "cross-cultural reconstruction of human rights" can be "one of the most powerful factors in bringing about the unthinking of modern law and politics" (Santos, 2002b: 282) and thereby produce the necessary momentum to challenge neoliberal capitalism. He goes on to qualify the conditions of this transformation.[90] Santos asserts that the potential for human rights law lies in the recognition that "it is one thing to use a hegemonic instrument in a given political struggle. It is another thing to use it in a hegemonic fashion" (Santos, 2002b: 466).

An example of Santos' assertion is the issue of 'regulatory capture', raised in Section 3.1. Although in the context of corporate accountability it is most often associated with the de-radicalisation of CSR, the notion of 'capture' may also have empowering connotations. For example, pluralist capture theory refers to the struggle of groups to capture the state, e.g. one group may capture the state encouraging other groups to further develop strategies to recapture it, and so on. In these cases, strategies to 'capture' come from both within and without the state or law. The fluidity of these strategies can sometimes be advantageous to counter-hegemonic groups. 'Capture' can sometimes be empowering for groups challenging the status quo, since it implies that the state and/or law can never be fully captured, and hence can never fully belong to one group. Niemonen (2002: 220) notes that, "in some pluralist accounts of the state, the proliferation of agencies, on the one hand, and the differentiation of state levels on the other, provide greater access for any group to block gross injustice and at least secure a

[90] These include a discussion of i) the actors likely to be responsible for or benefit from a cosmopolitan human rights discourse and practice at the global level; ii) cultural relativity and the possibilities for a cross-cultural reconstruction of human rights; iii) the conception of the world system as a single human rights field (for details see Santos, 2002b: 283-311).

minimum foothold in the State". The value, and simultaneous disadvantage, to this is that the law can be used or manipulated by various groups.

It is true that human rights guarantees and protections are not always enforced, but they are enforceable by human rights Courts. The enforceability of rights, due to states' bids for legitimacy associated with human rights, reveals a forum to expose and place demands upon the state. The potential to use the law in this way is illustrated by the examples where human rights have prevailed through the Courts (e.g. civil rights movement). Of course, most of these examples do not fundamentally question the structural and systemic causes of human rights violations, as such; but, recent events (e.g. the U'wa challenge to Oxy;[91] the Indignados movement,[92] etc.) may be revealing changes to the approaches adopted by activists, individuals and groups who have until recently predominantly focussed on challenging the consequences of violations. In the remaining Chapters, the thesis will refer to this discussion on counter-hegemony to consider the potential for counter-hegemonic struggles to challenge the neoliberal doctrine of human rights from *within* the law. In other words, the remainder of the thesis will scrutinise the possibility to challenge hegemony by using the very institutions that underpin it.

The potential to radically rethink human rights law exists, according to Makua Mutua (2002) because for one, the human rights movement is still young and its youth gives it an experimental status, not a final truth. The dominant human rights discourse insists that all of the most important human rights standards and norms have been set and that what remains of the project is elaboration and implementation. This is a dangerous perspective that is at the heart of the push to prematurely cut off debate about the political and philosophical roots, nature, and application of human rights – in short, to preclude problematizing human rights (Evans, 2005b). The task ahead, proposed by Santos, is "how to reinvent law beyond the liberal and demo-socialist model without falling into the

[91] The U'Wa petitioned the IACommHR against Colombia challenging the government's concession to Occidental of Colombia (a subsidiary of the American company Occidental Petroleum); see *Third Report on the Human Rights Situation in Colombia* (IACommHR, 1999); also Chapter 6.
[92] *Supra* ftnt 3.

conservative agenda and indeed, how to do it so as to combat the latter more efficiently" (2002b: 441). What Santos (2002b) proposes is to reimagine human rights in ways that will complement a post-capitalist world. The question that concerns us in this thesis is whether human rights can be reimagined in ways that can challenge corporate power.

Conclusion

This Chapter has argued that the discourse of international human rights law has been integral to the rise of neoliberal hegemony. It has argued that rights have always had a role in upholding a particular form of property relations. It has examined how the rise of neoliberalism post-1945 coincided with the internationalisation and normalisation of human rights law as a legitimation of neoliberal capitalism. In other words, the Chapter has demonstrated that the emphasis of the discourse of human rights on individuality and private property rights is complementary to capitalism. It has further argued that human rights fulfils a disciplinary role compatible with the objectives of US-led neoliberal hegemony. The emasculation of the CSR movement, discussed at Section III, is one example of this compatibility.

But, human rights is a source of legitimacy for states. Because of this, there is a potential to challenge the legitimacy of the state through the institutions of human rights. In this way, it may be possible to use human rights law in counter-hegemonic struggles. For example, there are fundamental differences in the understanding of human rights between Indigenous peoples and the ACHR, particularly regarding the notion of collective rights. Nonetheless, Indigenous peoples have repeatedly petitioned the Inter-American human rights system against violations of their rights by corporations in collusion with states. The use of human rights Courts in this way indicates that even the concept of human rights law is not impervious, and so there is a possibility to challenge its interpretation (see also Conclusion Chapter; Chapter 6 will discuss other examples).

This Chapter has provided a critique of international human rights law. It is the framework for the analysis of the relationship between the corporation and human rights. It has thus provided the basis for the scrutiny of the interconnectedness of the rise of capitalism with the development of the corporation as a legal entity, in the next Chapter, and the granting of human rights to corporations in Chapter 5. Together, these analyses inform the discussions on the empirical data in Chapters 6 and 7. The next Chapter examines the development of the modern corporation.

CHAPTER 3: THE CORPORATION

(…) A certain class of dishonesty, dishonesty magnificent in its proportions, and climbing into high places, has become at the same time so rampant and so splendid that men and women will be taught to feel that dishonesty, if it can become splendid, will cease to be abominable.

- Anthony Trollope, 1856

Introduction

This Chapter examines the role of law in the development of the modern corporation. The chapter will focus on the specific historical and political contexts that gave rise to the institutionalisation of corporate personhood. The Chapter will argue that the legal architecture of the corporation has resulted in a structure of irresponsibility sheltered by a neoliberal human rights regime. By so doing, it will raise questions about the response of human rights law to corporate violations of human rights. Moreover, the discussion will support the argument, raised in the previous Chapter, that the state continues to perform vital functions that enable capital accumulation (Foucault, 2008; Glasbeek, 2005; Harvey, 2009; Jessop, 1990; Polanyi, 2001; Wood, 2005). In this way, the state remains the primary actor in guaranteeing and enforcing rights and responsibilities (Tombs and Whyte, 2003c) and is responsible for curbing corporate power – an element that is vital to the potential for international law to impose global corporate accountability. The Chapter will scrutinise the corporation's evolution from corporation-as-business-entity in pre-industrial capitalism to corporation-as-person in post-industrial capitalism.

The Chapter begins by outlining a Marxist theory of law (Section I).[93] A Marxist theory of law is concerned with the evolution of the relations of production at a specific historical moment that also affected the evolution of the law. The theory will be applied to analyse the granting of legal personhood to the modern

[93] There is no overarching Marxist framework rather there is a plurality of distinct discourses that share a common banner of Marxism without necessarily being a consistent or homogenous group of ideas. For our purposes, Marxism (or perhaps more accurately neo-Marxism) refers to a critical theory linked to Marx and Engels, but that draws on other intellectual traditions (e.g. critical theory) and other theorists inspired by Marx (e.g. Gramsci, Foucault, etc.). A Marxist theory of law is used here to analyse the structures of domination and the beliefs and values that sustain them.

corporation. Section II will address the specific developments in law that led to the "anthropomorphisation" of the corporation when it was granted a distinct legal personality. Informed primarily by the works of Paddy Ireland (1996, 1999, 2010) and Harry Glasbeek (2002, 2003b, 2007), the section will argue that corporations are legal sites of irresponsibility. Section III scrutinises the development of international human rights with regards to the corporation and the impact that the doctrine of corporate personality has had on human rights law. The Chapter concludes with some reflections on the role of law in buttressing capitalism through the corporate form.

I. Marxism and Law

It would be impossible to construct a comprehensive Marxist theory of law because there are too many interpretations of Marx's work. Consequently, this section does not provide an expansive overview of Marx's own writings or Marxist writings on law. It will instead outline a few selected themes. The objective is to outline a workable Marxist theory of law in order to develop the analysis of the evolution of the modern corporation – and *a fortiori* capitalism – *through* law.

Marx's contribution to the sociology of law is undisputed, however Marx did not produce a 'theory of law' as such (Cain, 1974; Hunt, 2010; Vincent, 1993). Nonetheless, Marx and Engels' discussions on and references to law remain provocative and relevant for challenges to neoliberal capitalism. Maureen Cain has formulated the socio-legal interest in Marxist theory of law as one "that is still useful not only in analysing and comprehending present day society but also (…) in guiding one to fruitful areas of research" (1974: 136). Marxism's central concerns, according to Alan Hunt (2010: 358) are,

> (…) 1) to explain the relations of subordination or domination that characterise particular historical epochs; 2) to account for the persistence and reproduction of these relations; and 3) to identify the conditions for ending these relations and realising emancipated social relations.

The method and content of a Marxist theory of law, as Hunt points out, seeks to explore the role of law in these three areas. Thus, a Marxist theory of law informs this thesis in its critical analysis of the relationship between human rights law and corporations.

Hunt describes Marxism as "a rigorously sociological theory in that its general focus of attention is on social relations" (2010: 356). Law is a specific form of social relation[94] and as such various versions of Marxist theory of law seek to determine the role of law in the reproduction of structural inequalities that characterise capitalist societies (Hunt, 2010). Marxist theory of law has thus, Hunt (*ibid*) explains, been used "oppositionally" to provide a critique of liberal legal thought.[95] This Section will discuss a Marxist theory of law and its relevance in the analysis of corporate violations of human rights and law.

1.1. Outline of a Marxist Theory of Law

Marx's writings on law deal with relations of production, i.e. economic relations,

[94] Sociology is often defined as the study of social relations. Broadly, social relations refer to the way we interact to make sense of our world. In Marxist terms, a working definition of social relations is the relation between individuals or groups of individuals in a given society, in a determinate historical stage of its development that governs the relations of production. Marx's central 'relational' concept is that of the relations of production, which in its basic definition is the social relation that one *must* enter into to produce and reproduce her means of living. Marx asserts that this type of social relation is an obligation because the relations of production constitute the fabric of the economic structure (discussed below in this Chapter).

[95] In his discussion, Hunt (2010: 355) outlines what he defines as the six major themes of Marxist theory of law.

1. Law is inescapably political, or law is one form of politics.
2. Law and state are closely connected law exhibits a relative autonomy from the state.
3. Law gives effect to, mirrors or is otherwise expressive of the prevailing economic relations.
4. Law is always potentially coercive and manifests the state's monopoly of the means of coercion.
5. The content and procedures of law manifest, directly or indirectly, the interests of the dominant class(es).
6. Law is ideological; it both exemplifies and provides legitimation to the embedded values of the dominant class(es).

Hunt argues that, for example theme 5, a basic analysis of Marxist theory of law argues that law is an instrument of class power. More sophisticated analyses, he argues, emphasise that the content of law can be read as an expression of the complex dynamic of class struggle. As such, it comes to include the legal recognition of subordinated classes secured through struggle (*ibid*).

and class relations.[96] Relations of production are linked to the concept of *historical materialism*[97], which is the theory that "an analysis of the world we live in must be grounded in the way in which human beings have organised production and reproduction of their material lives" (Overbeek, 2000: 178). In other words, historical materialism is the theory that socioeconomic developments are contingent on material conditions. Marx described the relations of production in his *Preface to a Contribution to the Critique of Political Economy*,

> In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but on the contrary, their social being that determines their consciousness (Marx, 1977: 389, emphasis added).

Marx argued that the material transformation of the economic conditions of production (i.e. the economic 'base') would eventually alter the law, religion, philosophy, politics, culture, or what is referred to in Marxism as the ideological 'superstructure'. Because of this, a main criticism of Marxism has been that it is economically deterministic, or in other words that everything in society is influenced and determined solely by economic factors. These interpretations view the base/superstructure as a one-way relationship whereby the base is responsible for all changes in the superstructure.

Evgeny Pashukanis, a Soviet jurist writing in the 1920s and 1930s, was an advocate of economic determinism and based his theory on Marx's concept of

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[96] Marx and Engels' focus on class conflict is a major aspect of their sociology of law. It has been taken up by several disciplines in the social sciences (e.g. sociology, criminology, international relations, etc.). Studies of the concept of class conflict have been intimately linked to the state and theories of the state. For more on (Marxist) state theories see for example Jessop (1990), Miliband (1969), Poulantzas (2000, 2008).

[97] Vincent (1993: 373) argues that terms such as 'dialectical materialism' or 'historical materialism' often associated to Marx should more accurately be attributed to Engels.

commodity in *Capital*. As such, Pashukanis' (1978) Marxist theory of law is also known as the commodity form theory of law. Hunt (2010) explains that Pashukanis sought to elucidate the "deep interconnection between the legal form and the commodity form" (Pashukanis, 1978: 63). Pashukanis argued that the legal relation was the reverse side of the mode of production, or commodity relation, in capitalist society (*ibid*: 85). According to Pashukanis, the emergence of law is intimately linked to the emergence of capitalism. However, a major weakness in Pashukanis' theory was that he pigeonholed a Marxist theory of law by reducing law to the commodity relation (Hunt, 2010: 36). In this way, Hunt explains, Pashukanis "reverses Marx's priority of production relations over commodity relations" (*ibid*). Hunt explains that this focalisation on the commodity relation may be attributable to Pashukanis' preoccupation with law as an intrinsically bourgeois notion.

Pashukanis identified law as a unique form of social regulation that creates a sphere of theoretically equal individuals. Class position is hidden from recognisable legal relations, resulting in formal 'equality' before the law without concern of socio-economic inequalities. Anderson and Greenberg clarify that for Pashukanis, "the resulting abstracted individuals become the 'subjects' of the law, possessed of wills and capable of arriving at agreements with other subjects" (1983: 70). Since contract is the paradigmatic form of bourgeois law, Pashukanis claimed that parties to legal relations are treated as "bearers of every imaginable legal claim" (*ibid*), which reflects property relations, based upon rights of possession. Anderson and Greenberg argue that because of this construction of property relations, "a system apparently composed of a mass of discrete, equivalent subjects preserves the aggregate inequality of capitalist class relations" (*ibid*).

However, Marx and Engels do not necessarily support this interpretation in their writings, which in some cases show that they may have in fact been wary of economic reductionism. In his *Letter to J. Bloch in Königsberg*, Engels wrote,

> According to the materialist conception of history, the *ultimately* determining element in history is the production and reproduction of real life. Other than this neither Marx nor I have ever asserted. If somebody twists this into saying that the economic element is the *only* determining one, he transforms that proposition into a meaningless, abstract, senseless phrase (…). The economic situation is the basis, but the various elements of the superstructure (…) also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their *form* (Engels, 1890).

Engels' comment implies a *complementary*, rather than deterministic relationship between base and superstructure. This complementary relationship is suggested by some neo-Marxists as distinctly present in the **e**ffects of globalisation. According to Teeple (2000) globalisation is understood as a structural change of productive forces (e.g. technological and communications revolutions) that facilitates the political and legal superstructure (i.e. neoliberalism). Thus, the relationship between law and the economy can be interpreted as "dialectical" (Cain, 1974) or "symbiotic" (Vincent, 1993) in the sense that the law can alter economic conditions and economic conditions can alter the law.[98] Hunt (2010) refers to these interpretations as "soft" or "weak" determinism. He explains this version of determinism takes into account the causal effects of law and other elements of superstructure, but retains the causal priority of the economic base. However, breaking with these more traditional interpretations, Hunt convincingly argues that even "soft determinism" cannot provide an adequate starting point for a Marxist theory of law because it ultimately imposes an economic determination to every point of question.

Gramsci (2005) made a break from economic determinism and orthodox Marxism when he developed a Marxist theory that critiqued the historical inevitability spawned by what he called "economism". He argued that Marxism, as a philosophy of praxis, involved an active role for human agency. According to

[98] The dialectical or interactionist view, as well as the reductionist view are present in Marx's writings. Vincent (1993) tells us that several readings of Marx are possible, and support for these can be found in Marx's writings. He gives the example that in some readings law can be seen as intentionally providing the conditions for change, whilst in others "law can also be read as a coercive structure representing the actual dominance of the bourgeoisie of the means of production, but determined by the laws of the economic base" (*ibid*: 381). Falling into circular and deterministic interpretations of Marx's writings on law is not helpful. What is of interest in this thesis is to explore whether law can be used counter-hegemonically (see Chapter 2 and Conclusion Chapter).

Gramsci, there was an equally important role for culture and politics as non-coercive forms of dominance as that of economic power. He developed his idea through the Marxist concept of ideology and what he identified as hegemony (see Chapter 2). For Gramsci, the dominant ideology forms the ideas that become what, as we have seen, he called "commonsense". The previous chapter has already discussed hegemony, which was Gramsci's definition of the process of socialisation through daily routines that leads to the internalisation of the dominant ideology by the masses. Ideology is part and parcel of the intellectual hegemony of capitalist societies and thus law can be scrutinised through ideology.

A good starting point for a Marxist theory of law is ideology, since Marx and Engels seem to have built their argument on the assumption that everyone knows what law means (Cain, 1974).[99] Their interest in the concept of ideology was integral to their theory of social relations. Marx used the concept of ideology in multiple ways in his writings. Insofar as it does not have an authoritative definition, ideology is a concept that is open-textured and multi-dimensional. The working definition of ideology that is used here is a body of ideas characteristic of a particular group at a particular historical moment. Hunt (2010: 361) argues that as part of its ideological process law offers legitimacy as the impersonal, formal legitimation of social relations in which law is often equated with reason.

Hunt describes Marx's relational approach to law as positing "that legal relations are first and foremost a variety or type of social relation that are identified by a specific set of characteristics that separates them from other types of social relations" (2010: 356). According to Hunt, 'legal relations' refer to the relation between legal subjects or persons. The status of a 'legal person' depends on the type of law (e.g. public law or private law) and the jurisdiction (e.g. different states might have different definition)[100]. Legal personhood is thus a status

[99] However, the question "what is law?" has been a subject of discussion and disagreement in the sociology and anthropology of law for some time now (see Benda-Beckham, 1988, 2002; Fitzpatrick, 1983; Galanter, 1981; Griffiths, 1986; Merry, 1988; Nader, 1969; Santos, 2002b; Tamanaha, 1993, 2000; Teubner, 1992). See also Chapter 1.

[100] For example, the recognition of women as legal persons is a relatively modern construction and is generally associated with universal suffrage, which has varied greatly around the world e.g. in Canada 18 October 1929 with *Edwards v Canada (Attorney General)* also known as 'The Persons

granted by law to specific groups of people, states, NGOs and corporations (see Section 2.2.). The compelling aspect of law as a social relation is that "the law and legal process have the potential to change the relative positions of legal subjects within social relations" (Hunt, 2010: 357-8). For example, when the law grants personhood to some entity, it is entitled to rights and duties that it did not necessarily have before. In other words, as Hunt points out, law can be considered a distributive mechanism with the potential to change the positions and capacities of the participants in social relations; and legal discourse is constantly negotiating the boundaries between the public and private.[101]

A focal point for Marxist theory of law is to question the role of law in the production and reproduction of capitalist economic relations (Hunt, 2010; also Cain, 1974; Vincent, 1993). With regards to economic relations, the law provides the framework for the acquisition and protection of private property (see Chapter 2). This framework, it has been argued by some commentators, is evidence that in capitalist societies "Courts of law sanction capitalist rule by providing ideological support and justification for the enforcement of the capitalist economic system" (Kawano, 2011: 42; see Chapter 1). Related arguments include those that consider that "law is both constituted by capitalist social relations, *and* constitutive of them" (Stanley, 1988: 97) or that "legal relations constitute economic relations" (Hunt, 2010: 363). A significant example of the constitutive effect of legal relations on economic relations is the legal developments responsible for granting the modern corporation its personhood, as well as limited liability. The remainder of this Chapter will address these legal developments and the relationship with human rights law.

This section has outlined a Marxist theory of law in order to frame what is to come in the rest of the Chapter by way of critique of the role of law in capitalist

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Case'; in the Western world Switzerland was the last country to grant women the vote first in some Cantons in 1971 and universally as of 1991 in a judgment of 27 November 1990 in the case of *Theresa Rohner et consorts contre Appenzell Rhodes-Intérieures*.

[101] Hunt argues that "a necessary tension between competing versions of legal boundaries, such as that between public and private, ensures the flexibility and responsiveness of law to changing contexts and pressures" (2010: 358). In this way, (capitalist) law is able to adapt and respond to the disgruntlements of minorities and the marginalised majority.

social orders. A Marxist theory of law thus informs the following discussion on the rise of the corporation in the 19th and 20th centuries and especially the subsequent anthropomorphisation of the corporation (see also Chapter 5).

II. The Corporation: A Vehicle for Capitalism

This section will show that the modern corporation was developed as a means for capitalist accumulation. It will develop a brief genealogy of the modern corporation in section 2.1., followed by an analysis of the development of the legal personality in section 2.2. The concept of the legal personality continues to shape the development of modern law and continues, "to profoundly affect everyday perceptions of the nature of companies" (Ireland, 1996: 69). Section 2.3. will address the legal sanctioning of the architecture of impunity of the corporation in an examination of shareholder primacy. It will link this discussion to the critique of human rights by scrutinising the effects of shareholder primacy in human rights law.

2.1. The Origins of the Modern Corporation: From *Societas* to Incorporation

Origins are always contested, however for the purposes of this thesis the traditional theory of the origins of the modern corporation in the Roman Republic is accepted (Blumberg, 1986; Ireland, 1999; Malmendier, 2005, 2009; Von Gierke and Maitland, 1958; Weber, 2003; Williston, 1888a, 1888b). One of the kinds of corporations that existed during Roman times was the business association or partnership, otherwise known as the *societas*.[102] With the decline and eventual collapse of the Roman Empire, merchants anxious to maintain their

[102]John Padgett (2012) describes the evolution of the corporation in Italy in Medieval times. He indicates that the societa implemented two organisational ideas: (a) unlimited liability of all the partners, and (b) corporate economic and legal existence above and beyond that of its constitutive members. In medieval terms, the rise of the "corporation" meant a move from a temporary alliance of companions or *compagnie*, with fluid partners, to the corporate body of a *societa*, with stationary branches or *filiali*. The Roman-law form of the founding partnership contract did not change, but there was a new reality and a new sense of continuity through time – continuity through generational time – that had not existed before in business (Padgett, 2012: 122).

trade began enforcing certain customs and developed rules of trade that applied unanimously. The outcome was an international private mercantile law known as *lex mercatoria*.[103] Early English mercantile Courts recognized the old *societas*, which existed for the purpose of profit. The medieval mercantile *societas* provided the possibility for a legally binding partnership between its business collaborators, instituting individual partner liability for the partnership's debts and obligations (Black, 1984: 37).[104] Although initially each merchant traded with his own stock, this would later change with the emergence of the JSC, discussed below.

It can be argued that *lex mercatoria* facilitated European trade by establishing common standards, evidenced by prosperous commercial activity in Europe throughout the Medieval period. At the same time, the trade guilds were granted charters by the sovereign, although the guilds' operations were limited to particular localities within the state (Cawston & Keaton, 1968: 1; Weber, 1978: 1023). During times of uncertainty and regular wars, the Crown benefited from the services and money grants of the chartered guilds, giving them various privileges, immunities, and monopolies in return (Cawston & Keaton, *ibid*: 2).[105] With the arrival of Europeans in the Americas in the 15th century and the frenetic propulsion towards colonisation, European sovereigns extended some charters

[103] For a critique and nuanced genealogy of *lex mercatoria* see Hatzimihail (2008). For a discussion on contemporary applications of *lex mercatoria* see for example Dezalay and Garth (1996), Santos (2002), Teubner (2002).

[104] It is generally speculated that the origins of the modern corporation and the concept of the legal personality date back to the Roman *societas* or partnerships (Ireland, 1999; Von Gierke and Maitland, 1958; Williston, 1888) and for some commentators more specifically the *societas publicanorum*, i.e. society of government leaseholders (Malmendier, 2005; 2009). In one of the first editions of the *Harvard Law Review* in 1888, Samuel Williston attempted to substantiate the Roman origins of corporate law in a history of the law of corporations before 1800. Williston's interest was in the evolution of the law of the *business* corporation as distinct from other corporations, i.e. ancient societies of units, such as the family, clan, and tribe, which were recognised as distinct entities of society (Williston, 1888a: 106). Von Savigny (1884) – famous for his work on Roman law – claimed that the corporate entity was in fact central to the Roman legal system but drew attention to the distinct legal personality attached to entities such as villages, towns, and colonies (Williston, 1888a). Thus, key to Von Savigny's description of the 'corporation' was the concept of personhood, which "applied to the old brotherhoods of priests and of artisans; then, by way of abstraction, to the State, which, under the name of *fiscus*, was treated as a person and placed within the jurisdiction of the Court" (Williston, 1888a: 106).

[105] Into the 19th century, some asserted from the structural point of view, "regulated companies merely develop[ed from] the local g[u]ilds adapted for trading purposes beyond the seas" (quoted in Schmitthoff, 1939: 82-83).

to corporations looking to trade abroad.[106] Corporations were thus chartered to the Crown for specific purposes and with mutually beneficial terms, e.g. the merchants and investors gained the protection of the Crown and the monarch collected in revenues and/or seized lands and established colonies using private resources.

In 1600, a Royal Charter was granted to a group of merchants that established the English East India Company.[107] It was chartered as a JSC with a fifteen-year exclusive renewable monopoly over trade in the Indian Ocean (Irwin, 1991: 1299).[108] The purpose and advantage of a JSC was that it allowed investors to pool their capital and divide the risks of the financial venture.[109] However, partners of the JSC remained individually liable for the nominal amount of their shares. Many companies in the years between 1624 and 1720 remained unincorporated.[110] In 1711, the South Sea Company was established as a chartered JSC in return for taking over the national debt incurred during war (Watzlaff, 1971: 9). By 1720, speculation had created a financial bubble, which came to be known as the 'South Sea Bubble', which sparked financial panic. In response to the financial bubble, Parliament passed the South Sea Bubble Act (1720). Henderson explains the Act "imposed stringent limitations on the nature of joint-stock companies permitting only transferability of ownership shares and

[106] JSCs sprouted in Medieval Italy spreading north with trade. We shall focus on English JSC since it is in England that industrial capitalism has its roots and so provides the context for the modern corporation.

[107] The English situation was distinctive from other chartering states at the same period, for example the Dutch, because the 'Statute of Monopolies' ended the Crown's prerogative to grant monopoly rights in 1624. This is a turning point in England as it marks the beginning of competitive mercantilism. For this reason, the focus is on the legal developments in the UK.

[108] Two years later, in 1602, the Dutch government initiated and financed the Dutch East India Company, granting a monopoly over Dutch trade in the Indian Ocean (Irwin, 1991: 1299).

[109] Ireland (2010) has pointed out in his analysis of the corporate legal form that the JSC is generally considered to be the most dominant corporate form due to a supposed superiority of its economic rationality and efficiency in comparison to other forms. Ireland (2010) describes the JSC as a business association built around a capital fund composed of freely transferable shares owned by a fluctuating body of company members, as opposed to being tied to the partnership of specific individuals. The JSC is also defined by its separation of ownership and management. Ireland describes what he considers to be the two most important components of the JSC as the fact that the JSC needs a corporate status that provides the corporation with a separate legal existence from its constantly changing membership, i.e. a legal personality; and secondly, it needs a limited liability status to enable it to attract capital from investors who will not be actively involved in management, i.e. shareholders (discussed in section 2.3.).

[110] For a detailed discussion of the differences between incorporated companies, JSCs and partnerships see Ireland (1996).

continuity of existence" (1986: 111). It basically abolished the LLC for approximately one hundred years. The Act required the establishment of a corporation based either on Royal Charter or an Act of Parliament.

The South Sea Bubble created a general distrust of corporations in the population (Williston, 1888a: 112), namely due to one of its key features, the separation between ownership and management. Individuals invested their capital in the JSC, which was managed in trust by a Court of Governors. Adam Smith criticised this feature in the *Wealth of Nations* claiming it led to negligence. He advised,

> The directors of such [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private co-partnery frequently watch over their own (…). Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company (2005: 606-607).

Despite this distrust, expensive endeavours including colonial and imperialist impulses as well as machinery 'improvements' at home (e.g. industry, railways) created an important niche for JSCs.

Several commentators have argued that 18th and 19th century legislation such as the Bubble Act set the stage for the many privileges the corporation has today (Henderson, 1986; Ireland, 1984; Ireland *et al.*, 1987). The following section traces the development of the corporate personality in the 19th century legislation and its implications. The aim is to demonstrate how the concept of legal personhood was integral to anchoring the corporation in post-industrial capitalist society in order to further scrutinise the consequences of this development on human rights.

2.2. The Central Tenets of the Corporation

This section is divided into two parts that outline and explain the central tenets of the modern corporation, corporate personality and limited liability. Section 2.2.1. focuses on the doctrine of the corporate personality and its development through the 19th century. Section 2.2.2. scrutinises limited liability and relates it to the legal fiction of corporate personhood. By so doing, this section serves to link the discussion to the Chapter's overarching analysis of the granting of human rights to corporations.

2.2.1. Legal Personality: The Anthropomorphisation of the Corporation in the 19th Century

This section provides a brief history and analysis of how 19th century Courts and legislatures propelled the corporation from financial institution to legal person. The doctrine of the corporate personality refers to the separation of the corporation from its members. However, it is more than a simple separation, it is the development of the non-state entity into a *legal* person; or in other words, the anthropomorphisation of the corporation. Legal personhood gave rise to the creation of a new body of law that would be more aptly suited to support the function of the modern corporation in society.

By the end of the 19th century, legal academics such as Samuel Williston observed that "regarding the conception of the business corporation, the law has been formed very largely since 1800" (1888a: 113). Thus, Williston asserted, "old doctrines that earlier applied to all corporations, though in reality were only suited to the kinds of corporations then existing, had to be discarded or adapted to the changing conditions of the new legal capacity of the corporation" (*ibid*). Paddy Ireland (1984; see also 1996, 2010; Ireland *et al.*, 1987; Picciotto, 2011: 108-121) has detailed the 19th century evolution of the JSC from a purely *economic* structure to a LLC with a specific *legal* status. He has argued that on one hand the economic structure of the corporation was based on an accumulated

capital fund, involving many people, whose membership took the impersonal form of a freely transferable share and whose participation in management was minimal. On the other, the legal status of the corporation means that it became incorporated and subject to the rules of company law, which also applies to all incorporated businesses, i.e. single proprietorships, TNCs, etc.

Ireland *et al.* (1987) scrutinise the origins of the modern corporation with reference to Court cases and texts dating from the 19th century. They describe the doctrine of separate corporate personality as a cornerstone of the modern corporation, entailing "the complete separation of the company from its members (Gower quoted in Ireland *et al*., 1987: 150; see also Ireland 1996). The modern corporation is thus "a [legal] person quite distinct from its members or shareholders" (Gower quoted in Ireland, 1996: 41). The separation of the company from its members has been "depersonalised", which Ireland *et al*. (1987) explain means that the company is emptied of its shareholders and thus has an existence independent and separate from them.[111] Traditionally, this separation is considered to extend from the legal act of incorporation. However, they argue, an examination into the 18th and early 19th century cases and texts reveals that incorporation at that time did *not* entail such a separation (*ibid*: 150).[112] Incorporation created an entity, i.e. the incorporated company, which was legally distinguishable from its members but there is no indication that the entity was 'completely separate' from its members (*ibid*). Ireland *et al*. (1987) go on to give a detailed account of the related cases and texts that corroborate their position (see also Ireland, 1984).

The complete separation of the company from its members was only confirmed in the late 19th century, in *Salomon v. Salomon* (1897), a landmark case in UK

[111] Ireland *et al*. (1987: 150) point out that the complete separation between the company and its members relates to the *in*corporated company – whose members are external to the company – as opposed to *un*incorporated companies – whose members *are* the company (see also Ireland, 1984 on distinctions between company forms). The depersonalised, reified corporation, they argue, can be linguistically evidenced by the singular reference "it", whereas in the 19th century companies, as associations of people, were referred to as "theys" (*ibid*: 150).

[112] Ireland (1984) details the differences between the incorporated and unincorporated company, JSCs and partnerships, private and public companies in order to map out the evolution of the 19th century separation between *economic* company and *legal* company that connoted different types of businesses.

company law (for details on the legal history of the case see Ireland, 1984). The Court established that the shareholders of an insolvent company could not be sued for outstanding debts. In other words, the *Salomon* case provided a judicial confirmation of the separation of the shareholder from the company by upholding the doctrine of the corporate personality.[113] Ireland (1984: 255) asserts that although *Salomon* is generally cited as the case that established separate corporate personality, the case merely confirmed its extension from JSCs to incorporated partnerships and individual proprietorships (see also Ireland, 1996). According to Ireland, the immediate importance of *Salomon* was that it

> (…) legitimated the adoption of the company *legal* form by individual proprietorships and small economic partnerships, validating their acquisition of the privilege of limited liability. It paved the way for the triumph of the company legal form" (1984: 255, emphasis added).

In other words, although it is significant that the *Salomon* case confirmed the doctrine of separate personality, its true impact and modern consequence lies in the extension of limited liability to all incorporated business forms.

A major consequence of the corporate personality and the correlated disassociation between the legal entity and its owners as the features of the modern corporation became the rationale for endowing human rights onto corporations. Corporations were granted human rights first under American law in the late 19th century, and later in legal traditions around the world in the 20th

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[113] Ireland *et al.* (1987) argue that the 'complete separation' of companies and their members emerged for the first time in the 19th century *before* the *Salomon case*. This separation was reflected in the changed consequences attributed to incorporation, although incorporation was not its source, rather the changing economic and legal nature of the JSC *share* (1987: 150; see also Ireland, 1984, 1996, 2005, 2010; Glasbeek, 2002, 2003a, 2005, 2007). Ireland (1996) has elsewhere noted that separate personality has been intimately linked with incorporation, asserting that "the separate personality is commonly referred to as '*corporate* personality' and the opaque barrier that descends between company and members on incorporation as the '*corporate* veil'" (2007: 41, emphasis in original) – although he takes issue with the claims of the origins of the modern corporation. He argues that in the 18th and 19th centuries the act of incorporation did not effect a complete separation of a company and its members, although such a separation did emerge during the 19th century. He holds to demonstrate that the modern concept of the corporate personality was confirmed in *Salomon*, but was already in existence before the case. As such, corporate personality, he argues, was not a product of incorporation *per se*. Ireland contends that the origins of the corporate personality are to be found in the emergence of the JSC *share* as an autonomous form of property.

century and even in some international law (see Chapter 5).[114] In the USA, the courts radically enforced the notion of corporate personhood by granting corporations protection under the equal protection clause of the Fourteenth Amendment of the Constitution.[115] In the landmark case *Santa Clara County v Southern Pacific Railroad Company* (1886) the Supreme Court was asked to judge whether the due process clause barred the State of California from taxing the property of a railroad corporation differently from that of individuals.[116] In the *obiter dictum* of the *Santa Clara County* judgement, the Court asserted the property rights of the corporation as its own legal entity, its own person.[117]

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[114] Ireland *et al.* (1987) convincingly argue that what the legal developments over the past two hundred years indicate is a major change in the nature of property, which evolved from being necessarily tied to physical assets to the legal recognition of shares: abstract, intangible, autonomous forms of property. They go on to analyse this new form of property in relation to Marx's analysis of fictitious capital (Ireland *et al.*, 1987). They explain that in the UK in the early 19th century shares were intimately linked to the owners of the shares, who were in turn identified with the company. However, by the mid-19th century the legal nature of shares was being reconceptualised (Ireland *et al.*, 1987). In *Bligh v Brent* (1837), the Court had to decide whether the waterworks company's shares were realty or not. The Court rejected the argument that the company's shares as property depended on the nature of the company's assets, and focussed instead on the nature of the interest of each shareholder (Ireland *et al.*, 1987: 152). Ireland *et al.* (1987) explain that the Court decided that the interest of shareholders in incorporated joint stock companies was in the profits of the companies and not in their assets, and thus shares were judged as personalty, irrespective of the nature of the company's property. Ireland *et al.* (1987: 152-153) note that for some years after *Bligh v Brent* uncertainties remained regarding the nature of shares of unincorporated companies and in companies closely related with land. They explain that these uncertainties dissipated in the case *Watson v Spratley* (1854) regarding the natures of the shares of an unincorporated mining company in which the Court declared that shares were interests only in the profits of the company and thus shareholders thereafter had, by law, no interest in the physical assets of the company. Thus, as of the mid-1850s, in the UK, shares were legally an entirely separate form of property.

[115] The relevant text of the Fourteenth Amendment of the USA Constitution reads:

Section 1**.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[116] Schwelb (1964: ftnt 8) comments on the meaning of the word "person" in the Fifth and Fourteenth Amendments of the USA Constitution. He observes that the unanimous ruling by the Supreme Court in the *Santa Clara County* case,

(…) remained uncontested until 1938 when Justice Black challenged it in a dissenting opinion in *Connecticut General Life Insurance Co. v Johnson* (…). See also the dissenting opinion of Justice Douglas, in which Justice Black concurred, in *Wheeling Steel Corporation v Glander* (1949). Justices Black and Douglas do not appear to have insisted on their point of view. They participated in the majority in later cases in which the Fourteenth Amendment was applied to corporations (…) (Schwelb, *ibid*).

[117] Corporations have access to rights of freedom of expression, reasonable delay for trials, but are often said to not have access to the right to life or the right to humane treatment, for example. Glasbeek points out that although this may be true most of the time, in some cases, such as in Sidney, Australia, "corporations are permitted to vote in municipal elections if they own, lease, or occupy rateable property; but that is the exception to the rule" (Glasbeek, 2003c: 9).

Legal personality, as a separation of the owners from the corporation was entrenched in law at the end of the 19th century in the *Salomon* and *Santa Clara* cases. However, it would be incorrect to attribute the rise of the corporation to this legal contrivance. The modern corporate form emerged at a specific historical moment, i.e. the 19th century's Industrial Revolution, when the growing accumulation of capital required a structure that could act as a vessel for that accumulation and a motor for its expansion. As a result, the legal recognition of the already-existing reality of collective capital in the 19th century was the progression of capitalism as a system of private property. The corporation was thus a reflection of the socialisation of productive forces within a capitalist mode of production, i.e. socialised capital. It represented the transformation of pre-capitalist individual private property into full-fledged aggregate capital in the form of shares. In this way, the JSC was a way for capital, as a social relation, to expand under changing conditions of accumulation. The aggregate capital of shares represented disparate shareholders, no one of which had the exclusive right to manage. The separation of managers from shareholders was thus the response to allow for the expansion of this new, organised, collective capital.

2.2.2. Corporate Personhood and Limited Liability

The exact dates of the emergence of the LLC are obscure, although it is relatively certain that by the end of the 18th century direct shareholder liability was no longer applied (Blumberg, 1986: 579-580). Nonetheless, it is conventionally accepted that the modern concept of limited liability – that protects the investor from the liabilities of the corporation in excess of the amount s/he invests – emerged in the UK in the mid-19th with the Limited Liability Act (1855) followed by a second Joint Stock Companies Act (1856) (Ireland, 1984).[118] The scope of

[118] Ireland (1984) explains that in the 19th century a first legislation was passed in the UK concerning *economic* JSCs entitled Joint Stock Companies Act (1844). He comments that,
Their size and impersonality, and the free transferability of their shares enabled them to be fraudulently exploited and created considerable legal problems for those that were *un*incorporated and subject to the law of partnership. The 1844 Act sought to remedy the legal

limited liability, once reserved for large, publicly owned JSCs, was extended to associations of seven shareholders, and eventually in the 20th century to sole-proprietor, incorporated companies. These Acts established limited liability in English law, which later had a significant impact on the modern corporation.[119]

Limited liability has become intimately linked to the corporation as its own legal entity. Inasmuch as it is its own legal entity, the corporation is distinct from the shareholder with separate rights and obligations, i.e. the legal personality.[120] However, some scholars posit that the concept of corporate personhood existed before limited liability, and is not necessarily its source (Blumberg, 1986; Ireland, 1984). These authors argue that the development of limited liability in the UK was the outcome of a deliberate political decision responding and acquiescing to commercial pressures to achieve economic objectives (Blumberg, 1986: 585; see also Ireland, 1984).[121] Philip Blumberg explains that

> (…) the concept of the corporation as separate legal entity ultimately led to the acceptance of the very different doctrine of limited liability: the rule that shareholders are not liable for the obligations of the corporation beyond their capital investment

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difficulties by compelling all [JSCs] to incorporate, and the problem of fraud by introducing an elaborate system of registration and publicity (Ireland, 1984: 241-242).
After more than a decade of heated debate, the 1844 Act was followed by the Limited Liability Act (1855) which was confined "to joint stock companies by the provision restricting the application of the 1855 Act to associations of 25 or more" (*ibid*: 242), i.e. seven or more shareholders. By 1856, a new Joint Stock Companies Act "dispensed with the minimum capital requirements, minimum share denominations and distasteful publicity stipulations to the old law, but enabled associations of only seven persons to incorporate" (*ibid*), thus transforming and extending the company legal form.

[119] As we have seen, limited liability was established in the UK in the mid-19th century and in the USA in the early 19th century. However the power for a corporation to acquire and own shares in another corporation, and thus form corporate groups, was not available until after 1889 (Blumberg, 1986). Subsidiary corporations existed prior to 1889, however the application of the doctrine of limited liability to insulate parent corporations from liability, along with shareholders, occurred as an unintentional consequence of the recognition of the separate legal identity of a corporation from its shareholders (*ibid*: ftnt 2). Limited liability, when applied to corporate groups (i.e. parent and subsidiary companies) protects not only the shareholders from the debts of the corporation, but also each of the subsidiaries (*ibid*: 575). See also Ireland (2010).

[120] The modern corporation has the following distinct features, legal recognition as a separate entity from its shareholders; transferability and unlimited divisibility of ownership shares; limitations on the liability of the owners; and continuity of existence (Ireland, 1984, 2010; Henderson, 1986: 111; see also Glasbeek (2003b: 8-14).

[121] Blumberg (1986: 585) asserts that limited liability was not essential to the economic development of England during the 18th century, evidenced by the prosper advances of the Industrial Revolution. Neither, he continues, was it an inevitable component of the capitalist economic system, since English industrial activity grew under a legal rule imposing liability on shareholders.

(1986: 577).

In other words, the economic and legal advantages of limited liability lie in the fact that by law (a) shareholders are only liable for the amount of their investment, and (b) shareholders do not legally own the property of the corporation and thus have no or little personal legal responsibility (see also Glasbeek, 2002: 9-10).

Blumberg (2001) suggests that the legal system that conceived the separation between the corporation and the shareholders is now incapable of dealing with the real problems of multi-tiered TNCs and shareholders spread across the globe. His criticism points to some of the fundamental dangers regarding how the law considers and deals with corporations. He argues that,

> (…) the major source of the problem arises from the ancient concept of the corporate juridical entity that particularly in the case of large public corporations departs sharply from the economic reality of modern business enterprise" (2001: 298; 1992).

TNCs can act as conglomerates for hundreds of sub-holding companies, e.g. Unilever, the Anglo-Dutch TNC, has over 300 companies in 70 different countries (Corporate Watch, 2013; also Vitali *et al.*, 2011; see Appendix 4). The law distinguishes each sub-holding company as its own legal entity, with separate and distinct rights and responsibilities despite the direction of the overarching corporate structure. For Blumberg, this is a "legal conception that is manifestly anachronistic and bears no resemblance to the economic reality" (2001: 303). The corporation is thus not simply the manifestation of individuals cooperating economically, but has become a political mechanism in itself.

In an analogous critique, Glasbeek (2002, 2003b, 2007) argues that the modern consequence of the corporate personality and limited liability legislation is equivalent to arming corporations with "a virtual shield from law". He asserts that individuals behind the corporation (i.e. shareholders) should be held responsible for damages resulting from corporate activities. He argues that legal fictions work to the advantage of corporations created to empower them

institutionally and legally, and enable them restitution when their rights have been violated. Glasbeek points out that although the corporation's separate personality makes it possible in *some* cases to hold it accountable for *some* of its transgressions (with important limitations),[122] in most cases, corporate personhood serves to immunise the physical people in the corporation from the law.[123] Similarly, Sjoberg argues that, "the bottom line is that corporate law [i.e. corporate personality and limited liability] serves to insulate managers and shareholders of a corporation from direct legal challenge by other interests in the social order" (2009: 164).

Glasbeek (2007) considers the significance of the corporate personality in the characteristics and attributes that make it a political unit compatible with our notions of liberalism, rather than simply an economic construction. The law insists that shareholders have ownership rights, however when corporations engage in violations, the law holds that shareholders are not and cannot be held responsible, i.e. the law upholds the 'corporate veil'. The corporate veil is thus a legal concept that separates the legal personality of the corporation from that of its shareholders and which protects the shareholders from personal liability for the company's debts or other obligations. Glasbeek refers to two mainstream justifications for this contradiction. Firstly, the legal (*ir*)responsibility of shareholders is justified on the basis that their invested capital has legally become the property of the corporation (Glasbeek, 2007: 260). Secondly, legal

[122] Corporate liability is most commonly seen in fraud or anti-trust law cases, as opposed to for example criminal or human rights cases. It should be noted that holding corporations 'accountable' in this way – that is in ways that promote or maintain market competition – is vital to the reproduction of capitalism and therefore is here considered an acutely limited view of accountability of corporations for their transgressions.

[123] This is, for example, the case with numbered companies or parent-company/subsidiary relationships (see Glasbeek, 2003 for a discussion). Numbered companies are most commonly used in Canada; the company is given a generic name based on an assigned corporation number, e.g. "1234567 Canada Inc." as its legal name. Numbered companies may include those that have not yet determined a permanent brand identity, or shell companies used by larger enterprises to deflect attention from the parent company's ultimate motives. This web makes it virtually impossible to trace back to any one individual. If the corporation is brought to Court and is found responsible, the physical individual is not liable since his/her personality is separate. The incorporation of a company in some countries takes a very limited amount of money that can be transferred to another company after its incorporation making it essentially hollow. When it is sued, it is possible that it has transferred its assets to a different company and therefore the individual claiming damage receives nothing because the corporation is worthless. It can simply claim insolvency (see Glasbeek 2003c).

infractions committed by the corporation in its quest for profits on behalf of shareholders cannot be attributed to the shareholders since they are neither in control of the day-to-day decisions of the corporation nor its managers. In other words, the corporate veil has provided a legal defence for the negligence of shareholders (Glasbeek, 2003b; Sjoberg, 2009).

Corporate personhood and limited liability are thus the fundamental components of the corporation as an institutional form of capital. The role of law has been to endorse and advance the corporation as the vehicle for accumulated capital and private property. The significance of the law's role in corporate capital is therefore not in creating the corporation as such since, as it has already been argued, the corporation was the reflection of the transition to capitalist forms of private property. Rather, the law's role has been to formally legitimise a particular form of economic relation through the corporation, thus bringing the corporation into the scope of commonsense. In other words, the legal recognition of corporate personhood and limited liability has resulted in the social legitimation of the power of private property.

This section has argued that corporate personhood was the legal recognition of the capitalist development of collective capital in the 19th century. This development was expanded upon in the 20th century with the rise of TNCs. It has shown that the central tenets of the corporation, i.e. legal personality and limited liability, produced a site of irresponsibility that insulates shareholders from liability. However, the corporation's structural potential for harm came to a head in the Second World War, when corporations actively participated in crimes against humanity.[124] Public outcry required that the actions of the corporations that participated in the Nazi regime be addressed; and, although shareholders remain untouchable, Section III will outline the developments in international

[124] The Article 6 of the Statute of the N&TIMT defined crimes against humanity as,
Murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, whether before or during the war, or persecution on any political, racial or religious grounds in execution or in connection with a crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

public law as key examples that led to the possibility for the liability of managers and directors of corporations in some cases.

III. Legal Subjectivity and International Law

The role of corporations in the Second World War, and more specifically within the Nazi regime,[125] sparked debates in the aftermath of the War on what, if any, law would or could respond to the corporate crimes against humanity. These debates raised questions regarding the definition of a legal subject under international, a status traditionally reserved for states (Acquaviva, 2005; Deva, 2003; Menon, 1992). The most significant legal discussion in the post-war years regarding the role of German corporations during the war and the subsequent debate on corporate legal subjectivity took place at the Nuremberg and Tokyo International Military Tribunals (N&TIMT) (Bratton, 2001).[126] The N&TIMT was perhaps the first international forum to discuss corporate responsibility. The outcome of the N&TIMT, within the context of the discussion here, was that the structure of international public law obscured the possibility of prosecuting corporations directly, because it was decided that corporations were not *subjects* of international law. [127] Nonetheless, the N&TIMT established individual responsibility for crimes against humanity including for state executive officials and corporate directors and managers.

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[125] The focus of this discussion is on the debate that ensued post-1945 with relation to the role of corporations in Nazi Germany. However, it is worth noting that decades later, new debates regarding American industrial and financial links to the rise of the Third Reich, e.g. JP Morgan, Ford and GM have emerged (Dobbs, 1998; for details see for example Higham, 2007; Sutton, 2010).

[126] During the Nuremberg Military Tribunal, the accountability of the directors of a corporation was invoked for their individual involvement not as representatives of the corporations. The Tribunal related corporate accountability to individual responsibility, which according to the respondents who raised this point defined the appropriate forum for corporate violations as being a criminal or civil/torts Court. A human rights Court, according to these respondents is a *forum non conveniens* or an inappropriate forum for dealing with corporate accountability.

[127] Instead, a handful of corporate directors were implicated and tried at the Trials. The corporate leaders tried at Nuremberg were ultimately released with virtually no repercussions. Krupp and Flick, for example, were convicted at the Nuremberg Trials. Both were released in 1951 and continued to consult German corporations for decades after (Baars, 2013). American Allied High Commissioner John McCloy revoked the confiscation of Krupp's property. The corporations themselves were virtually unscathed; most of the corporations have remained powerful market actors (e.g. Bayer, Aventis (formerly Hoechst), BASF).

The debates over the trials of the German corporations leading up to the N&TIMT raised important questions about the changing context of international relations. Until 1945, international law implemented Westphalian-inspired notions of power and influence, considering only states and the Holy See as 'subjects of international law'.[128] However, post-1945, questions about the role of non-state actors during war and their status under international law became unavoidable. In the *Reparations for Injuries Case* (1949), the International Court of Justice (ICJ) widened the scope of the definition of an international legal subject by defining a subject of law as an entity capable of possessing international rights and duties, and having the capacity to maintain its rights by bringing forth its international claims (see Brownlie, 1999: 57; Clapham, 2006: 64).

The ICJ's purpose was to recognise the legal subjectivity of the UN – a non-state actor – but the outcome has had significant influence on debates regarding the international legal status of other non-state actors, including corporations. However, it would appear that the ICJ was aware of the potential effects of its decision and sought to minimise the extension of subjectivity to other non-state actors. Andrew Clapham points out that whilst the ICJ acknowledged the legal subjectivity of some non-state actors, such as the UN, it was careful to emphasise that the possession of international personality did not imply the same rights and duties as those of states (2006: 68).[129] Consequently, while the ICJ accepted the subjectivity of the UN, it is yet to recognise corporations directly (Malanczuk in Clapham, 2006: 78).[130]

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[128] Philip C. Jessup emphasises the restrictedness of legal subjectivity as the basic rule of international law (1947: 343). This traditional restrictedness is not limited to the fact that international legal subjects have rights and duties but rather that they have the competence to create law (Portmann, 2010: 8). The association of legal subjectivity and law making is made because of the lack of a centralised legislator at the international level (*ibid*; see Brownlie, 1999). In the same vein, although acknowledging the limited attribution of subjectivity in international law, Emeka Duruigbo (2008) draws attention to the fact that it does not exclude the reality of interactions on the international stage. See Duruigbo (2008) for a discussion of the legal subjectivity of corporations.

[129] For the classification of international organisations as subjects of international law see *Reparations for Injuries Suffered in Service of the United Nations.*

[130] For a discussion on the potential for direct corporate responsibility see Kamminga (2004). Kamminga examines the implications of several treaties on the direct approach to corporate responsibility. He argues that, contrary to claims about the loss of state power, these provisions demonstrate the opposite: the inclusion of corporations into international treaties illustrates their importance on the international stage. He also emphasises that the drafters of these treaties felt it

Some legal scholars have criticised international law's "conceptual helplessness" (Klabbers, 2003) and argue that the system of international law is riddled with ambivalence and is incapable of dealing with entities other than states. Klabbers (2003) contends that the system of international law is quite simply out-dated, which he suggests is evidenced by its failure to incorporate non-state entities into its framework.[131] Still other authors, such as Forsythe (2000) and Jägers (1999) attempt to negotiate the doctrine of legal subjectivity, suggesting that although TNCs are not formally subjects of international law they can have derivative subjectivity through the intermediary of the state. They propose that international legal subjectivity has in fact expanded to include corporations and individuals in some cases. Nonetheless, these legal debates do not change the fact that although whilst it may be true that "human rights *theory* rejects efforts to limit duty-holders to states or to those carrying out state policy" (Ratner 2001: 461, emphasis added; see also Weissbrodt, 2005: 60), human rights *law* remains intransigent on the matter; the only international legal subjects are states.[132]

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necessary to address corporations directly, and congruently with states, in order to achieve the treaties' objectives. Kamminga (2004:4) deduces that, "there are no reasons of principle why companies cannot have direct obligations under international law". Ultimately, he suggests, it is not whether it is possible for companies to have direct obligations under international law, but rather whether or not it is appropriate in specific instances. Thus, it is a matter of choice and interpretation of the circumstances. Examples of direct responsibility include *International Convention on Civil Liability for Oil Pollution Damage* (1969), which provides that the owner of a ship (natural or legal person) may be directly liable for environmental damage caused by the ship's operations. The UN *Convention on the Law of the Sea* (1982) prohibits not only States but also natural and juridical persons from appropriating parts of the seabed or its minerals. The case *Doe v Unocal* (1997), filed under the United States' *Alien Torts Claims Act* (ATCA) (1789). In this case, Muchlinksi (2001) clarifies it was held for the first time that TNCs could, in principle be directly liable for violations of human rights under the ATCA. Other cases filed under ATCA against corporate violations of human rights include the violence against the Ogoni people in Nigeria. These cases are *Wiwa v Royal Dutch Petroleum* (2000) against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell); *Wiwa v Anderson* (2001), the head of its Nigerian operation, Brian Anderson; and, *Wiwa v Shell Petroleum Development Company* (2000), the Nigerian subsidiary itself, Shell Petroleum Development Company (SPDC). The USA Supreme Court greatly restricted the use and application of the ATCA in 2013, holding that the statute does not apply extraterritorially (*Kiobel v Dutch Petroleum*, 2013).

[131] Klabbers considers drawn out discussions on legal subjectivity relatively unimportant because, he argues,, "there is no particular legal advantage to be gained from being regarded as a subject of international law" (2003: 367). He reasons, with reference to the *Reparations* case, that, legal subjectivity says nothing at all about rights or obligations. Klabbers (*ibid*) points out the paradox that one need not be a subject of the law to perform legally valid acts, however the very performance of those acts indicates subjectivity (see also Brownlie, 1999 on the circular argument of legal subjectivity).

[132] In a critique of international law, the Harvard Law Review suggested that,

Nonetheless, discussions of legal subjectivity retain their relevance for human rights law in light of the internationalisation of organisations, transnational agreements, and globalisation. Despite the changes in international context since 1945, states have remained the only indictable subjects before international human rights Courts.[133] Clapham (2006) suggests that international law ought extend legal subjectivity to some actors already performing para-statal activities. He qualifies this extension as,

> (…) attributing legal subjectivity to *de facto* regimes, insurgents recognised as belligerents, national liberation movements representing peoples struggling for self-determination, even the Order of Malta, as well as inter-state organisations, e.g. the United Nations" (Clapham, 2006: 59; also Jägers 2006 for an analogous discussion on NGOs).

The para-statal activities of corporations (e.g. the privatisation of functions previously performed by the State)[134] are evidence of their impact within states and in the global context. Corporations can be applicants at international

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> Though corporations are capable of interfering with the enjoyment of a broad range of human rights, international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights. Since the nineteenth century, international law has addressed almost exclusively the conduct of States. Traditionally, States were viewed as the only "subjects" of international law, the only entities capable of bearing legal rights and duties. Over the last fifty years, though, the gradual establishment of an elaborate regime of international human rights law and international criminal law has begun to redefine the individual's role under international law. It is now generally accepted that individuals have rights under international human rights law and obligations under international criminal law. This redefinition, however, has occurred only partially with respect to legal persons such as corporations: international law views corporations as possessing certain human rights, but *it generally does not recognize corporations as bearers of legal obligations* under international criminal law (2001: 2030-31, emphasis added).

The article goes on to state that "international law is virtually silent with respect to corporate liability for violations of human rights" and "has neither articulated the human rights obligations of corporations nor provided mechanisms to enforce such obligations" (quoted in Duruigbo, 2008: 223).

[133] The ICJ launched the concept of *erga omnes* obligations in the landmark case *Barcelona Traction* (1970) (discussed in Chapter 5). Jan Klabbers has argued that "the concept of *erga omnes* obligation was an audacious attempt to come to terms with the expansion of relevant actors in international law: it is no coincidence that the concept was launched in a case which centred around the question of the status of companies" (2003: 364). The ICJ has consistently maintained that a violation of an *erga omnes* obligation does not necessarily provide it with jurisdiction, however the articles on state responsibility are now understood that violations of such obligations can be addressed in diplomatic practice (Klabbers, 2013).

[134] This includes the establishment of PMCs, schools, railways, health care, the supply of water, gas and electricity, and in some countries even managing and organising the prison system.

tribunals, such as arbitration tribunals but also even at human rights Courts, such as the ECtHR.[135] Corporations are admitted as claimants at the ECtHR, discussed in detail in Chapter 5, which is indication of their privileged status in international law in some contexts.

The *de facto* expansion of the definition of legal subjects was given some effect during negotiations for the International Criminal Court (ICC). Although unsuccessful, attempts were made to include corporations as subjects of international law under the *Rome Statute*. The result would have been an extension of the Court's jurisdiction to include legal persons. An article was drafted that included the possibility to prosecute corporations – individual representatives and the companies themselves.[136] The text was ultimately removed from the final version. The drafters of the *Rome Statute* acquiesced to the political pressure, limiting the *Rome Statute*'s applicability to natural persons at Article 25(1) (de Schutter, 2006a: 3).

Nonetheless, the Rome Statute's draft Article remains significant because of the debates it provoked. These discussions brought the question of corporate accountability to the fore of international public law and constitute a preliminary, albeit failed, attempt to bring corporations under the microscope of international tribunals. Hence, to a certain extent it served to bring these issues to light and thus has provided a space for questioning corporate accountability debates at the international level. These spaces of dialogue and debate are important to the development of counter-hegemonic strategies and have a transformative potential. Moreover, the strong involvement of NGOs and other elements of civil society indicated public disgruntlement with international law, which was externalised through contestation and active participation in trying to influence the establishment of the ICC and thus in some ways the organisation of international law. In other words, there was a proactive campaign for political agency. One scholar has argued that this involvement suggests that an alternative use of international law may still be possible (Pureza, 2005). Pureza claims that,

[135] Corporations are not allowed formally permitted to appear as claimants before the IACtHR, discussed in Chapter 5.
[136] For details on the Rome Statute see Clapham (2006: 244-247).

"Legality and legitimacy are, more than ever, privileged instruments to be used by counter-hegemonic forces in their struggles for a more decent and balanced international community" (2005: 279). This argument supports a non-essentialist belief in the emancipatory potential of law if it is included in a broader political mobilisation strong enough to allow struggles to be politicised before they are legalised (*ibid*: 268; see also Santos 2002b; Santos and Rodriguez-Garavito, 2005).

An important critique of the debates of the *Rome Statute* for the purposes here is that there was no consideration of the structure of the corporation. This can be explained by the logic of capitalist social orders wherein the role of law is to ensure the private accumulation of capital. Therefore, capitalist law cannot fundamentally weaken the corporation, as a vehicle for capitalist accumulation and the institutionalisation of aggregate capital. Thus, it is unlikely that any legal reform of capitalist neoliberal law will or can control the corporation in any significant way. Any real change will require imagining a different relationship with property. Fundamentally, the draft Article did not actually seek to challenge corporations through international law.

Conclusion

This Chapter has used a Marxist theory of law to explore how a particular form of corporate personality is constructed hegemonically through law. The legal creativity of the 18th and 19th centuries gave rise to the architecture of domestic legal systems that gave corporations – and their shareholders – immense protections. These protections also provided for their equally extensive *ir*responsibility (Glasbeek, 2007; Ireland, 2010). In a capitalist political economy, law strives to satisfy capitalism's need to allow individuals to accumulate socially produced wealth. It becomes the task of law to mask the exploitative practices of capitalism (Glasbeek, 2007); for example, by setting up the legal architecture to create a corporation and claim that it is merely to facilitate economic activities within an ideological consensus of liberal market principles. Glasbeek (*ibid*)

contends that a capitalist legal framework hides the structural role the law plays in the creation of the conditions necessary to capitalist relations of production.[137]

The chapter has also outlined the development of the corporate form through the 19th century from an economic entity into a legal one. In an age of globalisation and the transnationalisation of business, the legal personality has been an important component in developing the *economic* corporation into the *legal* corporation. This transformation is notable in the hegemonic reinforcement of the corporate personality in international human rights Courts (see Chapter 5). The role of law in buttressing the corporation's political development is visible through scrutiny of the corporate veil – a legal fiction that has furthered the irresponsibility of individuals and corporations by guaranteeing the legal separation of the corporation and the shareholder. The corporate veil produces problems of accountability since the corporation effaces individuals, and thus avoids responsibility for transgressions (Glasbeek, 2003). Moreover, the state-centred approach to international human rights in which states remain the only indictable 'subjects' before international human rights Courts creates a gap for corporate accountability. Notwithstanding, the critique of the state-centred approach to international subjectivity is not to suggest that corporations should be elevated to the status of states, but rather that a complementary responsibility might be considered.

In human rights law, and within a relatively short time-span, corporations have acquired many of the same rights that took generations of struggle for human beings to obtain (e.g. property rights, equality under the law, right to a fair trial, non-discrimination, etc.). There is a widely accepted assumption in academia that corporations are claimants before international human rights Courts, although this has very rarely been evidenced (e.g. Emberland, 2003). Chapter 5 will

[137] For Harry Glasbeek (2007), it is reasonable to consider that although the corporation has been denounced since its creation, no reform can change it enough since it is structurally "crimonogenic" – it is legally created to pursue profit at all costs. This piques reflection on the corporation's very existence – and more comprehensively, consideration of the relationship between law and the market within which corporations are embedded. The market is often portrayed as having an independent existence exogenous to the law; but markets, like corporations, cannot exist without laws that enable them. The trend is to consider reforms compatible and even capitulatory to the purported 'natural' tendencies of the market.

address corporate human rights. It will scrutinise how, and the extent to which, corporations are protected by human rights and have thus become entitled to bring their claims before human rights Courts. But first, the next Chapter will explore the economic origins of the regional human rights systems and the fundamental notion of property within the Conventions.

CHAPTER 4: THE REGIONAL HUMAN RIGHTS SYSTEMS

(…) The history of human rights is one of innovation and discovery – a continuous, if uneven, discourse of challenge and counter-challenge, of evolution, movement, and process, reflecting the dynamics of social, political and economic change.

- Tony Evans, 2011

Introduction

The ECtHR and the IACtHR draw upon multiple sources of law, including various state laws (e.g. civil and common law systems; different types of law such as tax, criminal, etc.) and various international laws (e.g. treaties, conventions, declarations, etc.) when formulating their judicial decisions. The Courts also consult norms created by non-state entities. An example of the Courts drawing upon these norms includes customary Indigenous law in the case *Comunidad Mayagna (Sumo) Awas Tingni v Nicaragua* (2005, IACtHR)[138] (see Chapter 5). In this way, it can be said that the Courts work in hybrid or plural legal spaces, where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes (Berman, 2007; see Chapter 1).

Despite a similar institutional structure,[139] there are multiple differences between the Courts. These differences are due in large part to the radically different environment and context within which each system developed, detailed in Section I. For one, the socio-economic and political differences of the regions have provided each Court with distinct concerns: the IACtHR has become known for its case law regarding human rights abuses and military regimes, including disappearances and summary executions, as well as its innovative approach to

[138] In this case, the Court insisted that Indigenous customary law must form part of the analysis. According to customary practices, possession of the land should suffice to grant Indigenous communities official recognition and registration of their property rights. The Court declared that the State therefore had an obligation to delimit the territory owned by the Community and grant title to it, as the mere privilege of using the land was insufficient to ensure the Community's permanent use and enjoyment of it (Keenan, 2012: 8).

[139] This particularly prior to the Council of Europe's 1998 adoption of Protocol 11 that terminated the European Commission. The Inter-American human rights system's drafters were largely inspired by the institutional structure of the European human rights system (Buergenthal, 1980: 157).

Indigenous rights; whilst challenges confronting the ECtHR have included, but of course are in not limited to, the abolition of the death penalty, the length of pre-trial detention, prison conditions, and the protection of private property. In other words historically, the European system has regulated "democratic" countries, whilst the Inter-American system has had to contend with military dictatorships throughout the region (Harris, 1998: 2).

The procedural differences of the Courts are in large part due to their makeup. The composition of the IACtHR is such that it has only a fraction of the number of judges as its European counterpart (seven commissioners and seven judges in the former compared to forty-seven judges in the latter).[140] Whereas in the IACtHR and the IACommHR, the judges and commissioners are meant to represent the OAS, in the ECtHR each judge represents his/her member state but is assumed to retain judicial independence.[141] Other differences include the list of non-derogable rights for each human rights system. In the IACtHR and the IACommHR, these non-derogable rights were the outgrowth of attempted responses to states of emergency called under military regimes, which suspended Convention rights. At the ECtHR, the suspension of non-derogable rights has been qualified, and despite a 'margin of appreciation'[142] – what is essentially the arbitrary decision-making of states in international law – any derogation is subject to European supervision (see *Ireland v UK*, 1978 §78-9). The margin of appreciation is an indication of the recognition of the legal cultural differences between member states since it allows the Court to give a ruling but provides wiggle-room to the state in its discretion in how to fulfil its obligations.

[140] Given the emphasis on judicial actors, the interviews focused on the Inter-American judges. Although the Commission is referenced, the interviews were carried out in the Court. The case law refers to both the Court and Commission.

[141] There are 47 judges in the European Court to date, although with the adoption of Protocol 14 and the integration of the EU as a 'Member State', this number is expected to grow to 48 in the future.

[142] The term "margin of appreciation" has been used in hundreds of decisions by the Strasbourg organs to refer to the discretion that national authorities may be allowed in fulfilling some of their principal obligations under the European Convention on Human Rights (see Hutchison, 1999; Greer, 2000; Letsas, 2006; Spielmann, 1995; 2005). However, given that the exact phrase 'margin of appreciation' is not to be found either in the text of the Convention or in the preparatory work it is essentially judge-made doctrine (Spielmann, 2012: 2).

Section I of this chapter highlights the relevant similarities and differences that may affect how these Courts consider corporate responsibility for violations of human rights. Section II will examine the Inter-American human rights system, followed by the examination of the European human rights system in Section III. Section IV will briefly highlight the major differences between the Courts approaches to ESC rights. The purpose of juxtaposing the two regional Courts is to consider how similar legal principles work differently in diverse contexts. Given the very different historical, social, political and economic contexts of the IACtHR and the ECtHR this thesis does not seek to construct a strict comparison. However, the circumstantial differences between the Courts makes it important to bear in mind that law is constantly constructed by the struggle between various norm-generating communities – both by government and non-government sources (see Santos and Rodriguez-Garavito, 2005 on legal pluralism; see also Chapter 1)[143]. By acknowledging the differences, it becomes possible to think about the legal contradictions at each Court, and what these may reveal in terms of possibilities to apply human rights law in the debate on corporate accountability. In other words, it is valuable to do this because it opens up possibilities to think about the potential for legal concepts and principles to take different or alternative paths of development.

I. The Regional Human Rights Systems

The IACtHR and ECtHR were founded after the Second World War when governments all around the world were establishing 'common' goals of peace and the rule of law in the post-war years.[144] The rapid emergence of the Cold War

[143] Pluralism is an attractive approach because it observes that various actors pursue norms and it studies the interplay, but does not propose a hierarchy of substantive norms and values (Berman, 2007: 1166). The impact of which may snowball into unexpected results. An example of this would be the Peoples Permanent Tribunal, which is an opinion tribunal that uses international law to expose human rights violations and raise awareness. It is an attempt to address the moral and political shortcomings of states as guarantors of justice. Although it has no formal jurisdictional or legal powers, it has played an important role in bringing cases of abuse before national Courts (e.g. the displacement of people brought to the attention of the PPT by the Mexican Movement of People Affected by Dams and in Defense of Rivers (MAPDER). The findings of the PPT were later presented in front of the Mexican Supreme Court in November 2012).

[144] In his empirical study on the constitution of human rights regimes, Andrew Moravcsik points out "although established democracies supported certain human rights declarations, they allied

post-1945 led to human rights gaining currency in the West as the mantra for the new fight for freedom (see also Chapter 2). In the wake of the formalisation of rights in the series of conventions and treaties that the international community adopted in the late 1940s and 1950s (e.g. UDHR, ICCPR, ICESCR, etc,), regional agreements came to the fore based on what was for a time considered "political and cultural homogeneity" in the regions (Buergenthal, 1980: 156). It was in this context that the OAS and the CoE were established, and from which both the ECHR and ACHR and their subsequent Courts were then set up as supervisory mechanisms. The Courts were established by treaty through the OAS and CoE. However, the groundwork for the regional cooperation that followed the Second World War had been laid long before human rights became a buzzword. States had significant interests in other outcomes of regional cooperation such as security, trade and investment opportunities. The OAS and the CoE were both established to forge regional systems of shared norms and institutions, with the goal of buttressing economic relationships.

The OAS and the CoE adopted human rights conventions, which became part of their greater "political projects" (Evans, 1996). [145] These projects refer to "concerted efforts to build a public and worldwide consensus around the idea of human rights, including political strategies, diplomatic initiatives, agreement of explicit principles, and conclusion of an international accord" (Waltz, 2001: 45).

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with dictatorships and transitional regimes in opposition to reciprocally binding human rights enforcement – a seldom-noted tendency (…). The primary proponents of reciprocally binding human rights obligations were instead the governments of newly established democracies" (2000: 219-220). He explains this, in part, as part of a political strategy to stabilise the political status quo in newly established democracies against non-democratic threats. Moravcsik's analysis leads him to claim that in Britain, for example, public opinion took little note of negotiations for the European Court of Human Rights (ibid: 237).

[145] Discussing the reasons governments may or may not ratify treaties, one scholar suggests,

> [W]hat motivates governments to ratify, or fail to ratify, can be a complex phenomenon and may not be necessarily related to the real policies and concrete conditions of life in their countries. […] Alternatively, the decision to ratify may be taken for ulterior motives other than a genuine commitment to the contents of the particular international instruments (An-Na'im, 1987-1988: 510-511).

What this has meant is that the rhetorical commitment to human rights does not guarantee concrete government action. Kathryn Sikkink (1993) argues that government action can be broken down into three possible forms. Either the government rejects the legitimacy of international legal regimes; or it ratifies international treaties and cooperates with international organisations while leaving repressive domestic practices unaltered; or it improves domestic human rights practice. The same government may do any of these three actions depending on the situation and the human right in question.

The deliberate integration of human rights into the projects of the regional organisations is indicative of the construction of a hegemonic law relying on society-wide recognition.

1.1. The OAS

The OAS has a much longer history than the CoE. Its early establishment can be linked to strong pan-Americanism since the 1820s. The Spanish-American states established political and military solidarity mainly to protect themselves against European interventions. It was only after the American Civil War that the USA became interested in Latin America. In 1889, the government of the USA invited other American states to Washington, D.C., a meeting that shifted the focus of pan-Americanism from security to trade. The meeting was held,

> (…) For the purpose of discussing (…) some plan of arbitration for the settlement of disagreements (…) and for considering questions relating to the improvement of business intercourse (…) and to encourage (…) reciprocal commercial relations (…) and to *secure more extensive markets* for the products of each [country] (OAS, 2012: Internet).

The shift to a US-led pan-Americanism was framed by the American Secretary of State James Blaine, who advocated the creation of an International Bureau of American Republics to promote a customs union of trade for the Western Hemisphere (Martz, 1993: 30). The Bureau was later renamed the Pan American Union, headed by the USA which kept tight control over conference agendas. At the beginning of the 20th century, a Commercial Bureau for the International Union of American Republics was created and made available information pertinent to commercial and economic relations. Soon after, the International Commission of Jurists was established to draft codes on international law and state rights (Herz, 2008). The concretisation of hostilities in Europe led President Roosevelt to widen the agenda of his 'good neighbour policy', issued in 1933, to include political and security issues.

The precursor to the OAS was therefore initially an association of states for economic interest and cooperation, incorporating human rights in its objectives post-1945. The OAS adopted the American Declaration a few months before the UDHR in 1948.[146] One of the Declaration's impacts has been that the UDHR was reviewed in light of the human rights acknowledged in the former (Waltz, 2001: 65), which also substantiated the Declaration globally. Moreover, the introduction of human rights into the OAS project masked the production of hegemony by diffusing the discourse on power and interests. By focusing international attention on the commitment to human rights, the OAS established a collective will which cemented the project of universalising human rights as the infrastructure for otherwise incompatible hegemonic projects (Buckel and Fischer-Lescano, 2009: 446; see also Chapter 2). Several states in the Americas experienced golden years of wealth and production post-1945, including the USA, Argentina, and Mexico. The political project of human rights in the Americas can be seen as a means to attain consensus and collaboration.

The American Declaration did not create a supervisory mechanism with which to control and enforce the rights adopted within it despite Resolution XXXI of the Ninth Conference of American States in Bogotà, Colombia (1948). Resolution XXXI not only acknowledged the need for effective juridical protection, it also raised the idea of a court. The Resolution stated that the protection of human rights "should be guaranteed by a juridical organ, in as much as no right is genuinely assured unless it is safeguarded by a competent tribunal," and that "where internationally recognised rights are concerned, juridical protection, to be effective, should emanate from an international organ" (Rescia and Seitles, 1999-2000: 608). Nonetheless, to this day, the American Declaration remains a set of non-binding norms, although it has served as a source of law and term of reference for the IACommHR (Buergenthal, 1971: 134; see also *Interpretation of*

[146] The American Declaration has marked the Inter-American human rights system in important ways. Former President of the Inter-American Court, Judge Cançado Trindade, attributes four major contributions to the development of the Inter-American system of human rights to the American Declaration (Cançado Trindade, 1998a: 395-96). Firstly, the conception of human rights as inherent to the human person; secondly, the integral understanding of human rights (encompassing civil, political, economic, social and cultural rights); thirdly, the normative basis of protection vis-à-vis OAS member states not parties to the (subsequent) American Convention on Human Rights; and fourthly, the correlation between rights and duties (in Naddeo, 2010).

the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, IACtHR, 1989).

It was only several decades later that the OAS adopted its institutional human rights framework. The ACHR was adopted in 1969 and came into force in 1978. Costa Rica was the only state to immediately ratify the ACHR, and the absence of four states (Argentina, USA, Brazil, Mexico) tainted its initial 'success' (Buergenthal, 1971: 121). Former IACtHR judge Thomas Buergenthal claims the abstention of these four states was in part due to the over-comprehensiveness of the Convention. He suggests that the drafters of the Convention were unrealistic about the governmental attitudes regarding international human rights protections (*ibid*). What this lack of support indicates is that the endorsement for human rights from OAS members was noncommittal and insincere. It took ten years to muster the eight states necessary for the Convention to come into force. To date, twenty-five of the thirty-five OAS Members have ratified the ACHR, with two denunciations (Trinidad and Tobago, and Venezuela), leaving the total number at twenty-three. The Convention established the Court although given the long ratification process the IACtHR only came into existence in 1979 once the ACHR came into force. The IACtHR initially delivered mainly Advisory Opinions, struggling to develop its case law. It delivered its first judgement in 1987. Nonetheless, in its relatively brief history the Court has made a significant contribution to international human rights jurisprudence particularly with reference to human rights violations during dictatorships and civil wars in Latin America, and more recently involving Indigenous peoples' petitions (see Chapters 5 and 6).

The Court has been received tepidly by OAS member states, with about two-thirds accepting its jurisdiction, discussed in Section II. This limited jurisdiction illustrates a deficiency in the functional and institutional support that the IACtHR receives from the OAS member states. These are important obstacles. The refusal of a number of OAS states to ratify the ACHR, particularly the USA, was commented on by the Inter-American judges during the interviews as a clear indication of the depth of the accountability 'gap' and a threat to the legitimacy of

the IACtHR (see Chapter 7). The states that do not accept the jurisdiction of the Court do not want it scrutinising their actions or inactions (e.g. see Kirk, 1991 on the USA).

Despite their refusal to accept the jurisdiction of the Court, states such as the USA and Canada, are active and influential members of the OAS. The treaties, conventions, summits, and other political charters that are established and promulgated by the OAS impact the Court. However, as is the case with a number of other treaties that these countries (the USA in particular)[147] have signed but not ratified, the human rights system maintains some political force within these circles if only in providing a forum to raise consciousness about human rights violations.[148] The impact of not ratifying the Convention is that those states nonetheless maintain a stake in the discussions or policy debates but preclude any possibility of the treaties having an effect on domestic law. That said it is worth noting that the IACommHR has more consensual support. All member states of the OAS participate and recognise the jurisdiction of the IACommHR, which can only make recommendations or deliver Reports.

1.2. The CoE

Across the Atlantic, the CoE was established in the wake of the Second World War and in response to a generalised European financial crisis. A council of European states was thought to increase the chances of maintaining peace, whilst providing a policy framework for economic and social values on the continent. It was within

[147] One scholar suggests,
The US government's attitude toward human rights treaties differs from tis view of other international accords. Washington routinely accepts changes in its conduct when negotiating trade or security agreements – by, for example, lowering trade barriers or reducing missile or bomb deployments. But when it comes to human rights treaties, ratification will evidently be considered only if it is cost-free (Roth, 2000: 352).

[148] One respondent suggested that human rights Courts nonetheless remain important forums within which to raise consciousness, for example the case of Guantanamo Bay.

> The case of Guantanamo Bay did not come to the Court only because the USA is not party to the Convention, but it went to the Commission. And they have hearings, and Colin Powell has to answer. He was summoned, and of course, he didn't go there but he had to answer the questions of the Commission. It is a pity the Commission is not a tribunal so nothing happened. But if the USA was a party to the Convention then it would have come to the Court (IAJ2).

the context of Keynesianism in the post-war years that the founding member states of the CoE decided to create a union of European states to guarantee peace and stability. The CoE was established in the context of a new global financial system with recently developed international institutions led by the USA. Western Europe was rebuilding and the USA aimed to secure a distinctive return for aiding in its reconstruction under the Marshall Plan,[149] namely a certain market discipline (see Chapter 2).[150]

In his discussion on the relationship between discipline and human rights, Evans argues that,

> (…) if human rights have any significance within the contemporary global order, they offer a set of values delimited by an assumed normative consensus that legitimates activities associated with market discipline, specifically negative rights and those associated with property (2005: 44; see Chapter 2, also Chapter 5).

The years of reconstruction were marked by strong debates between socialist ideals for the welfare state, and its critics who began planting the seeds of neoliberalism from the end of the War. Ideological deliberations contributed to the debates at the CoE regarding the newly adopted ECHR (see Chapter 5).

The CoE was established in 1949. Its objective was to achieve a greater unity between its members for the purpose of safeguarding and realising the "ideals and principles which are their [European states'] common heritage and

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[149] Officially known as the European Recovery Programme, the Marshall Plan was designed by the United States to stem the spread of Soviet Communism in Europe after the Second World War. The United States became financially engaged in aiding Europe rebuild with the aims of removing trade barriers, modernising European industries, and creating the necessary conditions for capitalist trade partners.

[150] Governments' relative omnipotence over internal affairs of the state was challenged by the realisations of Nazi atrocities during the Second World War. The exercise of power and discipline were subtly engaged in Western Europe, not least within the discourse of human rights. Power and discipline were no longer solely located within the government or within particular factions, classes or institutions but rather were exercised in the actions of daily life. In other words, modern forms of discipline, particularly those in the post-war years, operated and continue to operate, continuously and without agency (Evans, 2005b: 42; see Chapter 2). The reconstruction of Western Europe, with the aid of the USA, created the necessary conditions for a Gramscian-style consensus over ideological intent and legitimate social action. With this in mind, it could be argued the CoE, at least its founding members together with the USA, engineered the notion of right to coincide with market discipline.

facilitat[ing] their economic and social progress (Council of Europe, 1949: 2; see also Ryssdal, 1997: 31). The CoE's constitutive Statute stipulates that member states are to apply common European values in practice, above all democracy and human rights, as part of an overarching strategy of European integration. In this way, human rights became synonymous with democracy and thus became a source of legitimation for state members of the CoE.

Member states must agree to collaborate on the development and protection of European nations as democratic countries, the key to which is applying the rule of law and acting as socially responsible countries. In this way, the CoE seeks to create a European cultural identity with an emphasis on similar values despite socio-cultural diversities. The cornerstone of the CoE's ideals and principles was, and remains that "these values are the foundations of a tolerant and civilised society and indispensable for European stability, economic growth, and social cohesion" (Council of Europe, 1949: 2). Thus, in the CoE, like in the OAS, human rights was conceptualised as part of the foundation of an economically healthy and successful region.

The ECHR was drawn up by the CoE in 1950 and came into force in 1953. It established the Court in 1959, discussed in Section III. The Convention has expanded along three axes – jurisprudentially, institutionally, and geographically (Helfer, 2008: 126).[151] The success of the ECtHR is due not only to its resilience and history, but also to the CoE's capacity to evolve through the adoption of Protocols. These Additional Protocols have developed the institutional framework of the Court (albeit not without criticisms).[152] The ECtHR has imposed itself as *the* regional human rights tribunal, which one European scholar insists has "transformed Europe's legal and political landscape" (Helfer, *ibid*). However,

[151] It has expanded jurisprudentially through its case law; institutionally merging the Commission and the Court in 1998 with Protocol 11; and geographically with the integration of 'new' democracies over the years.

[152] A repeated criticism is that the Protocols are ratified too late and so the problems or issues the Protocol was meant to address have either been exacerbated and require additional changes. For example, the ratification of Protocol 14 by all Member States took almost a decade and many critics, including judges, have stated that it is insufficient to deal with the Court's caseload. In other words, a new Protocol will certainly be necessary to deal with the challenges of the Court's success.

the Court has its own set of problems, particularly its large caseload, which has expanded exponentially over the past twenty years. The success of the Court is therefore also the thorn in its side, and the Court risks losing legitimacy if it cannot cope with the case law, an issue raised by the respondents during the interviews (see Chapter 7).

By 1979, the Cold War was well underway. The political and economic global order had bifurcated into liberal democracies and the Communist bloc. The social context had radically changed since 1949. Former colonies had broken the shackles of empire; the G-77 was inaugurated in 1964 challenging the dominant powers and later proposing a New International Economic Order (NIEO) to counter the Bretton Woods system; and the ideology of neoliberalism had begun to embed itself and fortify the market economy. TNCs were by this time a growing force, addressed by the UN in the mid-1970s. In 1977, the G-77 proposed a Draft Code of Conduct[153] at the UN, in an attempt to introduce regulations for 'corporate social responsibility' through intergovernmental codes (see also Introduction Chapter).[154] Notwithstanding these efforts, the corporation was meanwhile benefitting from its position as rights-holder, further explored in the next Chapter.

1.3. The Life of an Application

The role of the judiciary at both Courts is not to interpret national laws but rather to ensure that domestic Courts apply legislation in ways that are compatible with their respective human rights Conventions. Admissibility to these Courts is governed by a strict procedure (see Appendix 3). In the case of the ECtHR there are four admissibility rules that apply to *individual* applicants. Firstly, the

[153] This was debated in the UN for over a decade before dissipating in 1992. The Code of Conduct was followed by the UN Global Compact in 1999, which was prorogued. The latest attempt by the UN to address corporate responsibility has been the UN *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* in 2003, although this too appears to have stagnated in the face of opposition for more concrete rules for corporations.

[154] This was later abandoned for Corporate Codes of Conduct, which are voluntary and internal forms of regulation or 'soft law' rather than state-enforced legislation.

applicant must be a victim of a violation of one or more of the articles of the ECHR. Secondly, the application must be made against a state. Judge Lech Garlicki proposes that,

> The relations between private actors, even if not included into the mainstream of the Convention guarantees, do not entirely escape the scope of the Court's interest. (...) [Nonetheless] there is no formal procedure in Strasbourg that allows the lodging of a complaint against a private person (2005: 142).

Thirdly, the applicant must first exhaust all domestic remedies. Finally, the application must be made within six months of the conclusion of any national Court proceedings or where no proceedings were held that the application is lodged within six months of the alleged breach of the Convention right.

In the Inter-American system the rules are quite different, starting with the admissibility of a petition, which begins at the Commission. The IACtHR can and does proactively engage in on-site observations of the general human rights conditions of member states as well as investigating specific situations. In the Inter-American system either an individual or a third party may file a petition, which may be considered a 'general petition' – when a widespread form of human rights violations not limited to one group or incident – or a 'collective petition' – referring to numerous victims of a specific incident or practice violating human rights. Similarly to the ECtHR, the petition's admissibility depends on the violation of specific Convention rights as well as the exhaustion of domestic remedies. If some domestic legal opportunities are still available to the petitioner, then it must be demonstrated that one of four situations applies: (1) either access to these remedies has been denied or prevented, (2) there has been an unnecessary delay in judgment, (3) there was a denial of adequate legal counsel, or (4) the domestic legislation does not provide due process to protect the rights violated. Finally, the petition must be filed within six months of the final domestic ruling, although extensions are granted when the state interferes with the process and then the petition must be made within a reasonable time. It is only three months after the Commission has written its conclusions, recommendations or proposals that the state or the Commission may solicit the

IACtHR – if the state has ratified the Convention – for a new evaluation and eventual judgement with possible monetary ramifications.

II. The Inter-American Court of Human Rights

All thirty-five independent states of the Americas have ratified the OAS Charter and are therefore member states of the OAS.[155] All but the USA have ratified the ACHR; but only twenty-six have accepted the jurisdiction of the Court.[156] The USA, Canada and several Caribbean states do not recognise the Court's jurisdiction. The IACtHR is an autonomous judicial body mandated to interpret and apply the ACHR. It is composed of seven judges elected from any of the OAS member states. Member states that have not accepted the jurisdiction of the Court cannot nominate judges from their own countries; however, the judges can be nominated from any of the OAS member states but only states that have accepted the Court's jurisdiction can nominate judges.

The Inter-American human rights system is composed of two main institutional bodies: the IACommHR and the IACtHR. Unlike the Court, the Commission represents all member states of the OAS; that is, all member states are subject to the Commission's jurisdiction. Steiner, Alston, and Goodman (2006) explain the Commission has a dual role.

> It has retained its status as an organ of the OAS, thereby maintaining its power to promote and protect human rights in the territories of all OAS member states. In addition, it is now an organ of the Convention, and in that capacity it supervises human rights in the territories of the states parties to the Convention (*ibid*: 1025).

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[155] These are Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (Commonwealth of), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas (Commonwealth of), Trinidad and Tobago, United States of America, Uruguay, Venezuela (Bolivarian Republic of).

[156] Members who accept the Court's jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay, Venezuela.

The Commission has many functions, including recommending progressive human rights measures to governments of the member states, preparing progress reports, requesting information from governments of the member states on the measures they have adopted, responding to inquiries made by other member states, acting on petitions, and submitting an Annual Report to the General Assembly of the OAS (Jarmul, 1995: 313). The Commission is a quasi-judicial, quasi-political, permanent body that meets several times a year with the possibility of meeting as many times as deemed necessary if voted by the majority. It is headquartered in Washington, D.C., USA.

The IACtHR convenes in San José, Costa Rica. It is a non-permanent Court, meaning the judges meet a few times a year for sessions in San José and occasionally for special sessions in a country under examination. Judges are therefore only occasionally called upon to exercise their functions at the Court and otherwise exercise other professions in their daily lives (e.g. professors, lawyers, etc.). The non-permanent status of the Court is due in part to the Rules of Procedure, and in part to a lack of financial resources. In truth, the Court's minimal financial resources limits the number of cases it can realistically deal with. The total budget of the OAS for 2011 was $90 292 549 (OAS, 2011: 152). The OAS allocated 6% of its 2011 budget to human rights (*ibid*: 33), or in other words a little over $1.5 million USD compared to the almost 60 million euros allocated to the ECtHR by the CoE for the same year (ECtHR, 2011).

The power of the IACtHR applies not only to interpreting the ACHR but also to the interpretation of "other treaties concerning the protection of human rights in the American states" (Jarmul, 1995-1996: 316). The Court's jurisdiction extends through South and Central America and some Caribbean states. The significance of a limited jurisdiction in what concerns this thesis, is a weakened capacity of the Court to address corporate violations of human rights, For example, of the fifty largest corporations worldwide, sixteen of them are based in the USA (CNN, 2011), a country that has not recognised the jurisdiction of the IACtHR. The impact these corporations have is enormous, but they cannot be scrutinised by the Court, even under the potential mechanism of the indirect approach (see

Chapter 6). Because of the lack of jurisdiction, the Court cannot scrutinise American laws, the USA's approach to and fulfilment of due diligence, and the requirement to investigate alleged abuses, explained in Chapter 6.[157] Despite this, the IACtHR does have advisory jurisdiction, which may be invoked by all OAS organs and member states, whether or not they have ratified the ACHR or accepted the Court's jurisdiction.

Notwithstanding jurisdictional obstacles, the IACtHR built a reputation for being an innovative judicial body because of its creativity in addressing gross violations of human rights during the 1980s and 1990s. Nonetheless, the years of dictatorships in Latin America tainted the early years of the Inter-American human rights system. Cécilia MacDowell Santos (2006) has commented on the beginnings of the Inter-American human rights system noting,

> The political context in which the Inter-American system was established marked its slow development and the disregard for its own purposes. On the one hand, the commitment to democracy and respect for human rights given in treaties by Latin American member states was neutralized by a fear of intervention by the United States. On the other hand, the fear of communism prompted the United States to support military dictatorships in the Latin American region. Until the 1980s, military and other authoritarian governments sat at the Inter-American system, discrediting the system's goals of promoting democracy and respect for human rights. States of emergency and unresponsive or antagonistic governments were not uncommon. In addition to facing and overlooking large-scale practices of torture, disappearances, and execution, the system had also to deal with a weak, inefficient, and corrupt domestic judiciary (2006: 12).

Despite these difficult beginnings, the IACtHR symbolised a possibility for individuals to have their petitions heard; and indeed, the Court was immediately petitioned by cases against paramilitary groups. In order for the IACtHR to deal with these cases it first had to define the legal status of paramilitary groups (i.e. non-state actors) and reconceptualise the traditional approach to human rights (i.e. state-centred) in order to address the violations. In other words, the Court had to be creative about how the state could be made responsible for non-state

[157] Canadian and American examples of abuses for union rights are frequent (e.g. Walmart, Indigo-Chapters Books), despite the right to unionise being explicitly set out in the 1999 PSS.

actor violations in order to apply human rights law, i.e. the horizontal effect discussed in Chapter 6).

III. The European Court of Human Rights

There are forty-seven judges at the ECtHR, one judge per member state of the CoE.[158] All European countries (extending from Iceland to Azerbaijan, Cyprus to the Norway) are member states of the CoE, save Belarus, Kazakhstan, and Vatican City. The EU ratified the Convention and thus accepted the jurisdiction of the Court in June 2011, although the practicalities of its accession as a member state remain vague. In 1998, with the ratification of Protocol 11, the ECommHR was made obsolete and the ECtHR gained more responsibility. Protocol 11 also instituted the individual application process (see Appendix 3).

The size of the ECtHR represents advantages as well as many challenges. There are differences in legal culture and education; different historical and political backgrounds of the countries, which influence the nomination of judges to the Court; as well as the personal perspectives and interpretations of the ECHR by each judge. Notwithstanding, the provisions of the Convention are intended to apply in a uniform manner to all member states. According to the Preamble of the Convention, the rules found within are based on "a common heritage of political traditions, ideals, freedom, and the rule of law". The accession of former Soviet states post-1989 has influenced the so-called common heritage given the political, economic, legal, and constitutional transformation in Europe.

Stephen Greer suggests that the ECHR initially provided expression for Western European liberal democracy, in contrast with the communist model of the Soviet bloc, as well as a tribunal with which to preclude authoritarianism (2006: vx).

[158] Member states: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

Today, one of the Court's central roles is arguably to create a kind of European constitutionalism, based on a democratic architecture guaranteeing human rights and fundamental freedoms, and the Rule of Law (Ryssdal, 1997). The rules set out in the ECHR are thus autonomous, supra-national ones, that produce standards and principles that may be found to be incompatible with the legal systems of particular states (Loucaides, 2007: 2). Despite this, the Convention has imposed itself, and in cases of incompatibility with national principles or laws ECHR norms must prevail, "regardless of the importance of the municipal legislation at stake and of the ensuing consequences, legal, economic, or political in the State concerned" (*ibid*). In this way, over the decades, the ECtHR has imposed itself as an independent body within the CoE, although not without resistance from some member states. Former ECtHR president, Luzius Wildhaber admits,

> (…) There are still unresolved questions about the Court's status and its true position within the Council of Europe architecture. I should also say that we in Strasbourg have ourselves on occasion had to remind Governments of the special character of the Court's judicial function, which should command the same respect owed to a national judiciary (2004: 87).

The expansion of the Court since 1989 with the absorption of Eastern bloc countries has changed its composition. Wildhaber goes on to state that

> the understandable political imperatives of the heady days post-1989 have, it must be said, left the Court with a major headache, just because it is a Court and must decide issues of law, without reference to political expediency" (*ibid*: 89).

The ECtHR, in effect, deals with a wide range of human rights issues with significant impacts on the legal and political developments across Europe.

The ECHR, like most other international human rights instruments, focuses mainly on the states' duty not to interfere through their own agents with the individual's exercise of fundamental freedoms (Weissbrodt, 2002: 185). Certain parts of the ECHR do however imply a positive obligation for states to enact legal, judicial and administrative frameworks in order to protect individuals against the violence of non-state actors. Some judges at the ECtHR have relied on the

'evolutive approach' or 'dynamic interpretation' of the Convention as a 'living instrument' to support the positive obligations doctrine (explored in detail in the analysis in Chapters 5 and 6). This doctrine has, according to some, been critical to the reform and improvement of the Convention (Wildhaber, 2004: 86).

The Court has continually affirmed the principle of subsidiarity,[159] which invests the member state – and primarily its judiciary – with the effective safeguarding of the human rights set forth in the Convention (Ryssdal, 1997: 48). It is a principle that seeks to resolve cases before they reach Strasbourg, or otherwise dismiss them on procedural grounds once they reach the admissibility hearing. The Court therefore sets a standard and ensures that human rights principles reflect the changes in national contexts, but the state is effectively responsible for its implementation. In this way, Wildhaber (2004: 90) suggests, the Court has illustrated its 'public policy intention'.

The principle of subsidiarity is intended to ensure that the Court's mission remains that of setting a principle to be followed by member states rather than individual justice. The principle of subsidiarity remains a distinctive feature of the ECtHR, however in an Opinion submitted to the Committee of Ministers at the Izmir Conference in April 2011, the Court raised some concerns. The ECtHR emphasised that although subsidiarity is the hallmark of the CoE's system, it "cannot be unconditional and unilateral". This statement suggests the recognition by the ECtHR that subsidiarity cannot act in a vacuum since it may result in states paying lip service to national protection without necessarily following through with substantive human rights protection, such as corporate violations of human

[159] The legal basis of the principle of subsidiarity of the ECtHR is found at Articles 1, 13 and 35 of the Convention. It means that the primary responsibility for guaranteeing and protecting human rights falls on the internal institutions of the state (government, legislature and Courts). In the judgment *Scordino v Italy* (2006) the Court reiterated that,

> The primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights (§140).

The Court should intervene only where the domestic authorities fail in the task of implementing and enforcing the rights and freedoms of the Convention. When the ECtHR finds a state guilty of violating a human right, it is the state that is responsible for deciding how to remedy the breach.

rights.[160] Instead of the Court interpreting the ECHR and delivering an authoritative position, each state would be entitled to interpret the Convention according to its position under the principle of subsidiarity.

The object and purpose of the Court, as defined in Article 1 ECHR, is to monitor the human rights protection by member states. The effective guarantee of fundamental rights and freedoms remains within the national jurisdiction. The effective guarantee relates to the 'margin of appreciation' given to member states regarding "the room for manoeuvre that the ECtHR is prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights" (Spielmann, 2012: 2). Despite the doctrine of the margin of appreciation, the principle of individual access has meant that the Court has often been used as a '4th instance' Court rather than a 'constitutional' Court that checks national jurisdictions. In these cases, petitioners request a review of their individual case by the ECtHR having not received satisfactory judgements in their national jurisdictions.

The result has led to a dramatic number of petitions and so-called 'copycat cases'[161] that currently risk undermining the Court's legitimacy given the backlog it is facing (see Chapter 7 for a discussion). Copycat cases are those cases that are modelled on previous cases that the Court has already dealt with, and are explicitly addressed at Article 35(2) ECHR (also addressed at Article 47(d) ACHR).

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[160] The risk of states paying lip service to the ECtHR and the Court's concern regarding the principle of subsidiarity is given justification by recent examples. One such example is the position taken by British Attorney General Dominic Grieve in 2011 when he stated that the Court was not necessarily in a position to intervene in Britain's position on prisoner voting rights. In other words, some cases of human rights abuses would risk never being able to be brought before Strasbourg if the state deems the ECtHR ought not interfere in the internal matters of the UK. There is a long-standing history of a tense relationship between the UK and the ECtHR, most notably with the position of Lord Hoffman, British Law Lord who has been a thorn in the side of the ECtHR.

[161] Copycat cases are those that present similar allegations as a case the Court has already dealt with. If the European Court is a supra-national, 'constitutional' Court, its role is to review potential violations and set a guideline which is then implemented internally by state legislatures and Courts respecting the doctrine of the 'margin of appreciation'. It is not a Court of appeal, in that it is not meant to deal with each individual claim, but rather provide overarching legal principles with regards to human rights. Copycat cases have been considered one of the major reasons for the Court's massive backlog of 160 000 cases. Protocol 14 and the Brighton Conference (2012) have sought to deal with these issues, particularly regarding the admissibility of cases, although there has been criticism regarding the potential to deny access to justice.

According to Wildhaber, "(…) [copycat cases] would undermine the credibility of the Court for it to continue to issue findings of violations with no apparent effect. The inflow of thousands of same-issue-cases would clog up the system almost irremediably" (2004: 90). Thus, although the Court is considered a success story as far as human rights tribunals go, the number of copycat cases it receives is testament to a failure of change to structural human rights issues within member states. In other words, there is a failure from member states to make the necessary changes within their domestic law to align with the Judgements of the Court. This has repercussions on the potential for the ECtHR to consider corporate accountability for reasons discussed in Chapter 7.

IV. ESC Rights at the Regional Courts

The Inter-American system adopted the *Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (PSS; OAS, 1999) in 1988 and entered into force in 1999.[162] The PSS sought to introduce ESC rights into the ACHR and thus under the jurisdiction of the Court on the same level as civil and political rights. However, in its final version it was reduced to just two justiciable rights: Article 8(a), the right of workers to form and join trade unions, and Article 13, the right to education.[163] Thus, the PSS has been largely ineffective

[162] The PSS includes the following rights: the right to work (Article 6); just, equitable, and satisfactory conditions of work (Article 7); trade union rights (Article 8); right to social security (Article 9); right to health (Article 10); right to a healthy environment (Article 11); right to food (Article 12); right to education (Article 13); right to benefits of culture (Article 14); right to the formation and the protection of families (Article 15); rights of children (Article 16); protection of the elderly (Article 17); and protection of the handicapped (Article 18). In addition, the possibility of incorporating other rights and expanding those already recognised was left open (see Cançado Trindade, 1998b: §190).

[163] The limitation of the PSS to the justiciability of Articles 8 and 13 is formally rooted in Article 19(6) of the PSS, which reads:

Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

Article 19(7) plainly states that the remaining Articles fall within the jurisdiction of the Commission to formulate "observations and recommendations as it deems pertinent concerning the status of economic, social and cultural rights". There have been noteworthy challenges to this limited justiciability that argue that Article 26 ACHR, which addresses the "Progressive Development" of the Convention, is directly applicable to any ESC right (see Ruiz-Chiriboga,

and the OAS' approach to ESC rights has ultimately resulted in a two-tiered system similar to the CoE's, discussed in the next Section. During the interviews (see Chapter 7), the respondents from the IACtHR attributed the limited justiciability of the PSS to the lack of importance given by the states to ESC rights. Nonetheless, the IACtHR judges have invoked some of the non-justiciable PSS provisions by way of Article 26 ACHR[164] (see *Acevedo Buendía et al. v. Peru,* 2009 discussed at Chapter 6).[165] Article 26 requires the "progressive development" of the economic, social, educational, and cultural standards set out in the OAS Charter. These kinds of interpretations by the Court indicate that there is space within the law for the judge to make a subjective reading (re: Chapter 1; see Chapter 6).

In the European human rights system, ESC rights were enshrined in a separate declaration known as the European Social Charter in 1961, revised in 1996. The CoE claims the Social Charter is the ECHR's "natural complement"[166], however the marginal importance of ESC can be summed up in the membership requirements of the CoE; the ratification of the ECHR is mandatory for membership, the ratification of the Social Charter is not. Moreover, the Social Charter does not have a *legal* supervisory mechanism (see Appendix 5).[167] Concretely, this means that although it may have symbolic value, there are problems with its enforcement.[168] Insofar as human rights have been constructed as a *legal*

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forthcoming: ftnt 8). Critics, however, counter that argument by claiming that Article 19(6) of the PSS does not recognise individual, immediately justiciable rights (*ibid*: 4).

[164]Article 26 ACHR Progressive Development reads,
The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, education, scientific, and cultural standards set forth in the Charter of the Organization of American States […].

[165] In order to consider the applicant's claim regarding an issue with social security benefits, the IACtHR justified its admissibility as a right to property, but looked to the PSS' provisions on economic and social rights when deciding on the content of the right to property

[166] See the Council of Europe website: 'What is the European Social Charter?' at www.coe.int.

[167] The European Committee on Economic, Social, and Cultural Rights adopts conclusions and decisions but there is no judicial mechanism to enforce them.

[168] The European Committee of Social Rights is made up of 15 members elected by the CoE to determine whether national laws and practice are in conformity with the Social Charter. Member states are required to present annual progress reports indicating how they have implemented the Social Charter. The Committee examines the reports and delivers its decisions known as 'conclusions' with recommendations, asking the state to make certain changes in law and/or practice. According to Article 20 of the Social Charter, member states must recognise *some* rights

discourse (Evans, 2005a, 2005b; see Chapter 2), the lack of a legal supervisory mechanism means that in practice states have little incentive to achieve ESC rights. Nonetheless, innovative interpretations can also be seen in the ECtHR, where some judges have also widened the scope of the Convention by interpreting social rights through certain Articles (see *Demir and Baykara v Turkey*, 2008; see Chapter 6).[169]

Conclusion

This Chapter has examined the origins of the Inter-American and European human rights systems by tracing them to the primarily economic beginnings of the OAS and the CoE. The juxtaposition of the two regional Courts allowed for the consideration of how similar legal principles work differently according to the specific context. The Chapter explored how the introduction of human rights into the objectives of both the OAS and the CoE played a strategic role in the development of the regional economies and trade. In the Inter-American context, the introduction of human rights as a goal of the OAS diffused the discourse on power and interests, seeking to mask the production of hegemony across the Americas. In the European context, the end of the Second World War and the emergence of the Cold War heavily influenced the development of the human rights project at the CoE as an ideological weapon. The ECHR was an expression

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of the Charter but not all. The Social Charter was revised and expanded in 1996, however many states still have not ratified the revised Charter. It was adopted in 1989 as a non-binding solemn declaration (Geyer, 2000: 46), and remains so today. The European Social Charter has no formal legal status comparable to the ECHR. The Charter does not provide the Committee of Ministers with any recourse to enforce its recommendations and there are no punitive measures provided for member states that fail to comply with their obligations.

[169] At the time the Tum Bel Sen trade union was formed – the union representing civil servants in Turkey – Turkish law did not permit civil service trade unionism, although a collective agreement negotiated between the union and the employer was in operation for two years before it was annulled. Demir and Baykara, representing the trade union and its members, claimed at the ECHR that the right to collectively bargain was contained within Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR noted the declaration of the right in Article 11(1) and the restrictions under Article 11(2). It held that these had to be strictly construed and that they could not impair the very essence of the right to organise. Restrictions imposed by the state thus had to be shown to be legitimate and civil servants could not be treated as 'members of the administration of the state'.

of Western liberal democracy and of a capitalist economic system, illustrated by the rapid adoption of property rights and the abstention from social rights.[170]

The comparative approach in this Chapter has allowed for a discussion of the differences and the similarities of the Courts. The institutional similarities of the Courts are juxtaposed with the differences in support of their jurisdiction. More importantly, the circumstantial differences between the Courts reinforce the argument that law is constantly constructed by the struggle between various norm-generating communities. The Chapter has thus fulfilled its purpose by acknowledging the differences between the Courts in order to think about the legal contradictions within them. The recognition of the legal contradictions emphasises the need to consider what they might reveal in terms of applying human rights law to the debate on corporate accountability. The next Chapter proceeds to develop the comparative approach to the Courts in order to illustrate how the corporation's legal personality has been addressed at the IACtHR and the ECtHR.

[170] In a capitalist economy, social rights represent an inevitable curtailment of property rights and, by logical extension, of individual freedom, which is a perspective linked to classical liberalism (Rimlinger, 1983).

CHAPTER 5: THE *HUMAN* RIGHTS OF CORPORATIONS

The money king is only an illusion. Capitalism is blind and barbaric.
It buys consciences, governments, peoples, and nations.
It poisons the water and the air. It destroys everything.
And to the U'wa, it says that we are crazy, but we want to continue being crazy
if it means we can continue to exist on our dear mother EARTH.

- U'wa Traditional Authorities, 2002

Introduction

This chapter focuses on how the regional human rights regimes have been compatible and complacent with incorporating corporate persons – and *a fortiori* corporate interests – into human rights law. It will demonstrate the complementarity between institutionalised human rights and the legal form of the corporation. The analysis focuses on what the corporate veil and the legal personality, as fundamental concepts that have been pivotal in securing corporate human rights (see Chapter 3), imply for the understanding of rights at the IACtHR and the ECtHR. The differences in the European and Inter-American human rights systems are examined, and the effect on their respective case law is highlighted.

The Chapter explores the extent to which corporations are asserting their human rights in human rights Courts. Section I will argue that the acceptance and endorsement of corporations as rights holders has been an attempt to create a hegemonic notion of human rights that is compatible with neoliberal capitalism, particularly at the ECtHR but also generally in the conception of rights (see also Chapters 6 and 7); although, that is not to say that it has been successful, a point made also in the Conclusion of the thesis. The Chapter will focus on the relationship between corporations and human rights, and more specifically on the status of corporations within the ECHR and the ACHR. Section II moves on to examine the contradictions within the notion of the non-state entity as 'legal person' and its *human* rights. It analyses a body of case law, which points to differences and similarities in how cases involving corporations as plaintiffs have

been received by the Courts, as well as how the Courts have approached the issue of the corporate veil.

I. Legal Persons and 'Human' Rights Conventions: Protection for Whom?

This section explores the impact of the evolutions of corporate personhood on the ECHR and the ACHR. The CoE granted access to legal persons by way of Article 1, Protocol 1 (P1-1) ECHR, adopted in 1952. P1-1 has had significant ramifications on the conception of human rights and human rights law in Europe, particularly encouraged by a market-driven ideology. In his critique of the prioritisation of property rights in the ECHR, Tim Allen argues that, "Increasingly, the free market represents the norm for judging all State action affecting property, and the Court cannot even conceptualise an alternative perspective on property" (2010: 1056). Conversely, when drafting the ACHR in 1969, the OAS specifically rejected the explicit endowment of rights onto legal persons. The ACHR reserved the Convention for individual human beings. Despite this, the ACHR has been used to protect corporate interest by guaranteeing a prerogative to corporate shareholders. Section 1.1. explores the development of corporate *human* rights at the ECtHR and the use of the Court by corporations. Section 1.2. focuses on the rejection of the corporation as beneficiary of the ACHR, but reveals a supportive relationship of the corporation through the interpretation of law that ultimately serves to benefit corporate shareholders. In this way, it draws on earlier discussions in Chapter 3 to raise questions about the legal architecture of the corporation.

1.1. Human Rights in Post-war Europe: Market Discipline and the New Global Order

From the outset, the founding members[171] of the CoE – ten Western European democracies – adopted a framework of human rights firmly grounded in the UN's

[171] They were: UK, France, Ireland, Sweden, Norway, Italy, Belgium, the Netherlands, Luxembourg, and Denmark.

UDHR. In 1949, the CoE appointed a Consultative Assembly with the mandate to draft the ECHR. In its *cahier de charge*, or guidelines, the Assembly was given instructions to include the right to property as per the UDHR's Article 17.[172] The founding members included several socialist democracies (e.g. Norway, Sweden, the UK) that initially argued against the inclusion of property in the ECHR. After several drafts, the sub-committee of the Committee of Experts drafted a text that was readily considered to have "found a formula reconciling the Aristotelian view that property is [both] an extension of human personality and the socialist concept of property (i.e. collective/commons)" (CoE, 1985: 134).[173] This 'formula' appears to have reconciled the differences amongst the founding members and appeased the socialist view of property at that time.

Camilo Schutte informs us that although the Committee of Experts' draft was unanimously voted in the 1st session, socialist representatives appointed in the 2nd session argued against it. The socialists claimed that,

> (…) an economic right such as the right to own property ought not be included in a document dealing with political rights, or otherwise other economic rights such as right to full employment should be included too (*ibid*, 2004: 16).[174]

The debate resulted in the exclusion of the right to property (as well as the exclusion of non-state entities as legal persons) in the final draft of the ECHR in

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172 UDHR Article 17 (1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property (UN, 1949).

173 It is worth noting that the right to property was not originally included in the ECHR, but was quickly appended by way of Protocol 1 that came into force in 1952. The British and Swedes raised controversies over the inclusion of the right to property fearing it might be a fetter on the power of States to implement programmes of nationalisation of industries for social and political purposes (Harris, O'Boyle and Warbrick, 1995: 516). The Convention subsequently provided a caveat in its doctrine of the "margin of appreciation" discussed in later Chapters.

174 Schwelb (1964) discusses the protection of the right of property in the deliberations of the Council of Europe. He comments that "While opinion in the Assembly was divided on both the desirability of inserting a clause protecting the right of property and on the substantive content such a provision ought to have, the majority of the Consultative Assembly favoured making the protection of property part of the catalogue of rights" (Schwelb, 1964: 535). The original Recommendation transmitted to the Committee of Ministers by the Consultative Assembly regarding the draft Convention in 1949 did not include the right to property. However, the Consultative Assembly strongly urged the Committee of Ministers to include a provision on the right of property in 1950. Thus, whilst the Consultative Assembly, which is the parliamentary element of the CoE, favoured introducing property rights, the Committee of Ministers, which is the governmental element of the CoE, was less inclined and did not accept the recommendation to include a right to property in the original ECHR (1950). (Schwelb, 1964: 536).

1950.[175] However, social and property rights remained a pivotal issue and quite quickly property rights were annexed to the Convention through P1-1 in 1952. The specificity of the adoption of property rights in the ECHR was the extension of Convention rights to non-state legal entities (P1-1, Article 34 ECHR). P1-1 reads, "Every natural or *legal* person is entitled to the peaceful enjoyment of his possessions". The inclusion of legal persons in P1-1 has had a significant impact on the concept of rights in Europe. The status of legal persons as rights-holders was a watershed for the endorsement of the human rights of corporations. In this way, the Court has arguably aligned human rights with the current global political economy defined by neoliberalism.

Indeed, there is no evidence in the case law or in the *travaux préparatoires* that the CoE or the ECtHR have ever *contested* the idea of corporations as human rights-holders. Marius Emberland argues that the drafters of the Convention always intended to include corporations within the Convention's protective confines (2006: 3-4). However, early into the Court's history, Egon Schwelb (1964) argued that including corporations was not the drafters' intent but rather an interpretation manoeuvred by the Commission in order to favour a particular economic regime. Schwelb comments on the terminological differences in the French and English versions of the Convention.[176] He points out that whilst P1-1 extends its protection to natural and legal persons in both languages, there is a difference in Article 25 (now Article 34) between the versions regarding who may petition the Commission and the Court.[177]

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[175] Schwelb (1964: 536) suggests that the ratification of the ECHR in 1950 without a provision on property rights may have been the result of governments wanting time to evaluate the implementation of these rights. The rapid introduction of Protocol 1 would tend to support this observation.

[176] Egon Schwelb comments on the different terminology both within and between the English and French versions (i.e. property, possession; *biens*, *propriété*). He observes that,

The only reasonable conclusion which can be drawn from this lack of terminological symmetry and consistency is that for the purposes of the Protocol all the terms employed in Article 1 mean the same, namely "property", *propriété*, and that the use of different expressions is legally irrelevant (1964: 520).

[177] Schwelb's discussion refers to Article 25 ECHR as it existed in 1964. The Article 25 that he refers to is now Article 34 ECHR. The Commission was rendered defunct in 1998 following the coming into force of Protocol 11.

Schwelb's observations are compelling. In the English version, Article 25 ECHR accepted that the Commission (now Court) can receive petitions "from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights [of the ECHR]". But Schwelb notes that the French text renders,

> "(…) 'any person' by '*toute personne physique*' which seems to indicate that a 'legal person' (*personne morale*) does not have the right of petition, unless it also is a 'non-governmental organisation' or a 'group of individuals'. On the other hand, the substantive right to the peaceful enjoyment of his possessions is guaranteed to 'every natural *or legal* person' ('*toute personne physique ou morale*') (Art. 1 of Protocol No. 1). In practice, however, neither Respondent Governments nor the Commission *ex officio* have challenged the *locus standi* of legal persons (1964: 520).

The specification of a "physical person" in the French version of Article 25 ECHR would logically lead us to believe that this would be an indication of the wishes of the Contracting Parties not to extend to legal persons. However, the ECommHR would later enlarge the scope of the Article by applying an interpretation of the English "any person" which paved the way for the legal person to benefit from the protection of the ECHR and the Court.

Schwelb references early attempts by corporations to petition the Commission (i.e. *Retimag, S.A. v the Federal Republic of Germany*, 1961). The petitioner was a JSC under Swiss law. The petition was declared inadmissible for non-exhaustion of domestic remedies. However, the objection that the company did not have the right of petition under Article 25 ECHR was *not* raised. Thus, *a fortiori*, through this acceptance the Commission included corporations as rights-holders. Similarly, in *Gudmundsson v Iceland* (1960)[178], Schwelb explains "the second applicant, the company in which the first applicant had a majority shareholding, was, it seems, also a legal person without its right to be a party to the proceedings before the Commission having been challenged" (1964: ftnt 8). Schwelb's analysis

[178] The ECommHR declared inadmissible the petition of an Icelandic citizen and of an Icelandic company who alleged that a certain Icelandic Tax Law and the decision of the Supreme Court of Iceland applying it were in violation of P1-1, as well as the general principles of international law related to property to which the provision refers.

of the Commission's decision leads him to the conclusion that there was a *détournement* of human rights which is "(…) demoted to the level of furnishing one more argument in traditional disputes of an economic character (…) in deference to the views attributed to Social Democratic Governments that participated in the drafting of the Convention and of Protocol 1" (*ibid*: 522). In other words, despite the negotiations between the Contracting Parties regarding the issue of property (detailed in the *travaux préparatoires*) and the asymmetry of the English and French versions of the ECHR and Protocol 1, it was the ECommHR that ultimately granted legal persons the same rights as physical persons through its interpretation, informed by an economic inclination. The issue of a legal person petitioning the Commission (and later the Court) was never raised as a challenge to the admissibility of the case, and thus it has since become part of the legal commonsense of the European human rights system.

Thus, a major critique of the European system of human rights is that although it has provided important human rights judgements with binding legal effects, it has also been decisive in institutionalising corporate rights in Europe, and thus in supporting market discipline. In other words, the European system of human rights has conventionalised the freedoms necessary to maintain and legitimate particular forms of production and exchange as part of a European legal commonsense. These rights are the negative rights associated with liberty, security and property (Evans, 2005b: 43; see also Chapter 2); although, recently an emerging case law provides encouragement to challenges of this market-oriented conception of rights (see e.g. *Demir and Baykara v Turkey*, 2008 discussed at Chapter 6).[179]

In the ECtHR's early case law, the legal person referred to a variety of corporate groups such as trade unions and associations (e.g. *Swedish Engine Drivers' Union v Sweden*, 1976; see also below Section 2.1.). The protection of the ECHR was later extended to corporations and for-profit organisations since it appears the ECtHR accepted the ECommHR's extension of the 'legal person' with no opposition (Emberland, 2006). In this way, the definition of legal persons has come to include

[179] *Supra* ftnt 169; *Infra* ftnt 255.

both profit-making and not-for-profit legal persons, such as: commercial companies, trade unions, religious organisations, political parties, or charitable or social associations (Edel, 2010: 12). The wording of P1-1 was the uncontested legal premise for the subsequent interpretation that the term 'everyone', figuring frequently in the ECHR, also applies to corporations. The Convention defines its application in Article 34: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties (…)". Thus, although the term "legal persons" in P1-1 may not have originally been meant to apply to corporations, the interpretation of Article 34 (formerly Article 25) in conjunction with P1-1 resulted in the extension of the ECHR to protect corporations by likening corporations as legal persons to NGOs.

In his study on the human rights of corporations, Marius Emberland (2006) details the structure of the ECHR protection of corporations. The ECtHR, he argues, has never doubted that a company is a 'non-governmental organisation' within the meaning of Article 34, and that the Convention's system of private litigation is therefore open for corporate persons (Emberland, 2006: 32; see *Sunday Times v UK*, 1980).[180] Emberland goes on to explain that the term NGO appears to be analogous to the meaning understood in the UN context, primarily referring to not-for-profit organizations such as human rights NGOs, from which it was also borrowed (2006: ftnt 20). He argues that,

> The Convention drafting history shows, however, that the Convention always intended to include all corporate persons. The preliminary draft prepared by the European Movement's legal committee in May 1948 spoke in Art 7 a) of a right of petition for 'any natural or corporate person'. The wording was later amended, but the preparatory works contain nothing to suggest that subsequent changes were intended to delimit the scope of the right of application (Emberland, 2006: ftnt 20).

Thus, since the adoption of P1-1, there does not appear to have been any challenge to the concept of corporations as holders of human rights in the ECHR.

[180] *Sunday Times v UK* (1980) was the Court's first encounter with a corporate applicant.

On the contrary, Emberland (2005) argues it was the intent of the drafters all along to extend human rights to corporate persons. Whether it was the intent of the drafters, as Emberland argues, or the interpretation of the ECommHR as Shwelb suggests, the result has been the institutionalisation of corporate human rights that has complemented the new post-war global order (see case law below; see also Chapter 2).

1.2. Human Rights in the Americas: Shaping the Post-war Global and Political Order

In the Americas, the evolution of the ACHR was a little bit different from its European counterpart. The OAS anticipated the post-war human rights trend with the adoption of its own human rights framework in 1948. The American Declaration became the "first international human rights instrument of a general nature" (IACommHR, 2010: Internet). The adoption of the American Declaration just a few months before the UDHR meant that the Declaration played a role in the UN's drafting discussions, and therefore influenced the international development of human rights.

The interest of the USA in the human rights projects regionally and internationally lies in its strive for hegemonic leadership, which required more than economic, military, and political power (Donnelly, 1986: 637). In order to ensure its hegemonic leadership, the USA needed ideological dominance of the idea of human rights (see Chapter 2 on hegemony). The American states, led by the USA and benefitting from the ideational and ideological appeal of human rights in the post-war era (Donnelly, 1986), as well as the positive public response to human rights, adopted the American Declaration as a non-binding agreement. Human rights formed the triad with democracy and the rule of law in efforts to stave off Soviet Russia. The success of the American Declaration coincided with the hegemonic employment by the USA of its resources to help shape the global political and economic order (Ikenberry, 1989: 380). The Declaration marked the beginning of the ideological struggle for human rights – one that would complement market discipline.

The USA was able to station itself as a leader in the construction of a human rights regime regionally and internationally without committing to any kind of international supervision. In the OAS, the USA actively and even enthusiastically participated in the establishment of the Inter-American human rights system. Jack Donnelly, explicitly referring to the political project of human rights in the Americas, has written of the IACommHR that,

> (…) Much of the explanation [for] the Inter-American human rights regime (…) lies in power, particularly the dominant power of the United States. (…) [It] is probably best understood in these terms. The United States (…) exercised its hegemonic power to ensure its creation and support its operation (Donnelly, 1986: 625; 637-638).

The USA was thus able to exercise a hegemonic leadership over human rights and ensure an American presence in the human rights regime without submitting to its monitoring institutions. Seen in this way, it can be argued that the USA's commitment to human rights was a rhetorical one. It took decades to gather enough support for each step of the human rights framework. The IACommHR was established ten years after the Declaration in 1959, although once created it was accepted by all member states, as we saw in Chapter 4. It took the OAS another ten years to successfully adopt the ACHR, which was ratified another ten years later in 1978, resulting in the establishment of the IACtHR in 1979. Although a significant development, the IACtHR's jurisdiction was only accepted by a handful of member states.

The ACHR was adopted with the explicit exclusion of *legal* persons (Article 1.2.). The Convention therefore denied legal persons access to the Court. The Commission, however, is not bound by the ACHR alone. It is a quasi-judicial, quasi-political body of the Inter-American human rights system, mandated to observe the human rights situation in member states and is authorised to examine complaints or petitions regarding specific cases of human rights violations in all OAS states. It possesses additional faculties which pre-date and are not derived directly from the Convention, such as the processing of cases involving countries that have not ratified the ACHR. Crucially, it is the role of the

Commission to forward or recommend cases to the Court. In situations where the Commission brings the case before the Court, it acts as the victim's representative before the IACtHR. The Court thus depends on the judgement of the Commission to obtain jurisdiction over cases.

II. The Corporation as Rights-Holder

This section explores the differences in how the ECtHR and the IACtHR deal with corporate rights. In the European system, the corporate entity is itself *sine qua non* a rights-holder, upholding the corporate veil in most cases. As we have seen, in the Inter-American system, the legal person was not included in the Convention. Nonetheless, the Court has chosen in some cases to pierce the corporate veil in order to empower shareholders to claim their rights as individuals. The result of these differing mechanisms is less significant than might be imagined.

The Courts converge on their respect of the corporate veil (discussed in more detail at Section 2.1., see also Chapter 3), and relatedly, their endorsement of the ICJ's judgement in *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain*, *1970)* (*Barcelona Traction*). In *Barcelona Traction*, the International Court of Justice (ICJ) established the principle of upholding the corporate veil. The ICJ launched the idea that some obligations are not just owed towards a state's treaty partners or other individual states under customary international law (i.e. *jus cogens*), but that these obligations are also owed towards the international community of states as a whole, i.e. *erga omens* obligations (Klabbers, 2013: 133). The claim arose from the Spanish Court's proclaimed bankruptcy of *Barcelona Traction*, a company incorporated in Canada. The claim was filed by Belgium against Spain seeking reparations for damages allegedly sustained by Belgian nationals, shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State. Thus, Belgium filed for *erga omnes* obligations to be applied to its nationals as owners of the company (shareholders) under customary international law.

The question for the ICJ became "(…) whether international law recognises for the shareholders in a company a separate and independent right or interest" (1964: 44). The ICJ found that LLCs, such as *Barcelona Traction*, had distinct legal personalities and thus a distinct set of rights, separate and independent from the shareholders. It underlined,

> Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. However, the mere fact that both company and shareholder sustain damage does not imply that both are entitled to claim compensation. Thus, no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. (…) In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus, whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action: for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed (1970: §44).

The ICJ further stated that,

> The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence, the shareholder has no right to the corporate assets (*Barcelona Traction*, 1970: § 41).

In other words, the *Barcelona Traction* judgement upheld the corporate veil separating the shareholder from the company (see Chapter 3). Both the ECtHR and the IACtHR face questions of whether and/or when to pierce the corporate veil or maintain the domestically created legal fiction in the realm of international human rights law. Generally, both Courts apply the *Barcelona Traction* judgement and uphold the corporate veil. Despite the difference in the status of the legal person at the Courts, concretely, as will be shown in what follows, the effect is almost indistinguishable.

In what follows, a brief overview of some of the relevant case law from each Court will be considered with the aim of underlining the privileged position of corporations and shareholders in the use and application of human rights in the regional systems. Whether the corporation is granted access to the Court in its own right – as in the case of the ECtHR – or whether it is the shareholders who are ultimately rights-holders – as in the case of the IACtHR – the bottom line remains that violations of human rights by corporations (as entities unto themselves as well as their shareholders) go virtually uncensored. In addition, the rights of corporations (and their shareholders) are legitimated in both Courts. As this chapter will show, the status of the corporation as rights-holder is a key example of how power is directly exercised through the practice of human rights.

2.1. The Human Rights of Corporations at the ECtHR

The following case discussion examines the emergence of the application of the ECHR directly on companies. These cases demonstrate how corporations began using the ECHR against the exercise of the regulatory authority of the state; and importantly, how they mark the beginning of the Court's acceptance of the victim status of corporations in human rights law.

In the first few decades of its existence, cases dealing with legal entities referred primarily to non-state actors such as unions (e.g. *National Union of Belgian Police v Belgium*, 1975; Swedish *Engine Drivers' Union v Sweden*, 1976) under Article 11 (the right to free association). In 1979, the Court heard its first case by a corporation, the Sunday Times newspaper (*Sunday Times v UK*, 1979).[181] The Sunday Times claimed it had a right to the freedom of expression under Article 10 ECHR and its claim was admitted before the Court. The following year the ECtHR received its first complaint by a company claiming the right to a fair trial under Article 6 and the right to property under P1-1 (*AGOSI v UK*, 1980). These

[181] This was the first case involving a corporation that the Court found admissible (see Schwelb, 1964)

two provisions have become the two most commonly invoked rights by legal persons.[182]

The case of *AGOSI v UK* (1980) concerned a company incorporated in the UK that filed a complaint under the ECHR claiming violations of the right to a fair trial (Article 6) and the right to property (P1-1). The applicant company had issued a check to purchase South African gold coins (Krugerrands), however the check was dishonoured and the English bank alerted the authorities. Two individuals from the company were arrested and convicted of attempting to smuggle the coins into the UK contrary to the relevant customs and excise legislation. AGOSI requested that the Commissioners of Customs and Excise return the coins on the basis that the company was their rightful owner and had been the innocent victim of fraud. The Krugerrands were seized by customs and, after judicial proceedings, declared forfeit. The Court found a violation of the ECHR, by considering the forfeiture of the coins a clear interference with the applicant company's enjoyment of its possessions.

The following year, the ECommHR admitted the application of a British national and nine companies incorporated in the UK (*Lithgow and Others v UK*, 1981). The applicants had assets nationalised under the 1977 British Aircraft and Shipbuilding Industries Act and invoked Article P1-1 (right to property), Article 6 (right to a fair trial), Article 13 (right to effective remedy) and Article 14 (prohibition of discrimination). The claim did not contest the nationalisation as such, but challenged the compensation given by the UK government. The ECommHR held no violation in 1984. The case was then referred to the Court, which maintained that decision in 1986. *AGOSI v UK* (1980) and *Lithgow and*

[182] The European Court of Human Rights places particular emphasis on access to justice, legal remedy, and the rule of law (see *Airey v Ireland*, 1979, §24). Perusing the case law, one quickly notes that corporations demand primarily two rights: P1-1 (right to property) and Article 6 (right to a fair trial); these are most often coupled with claims to Article 7 (no punishment without law), Article 10 (freedom of expression), Article 13 (right to an effective remedy), and Article 14 (prohibition from discrimination). The Court has set out three rules related to the right to property. These are firstly, that the right is of a general nature and enunciates the principle of the peaceful enjoyment of property; secondly, it deals with the deprivation of possessions and subjects it to certain conditions; finally, it recognises that Contracting States are entitled to control the use of property in accordance with the general interest (see *Spörrong and Lönnroth v Sweden*, 1982: §61; *Lithgow and Others v UK*, 1986: §106).

Others v UK (1981) mark the beginning of the use of the ECHR by corporations. These cases are symptomatic of the fruition and consolidation of corporate personhood within the European human rights system.[183]

Although corporate responsibility for human rights has received increasing attention over the past twenty years, the use of the ECHR by corporations has inspired little academic interest.[184] Emberland (2006) claims this is probably due to what he considers a limited number of cases filed by companies. His research revealed that of the 3307 judgements delivered between 1998-2003, 126 (or 3.8%) originated in applications filed by companies or other persons clearly pursuing corporate interests (Emberland, 2006: 13-14).[185] Although seemingly minor, this number is a weighty minority that consolidates the ability of corporations to act as human rights claimants. These cases filed by corporations point to the solicitation of human rights Courts by corporations as another means to remove barriers to business. Many of the cases brought forth by companies at the ECtHR under P1-1 and Article 6 deal with patent law, intellectual property, and trade/commercial law. In this way, there is a clear and direct use of human

[183] These first corporate human rights claims in the European human rights system coincide with the rise of neoliberalism (see Chapter 2). As noted earlier in the thesis, in the post-war years, a class compromise was made to ensure peace and tranquillity that has become known as Keynesianism or embedded liberalism (Harvey, 2009: 10-11; see also Chapter 2). A certain state interventionism was applied to control business cycles and provide a variety of welfare systems (education, health care, etc.). By 1979-1980, the tide had turned and the post-war compromise began to break down in the wake of a series of global financial and economic crises (e.g. the 1974 oil crisis). Neoliberalism began to stake its claim on the global political stage. Although a clear causality is of course untenable, it is worth bearing these circumstances in mind when considering the development of corporate human rights claims such as *AGOSI* and *Lithgow* within the framework of an emergent neoliberalism.

[184] Exceptions exist for example, Addo, M.K. (1999: 186-197); Bottomley and Kinely (2002); Emberland (2006),

[185] The IACommHR has referenced the "frequent" petitions by corporations at the ECtHR. In *Bernard Merens and Family v Argentina*, the IACommHR stated that "The European system has not adopted the human personality restriction, and thus petitions submitted by corporations are frequent. *See* European Court of Human Rights *AGOSI* (…)" (1999: §22). The case of AGOSI (1986) concerned a company incorporated in the UK that filed a complaint under the ECHR claiming violations of the right to a fair trial (article 6) and the right to property (P1-1). The applicant company had issued a check to purchase South African gold coins (Krugerrands), however the check was dishonoured and the English bank alerted the authorities (see Appendix 2 for details). The Krugerrands were seized by customs and, after judicial proceedings, declared forfeit. The Court found a violation of the Convention considering that the forfeiture of the coins was a clear interference with the applicant company's enjoyment of possessions. The company was held responsible for the acts of the individuals (see also *Air Canada v UK*, 1995). AGOSI demonstrates how corporations began using the ECHR against the exercise of the regulatory authority of the state; and importantly, it marks an acceleration of the Court's acceptance of corporations as victims of human rights violations.

rights for commercially oriented legal problems. The significance of this corporate solicitation is the use of human rights Courts as a means to further bolster the protection of business and promulgates market discipline. A brief overview of key examples from the case law will help elucidate this point.

2.1.1. The ECtHR: Extending the Scope of Corporate Rights

This section will analyse a select few of the major cases relevant to the corporate human rights debate, although a more extensive case law analysis follows in Chapter 6. The ECtHR made a clear distinction between the rights of shareholders and the rights of the company as a separate entity by recognising the corporation as a legal person (see Chapter 3). In effect, the ECtHR applies the distinction established in the landmark case *Barcelona Traction* (1970), discussed at the beginning of Section II.[186] The importance of the case was that it provided the basis for an international protection of foreign investment. The ECtHR has upheld the ICJ's position by declining to pierce the corporate veil to permit shareholders to apply to the Court, established in its landmark case *Agrotexim v Greece* (1995).

In *Agrotexim v. Greece*, a Greek company had its land expropriated for the "city's social, cultural and commercial needs" (§13). The company had filed for bankruptcy and was being liquidated. The government alleged that the company no longer existed and therefore could not access the Court as a petitioner. In view of this, the shareholders demanded their right to step in as applicants. Although the ECommHR had initially granted the shareholders their request, the ECtHR reversed this decision, deciding to maintain the corporate veil. It stated, "to adopt the Commission's position would be to run the risk of creating – in view of these competing interests – difficulties in determining who is entitled to the Strasbourg institutions" (§65).

[186] In short, the case dealt with the *jus standi* of Belgium to exercise diplomatic protection for its citizens (majority shareholders in the company) over a company incorporated in Canada but acting in Spain. It has had profound implications for state responsibility, having espoused the principle of *erga omnes* obligations.

In *Agrotexim*, the question revolved around the capacity of a company that had already been liquidated to apply to the Court. The shareholders claimed 'identification'[187] with the company to apply in its stead, but were denied admissibility. Following the principle set out in *Barcelona Traction*, the ECtHR noted in *Agrotexim v Greece*,

> (…) the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or - in the event of liquidation - through its liquidators. (…) This principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice [in *Barcelona Traction* (1995: §66; see also pp. 39 and 41, §§ 56-58 and 66)].

It follows from the above judgement that under the European system an independent right of shareholders under P1-1 is subsidiary to the right of the company itself and will be recognized only in exceptional cases, for example where the company could not pursue the claim itself (Kriebaum & Schreuer, 2007: 755). However, in practice shareholder rights are effectively enacted through the person of the corporation. A corporation exists through its shareholders within the laws established and protected by the state, i.e. shareholders effectively own the company, managers and directors are effectively stewards to shareholder interests, and the corporation as such exists according to state laws that define the rules of incorporation. As we have seen in Chapter 3, the modern JSC assigns particular importance to shareholder primacy, which means that shareholder interests are prioritised; these interests are primarily the profitability of the shareholders' investments and for some it has even been stated that the only social responsibility of a corporation is to maximise shareholder profits (Friedman, 1970).

[187] A shareholder's rights are 'identified' when the shareholder is the direct victim of a violation his/her rights (see *B. Company & Others v Netherlands*, 1993). For an example see Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (CoE, 2007a).

In his dissenting opinion, Judge Walsh supported shareholder primacy by positioning himself in favour of piercing the corporate veil in order to directly uphold shareholder rights. He argued,

> Joint stock companies are simply commercial devices for raising capital (…). If such a company fails the ultimate losers are the individual shareholders. (…) While it is true to say that such a corporate body has neither a soul to be damned nor a body to be beaten, nonetheless, the shareholders have and the existence of the corporate entity gives no protection to the shareholders as individuals against the loss in value of their shares or against criminal or civil liability for their individual activities in the commercial advancement of the companies. It appears to me to be anomalous that the defence of human rights in the field of property, or otherwise, should yield to the commercially sacred impenetrability of the 'corporate veil'. (…) In my opinion the applicant bodies may be treated as the collective face of the individual victims.

This opinion promotes the extension of shareholder protection by allowing them to claim their rights by piercing the corporate veil. In his dissenting opinion, Judge Walsh is thus setting limits upon the ability of commercial/company law to trump human rights law. A discussion of a few relevant cases at the ECtHR will further illustrate how, through its case law, the Court has promoted the anthropomorphisation of the corporation.

In the ECtHR's case law, there has been a gradual extension of the scope of rights available to corporations. Nonetheless, certain rights are deemed applicable exclusively to human beings, such as the right to life under Article 2 and the prohibition of torture, and degrading or inhumane treatment under Article 3 (Addo, 1999: 194-195; Emberland, 2006: 33). Although most corporate claims deal primarily with property issues, others make claims that have required a kind of humanisation of the corporation, such as the right to freedom of speech or the right to private and family life. As such, over the years the Court has encouraged the anthropomorphisation of the corporation by extending certain Convention rights to corporations and enlarging the scope of corporate human rights by accepting claims otherwise reserved for human claimants, e.g. *Société Colas Est v France*

2002)[188] and *Comingersoll S.A. v Portugal* (2000)[189] where, in the former the Court applied Article 8 (respect of family life) to a company.

In *Société Colas Est v France* (2002), the Court justified the extension of Article 8 to the company by asserting that,

> (…) [it] reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions. As regards the rights secured to companies by the Convention, it should be pointed out that the Court [in its *Comingersoll* judgment] has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 §1 of the Convention. Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises (*Société Colas Est v France*, 2002: § 148-149).[190]

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[188] Three road construction companies in France, *Colas Est*, *Colas Ouest* and *Sacer* filed the complaint. The companies were investigated in 1985 as part of an administrative inquiry into fraud. The state investigated 56 companies simultaneously and seized several thousand documents from which they ascertained that illicit agreements had been made in respect of certain contracts. The investigating officers entered the premises of the applicant companies pursuant the law. Based on the seized documents the applicants were fined for engaging in illegal practices. The applicants appealed to the Paris Court of Appeal challenging the lawfulness of the searches and seizures due to the lack of a warrant. The Court of Appeal upheld the fines, and the Court of Cassation dismissed their appeals. Relying on Article 8 ECHR (right to respect for private and family life), the applicants claimed that the searches and seizures, which had been conducted by the investigating officers without any supervision or restriction, amounted to trespass against their "home". The Court found that the investigators had entered the applicants' premises without a warrant, which amounted to trespass against their "home".

[189] Comingersoll S.A. is a public company. It had in its possession eight bills of exchange that it had received from the A. Ltd Company. The bills were not honoured when due and the applicant company issued enforcement proceedings against A. Ltd Company. After years of proceedings, Comingersoll S.A. applied to the ECtHR to complain about the length of the civil proceedings in question. It alleged a violation of article 6§1 ECHR (right to a fair trial). Most importantly for the purposes here, it held that the corporation had a right to non-pecuniary damages, thus assimilating the corporation to a human being.

[190] The Court further supported its decision in *Société Colas Est* by referring its prior case law in the judgement *Niemietz v Germany* (1992) in which it had included corporate offices within the term 'home' of Article 8. In *Niemietz*, the case dealt with the privacy protection of a lawyer whose offices were located in his home. Although the German government argued that the protection of Article 8 distinguishes between private activities that are protected and professional activities that are not, the Court dismissed this argument. It claimed,

It may not always be possible to draw precise distinctions [private and professional activities], since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises (*Niemietz v Germany* 1992: §30).

The ECtHR decided that the victim, in this case the corporate applicant, had been subjected to government arbitrariness, which is contrary to the Rule of Law. The Court interpreted the meaning of 'home' to the business premise in order to protect and promote the rule of law by combatting the arbitrariness of the government (Emberland, 2006: 141). This is a clear extension of the Convention's protective gambit to corporations regarding an Article that had otherwise been considered admissible only to human beings. Thus, in the judgement *Société Colas Est v France* (2002) the ECtHR, relying on its own case law, extended the scope of rights to corporations for rights heretofore reserved for physical individual applicants.

The ECtHR relied on the dynamic of the *Comingersoll* judgement where it had accepted that corporations, like physical applicants can suffer non-pecuniary damages and thus the ECtHR felt it was a natural step to attribute the right to privacy to corporations as well. In their Concurring Opinion for the *Comingersoll* judgement, Judges Rozakis, Bratzas, Caflisch and Vajic described the corporation as "an independent living organism" (*Comingersoll S.A. v Portugal*, 2000, Concurring Opinion). Although the ECtHR has not extended the right to life to corporations at this date, the development of its case law and the opinions of some judges in this way indicates a trend to expand the human rights of corporations. There are indications in the case law that point towards interpretations that ultimately enlarge the scope of corporate human rights at the Court.

In *Anheuser-Busch v Portugal* (2005)[191], the applicant company alleged a violation of the right to peaceful enjoyment of its possessions (P1-1) based on the registration of a trademark. The point in issue was to ascertain precisely when the right to protection of the trademark became a 'possession' within the meaning of

[191] This case dealt with two companies with competing claims to the same name for which both had been granted a trademark. An American company sought a trademark for 'Budweiser Beer' in Portugal in the 1980s. However, a Czech company had originally held the trademark for the name 'Budweiser Bier'. The Court observed at the outset that intellectual property as such undeniably attracted the protection of Article 1 of Protocol No. 1. The point in issue in the present case was to ascertain precisely when the right to protection of the trademark became a 'possession' within the meaning of that provision. For a critique of the Court's decision particularly regarding the implications for human rights, see Reiss (2011).

that provision (§81).[192] The Court agreed with the Commission that P1-1 is applicable to intellectual property (also *Smith Kline and French Laboratories ltd v Netherlands*, 1990; *Lenzing AG v UK*, 1998). A few years later, the Court again considered a patent case in *British-American Tobacco Company Ltd v Netherlands* (1996: §62). The company alleged that it had been deprived of its possessions under P1-1 without an examination by an independent and impartial tribunal (Article 6). The Court agreed with the claim to Article 6 but did not consider it necessary to examine the case under P1-1. These cases illustrate the use of human rights law in relation to market-oriented ends. The ECtHR has created an opening for the corporate use of human rights by recognising the corporation as an individual with rights before the Court. This recognition raises questions of priorities and definitions of human rights in Europe regarding corporations as rights-holders, an issue raised by a few respondents and elaborated upon in Chapter 7. It also points to a legal commonsense that accepts the corporation as a rights-holder that may diverge from the popular commonsense that does not assume or accept that corporations have the same rights as physical persons. In this way, there are competing notions of rights and a lack of popular consensus on the meaning of human rights (see also Chapter 2).

In the highly publicised and extremely complex, multi-billion Euro case, *OAO Neftyaaya Kompaniya Yukos v Russia* (*Yukos v Russia,* 2011) the claimants applied and were granted admissibility to the ECtHR on the merits regarding violations of Article 6 and P1-1 together with Articles 1, 7, 13, 14, and 18.[193] OAO Neftyanaya kompaniya YUKOS was a publicly traded, private open JSC incorporated under the laws of the Russian Federation.[194] The oil company claimed the Russian government crippled it by concocting a massive tax liability that led to its bankruptcy, forcing its sale to a state-owned oil company. The executives claimed the action was politically motivated and breached ECHR law. The executives filed

[192] The Commission had earlier decided that shares were effectively 'possessions' and therefore fall under P1-1 in *Bramelid and Malmström v Sweden* (1982).
[193] The applicants were requesting $98 billion in reparations from the Russian government. Although formally the applicant is the company, it is a claim made on behalf of the 'stakeholders' (creditors and shareholders).
[194] The Russian Government as a holding company established it in 1993 to acquire and control a number of stand-alone entities specialised in oil production. The company was fully State-owned until the mid-1990s when, through a series of tenders and auctions, it was privatised.

the case in the name of all the stakeholders, alleging the denial of the protection of the rule of law.[195] Some observers have commented that, "the Yukos case clearly shows that knowledge of the workings of human rights has become a critical tool in any corporate lawyer's arsenal and should neither be ignored nor underestimated" (van den Muijsenbergh and Rezai, 2012: 68).

Van den Muijensenbergh and Rezai (2012) raise several important and intriguing points relevant to the *Yukos* case. They point out that during the lengthy proceedings at the ECtHR, the Russian Federation questioned the jurisdiction of the Court *ratione personae* in December 2007. The Yukos company had been declared bankrupt and liquidated by the Russian government on the 12th November 2007, thus the 'applicant' no longer existed. The presence of a 'victim' is indispensable in the proceedings and rules of the ECtHR. However, the Court refused to apply a strict application of this criterion claiming that to do otherwise would undermine the very essence of the right to individual applications by legal persons. The justification was thus that to apply a strict application of the 'victim' criterion would encourage governments to deprive entities of the possibility to pursue an application which was submitted at a time when they enjoyed legal personality. The Court's decision once again raises important questions about the right to life of a corporation and is yet another indication of the steady progress within the ECtHR towards the full anthropomorphisation of the corporation.

The significance of the *Yukos* case does not end there. Another relevant aspect of the *Yukos* case with regards to the development and expansion of corporate human rights since this case demonstrates the significance of the availability of the ECtHR, as an international independent judicial venue, for a corporation that had no other options (Van den Muijensenbergh and Rezai, 2012: 62). The Yukos corporation had no alternatives before it petitioned the ECtHR. Van den Muijensenbergh and

[195] The political motives behind this convoluted case are significant, but beyond the scope of this chapter. In late December 2010, the former CEO of Yukos, Mikhail Khodorkovsky was sentenced to fourteen years in prison for embezzlement charges. The case was decided 20 September 2011. The ECtHR found a violation of the right to a fair trial. However, it was ruled that the Russian government used legal instruments "to counter the company's tax evasion" and, therefore, its actions towards Yukos were legitimated. The Court dismissed the allegations that the Russian government actions were politically motivated.

Rezai (2012) explain that Yukos was essentially cut off from all international channels of judicial review because its case simply concerned an internal Russian matter. They point out that Yukos could neither petition to the ICJ because it was a Russian corporation (and thus a Russian national) and therefore could not bring a case against its own state, which was its adversary. Nor could it bring its claim before,

> (…) an international arbitral tribunal under a bilateral investment treaty, because such a tribunal only has jurisdiction over claims brought against a state (i.e. the Russian Federation in the Yukos case) by nationals of the other state which is a party to the bilateral investment treaty. Since Yukos was a Russian corporation (and not a national of any other state), its investment in the Russian Federation could not be governed by any bilateral investment treaty concluded by the Russian Federation with another state (Van den Muijensenbergh and Rezai, 2012: 67).

The ECHR's inclusion of legal persons allowed Yukos to transcend the national legal orders and the limits of international arbitration. The Yukos corporation was able to petition a human rights Court as a last resort in order to seek justice for what was an internal commercial/financial altercation.[196] As such, the *Yukos* case also demonstrates that the Court has consciously outfitted itself as a legitimate arsenal for corporations. This development consolidates the legal commonsense of corporate rights and may compound the hegemony of corporate legal entitlements internationally.

The cases explicated above underpin the argument that the paradigm of European human rights law is not only reinforcing the protection of corporations through law and bolstering a market-oriented perspective of human rights, but also actively participating in the anthropomorphisation of the corporation and the legitimation of corporate human rights claims. The crux of human rights law at its inception was to "protect the weak"[197] – human beings – from the abuses of the strong and powerful – the state. However, based on the case law review, since the first cases at the ECtHR involving legal persons, there appears to have been a steady extension

[196] The politics of the matter are not discussed here based on the ECtHR's judgement in which it stated that the Yukos trial was not politically motivated on the part of the Russian Federation.
[197] Remark made by ECtJ4 during interview.

of human rights to corporations, and only time will tell whether this will culminate in such inalienable rights such as the right to life. In other words, it seems that the steady evolution of the Court's case law "apparently signifies a dynamic process of the gradual humanisation of corporations" (van den Muijsenbergh and Rezai, 2012: 53).

The next section turns to the ACHR where legal persons have been explicitly excluded. Yet, the impact of this is not necessarily a more comprehensive or dynamic protection against corporate harms. As the following section argues, despite the wording of the ACHR, the Inter-American system presents a business-friendly model similar to that of her sister Court in Europe.

2.2. Piercing the Corporate Veil: Shareholder Rights in the Inter-American System

In contrast to the ECHR, legal persons are specifically excluded by the ACHR. This section examines the convergences of the two systems regarding their consideration of corporate rights, despite some cursory differences. Unlike in Europe, the Inter-American human rights system has kept both a Commission and a Court. The relationship between the two reveals a subtle tension, evidenced by passively disputed interpretations of certain articles. In his comprehensive study of the institutional and procedural features of the Inter-American system of human rights, Héctor Ledesma (2007) sheds light on this point. Article 44 ACHR provides that 'any person or group of persons' or any non-governmental body legally recognised by an OAS state may present a complaint without being the victim.[198] The inclusion of NGOs under the ACHR is not unusual. NGOs have, since the emergence of international human rights, been recognised as legal persons, i.e. Article 71 of the UDHR. However, the rather open-ended definition of a NGO has raised questions of semantics as to which entities are to be considered NGOs.

[198] This is not the case in the European system, which requires that the applicant be the victim of the human rights violation.

Ledesma observes, "in a very broad interpretation of the Convention, the Commission has considered that companies or 'private juridical persons' may be assimilated to the notion of 'non-governmental entity legally recognised' by any OAS member state" (2007: 235). In other words, despite the explicit language of the ACHR, the IACommHR has indicated clearly that it is possible to submit a petition in the name of a company or juridical person although the legal person cannot be considered the victim of that violation. In these cases, the petition is a third party petition for the victim. Ledesma explains that for some this interpretation is contrary to what was expressed in the ACHR, since,

> (…) one of the elements of [an NGO] is precisely being non-profit. It cannot be assumed that the drafters of the Convention used this expression carelessly, giving it the same meaning and scope as a juridical person or entities of private law, without being aware of the special role of NGOs as members of civil society that articulate the common interests of its members, which are completely different than commercial interests (*ibid*: 236).

The subtlety lies in the status of the petitioner versus the holder of rights or the victim (Article 44 ACHR; Commission's Rules of Procedure, Article 23).[199] Lindblom further observes that the IACommHR allows commercial entities to lodge petitions although it cannot formally be the victim of a human rights violation (2005: 272). So, a 'person' may be "characterised as 'any person or group of persons' and thus qualified to present a complaint to the Commission" (Ledesma: 2007: 235). *A fortiori*, the Commission accepts petitions from corporations in some cases.

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[199] The Rules of Procedure of the Inter-American Commission Article 23. Presentation of Petitions reads:

> *Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right* recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights "Pact of San José, Costa Rica", the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará", in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in a separate document (emphasis added).

The Commission has elsewhere recognised corporate claims to human rights by referring to the American Declaration, which offers protection to *all* persons. It has interpreted the Declaration to include corporate claims for protection in *"ABC Color" newspaper v Paraguay* (1984) and *Case No. 2137 Jehovah Witnesses v Argentina* (1978), to cite a few examples. The ACHR, in contrast, specifically nominates 'human beings' (Article 1.2.), defining them as "based upon attributes of the human personality" (Preamble; see also *Bendeck-Cohdinsa (Zacarías E. Bendeck) v Honduras*, 1999: §17; *MEVOPAL v Argentina*, 1999: §17). These diverging interpretations highlight subtle, but existing, internal struggles between the *political* and the *judicial* branches of the Inter-American Human Rights System, also alluded to during the interviews (see Chapter 7).

As a result of the ACHR's clear stipulation against the inclusion of legal persons, the IACommHR has an established case law that denies *direct* access to ACHR rights by corporations. However, shareholders are given access as individuals to the full gambit of protection offered by the Convention. Taken at face value, this marks a substantial difference from the ECHR; however, with closer reflection piercing the corporate veil may be an attempt to grant rights to the corporation through the shareholder. In light of the textual precision of the ACHR against legal persons, the IACommHR has been careful with regards to the difference between the petitioner and the victim. One example is the case *Tabacalera Boquerón S.A. v Paraguay* (1997), which dealt with the registered trademarking of a cigarette and claims to the brand name (see Appendix 2 for details). Emberland explains that

> (…) the individualistic nature of the substantive law suggests that a collective entity, such as the company, cannot successfully assert a claim for protection of its own rights. This has been unanimously confirmed in several decisions. For example, in *Tabacalera Boquerón S.A. v Paraguay,* a petition was filed by a company, which was the 'undisputed leader in tobacco sales in Paraguay', and its five individual shareholders (2004: 260, at §29 and 35 of the case in particular).

Thus, in *Tabacalera Boquerón S.A. v Paraguay* (1997), the IACommHR decided the case was inadmissible *ratione personae*, "given the lack of jurisdiction of the Commission over the rights of legal entities and over operations or legal acts of a

commercial nature" (§35).[200] A pivotal reason for the inadmissibility was the lack of participation of shareholders in the domestic proceedings.

In *105 Shareholders of Banco de Lima v. Peru* filed with the Commission in 1988, the claimants alleged violations of the ACHR due to the impending expropriation of their shares by the government. The IACommHR concluded that the Convention protects individual rights and/or individual property owners. This case was thus deemed inadmissible on the grounds that the claimants alleged the *collective* property rights of the Banco de Lima. In other words, the Commission found the claim to collective rights to be outside the jurisdiction of the ACHR because the Inter-American human rights system is based on individual rights. The Commission explained in its Annual Report that,

> (…) In the Inter-American system, the right to property is a personal right. The Commission (…) is not empowered with jurisdiction over the rights of juridical beings, such as corporations or as in this case, banking institutions. (…) [W]hat is at issue [here was] not the individual property rights of the individual shareholders, but rather the collective property rights of the company (…) (1990-1991: §13).

At first glance, this case appears to illustrate a rather banal reaffirmation of the separation of the shareholder and the company, which is a well-established principle in the Inter-American system. However, the significance of this case must be seen in light of the greater context of the Inter-American system. That is, the importance of maintaining an individualised concept of rights as opposed to a concept of collective rights. In the case of *105 Shareholders of Banco de Lima v Peru* the individualised concept of rights meant that the complaint was inadmissible. However the impact of this individualised conceptualisation has a far greater importance when seen in light of Indigenous complaints, particularly regarding the environment and Indigenous lands; these issues will be discussed below in greater detail.

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[200] The term 'jurisdiction' means that a state must ensure human rights even outside its territory provided the relevant individuals are within its jurisdiction (Carreau, 2001). It is important to emphasise the concept of 'jurisdiction', which differs greatly in the two systems. In the European system, the Convention's jurisdiction is reserved to the territories of Member States (although this is polemical and is at the time of writing undergoing revision in the case law at the ECtHR). The Inter-American system does not consider jurisdiction as limited to territory.

The IACommHR upheld the rationale of the distinction between shareholder rights and corporate entity rights in *Carvallo Quintana v Argentina* (2001). The Commission decided the admissibility of Mr Carvallo's claims as an individual, but denied any alleged violation against his company. The IACommHR reinforced the principle that shareholders cannot claim to be victims without demonstrating their rights have been directly affected (2001: §54). It further outlined the existence of the protection of rights of shareholders under the Convention as direct rights granted under domestic law and transposed to the international realm. The Commission referenced *Ivcher-Bornstein v Peru* (2001) where it had previously invoked the distinction made in *Barcelona Traction* between shareholders and companies as legal persons (§56). This case upheld the corporate veil, recognising the distinctiveness of the legal personality.

The IACtHR and the IACommHR maintain, at least in theory, that legal persons are not rights-holders of the ACHR. Nonetheless, the case law has demonstrated differences in interpretation between the two bodies, pointed to in the above discussion. These differences are further illustrated in the cases *Cesti Hurtado v Peru* (2001) and *Cantos v Argentina* (2001; 2002). Mr Cesti Hurtado was a retired military officer who ran a private security firm. In 1997, he was arrested, prosecuted, convicted, and sentenced to prison by the military justice system in a complicated case involving, in part, alleged insurance fraud in a military purchase of helicopters. At the time of his detention, Mr Cesti Hurtado was the legal representative and general manager of the family company, *Top Security*, which was well known in Peru. The shareholders were his wife, his daughter and his father. He claimed upon his detention that the Superintendence of Banks and Insurance decided that during his imprisonment he could no longer fulfil his functions as legal representative of the company. Mr Cesti Hurtado's activities in the company were considered essential requirements for its operation. The company's operations had to be suspended, a situation which continued until the date of the brief on reparations leading to severe losses for the company. Mr Cesti

Hurtado's petition at the IACtHR included compensation for pecuniary damages of the loss of revenue of his company during his imprisonment.[201]

The significance of the *Cesti Hurtado Case* for the purposes of the argument here is that implicitly the Court was solicited by Mr Cesti Hurtado and requested by the Commission to consider not only his case as shareholder but also the damages to the company *Top Security*. Subsequently, the request subsumed the company's rights into those of the shareholder, Mr Cesti Hurtado. In other words, *Top Security* would ultimately benefit from the protections of the ACHR through its shareholder. Disregarding the request of the Commission, the IACtHR decided,

> In view of the particularities of this case and the nature of the reparations requested, they should be determined by the mechanisms established in the domestic laws. The internal Courts or the specialized national institutions have specific knowledge of the branch of activity to which the victim was dedicated. Taking into consideration the specificity of the reparations requested and also the characteristics of commercial and company law and the commercial operations involved, *the Court considers that this determination corresponds to the said national institutions rather than to an international human rights tribunal* (*Cesti Hurtado v Peru*, 2001: §46, emphasis in original).

Significantly, the IACtHR rejected the request for reparations for the company. It decided commercial operations were irrelevant in a human rights tribunal and deferred the conclusion of the reparations to the domestic sphere.

In *Cantos v Argentina* the IACtHR held that in specific circumstances, an individual might resort to the ACHR's supervisory system to enforce his "fundamental rights" even if these rights are being claimed *in lieu* of the legal entity. In other words, this possibility allows the physical individual or shareholder to petition the Court, in some cases, even if the alleged violations

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[201] The petition included damages for,
(…) The loss of earnings caused directly by the termination of the company's activities; (…) the total expenses of security systems and personnel employed to provide surveillance services for the movements of the Cesti family, their homes and the company, *Top Security*; (…) for consequential damage in order to return the company, Top Security, to its former position of prestige and confidence; (…) for additional damage because, owing to the embargoes ordered on his assets, the company went into arrears in its payments to the Superintendence of Tax Administration, so that this institution withdrew the benefit of the special system of fractioning tax payments (*Cesti Hurtado v Peru*, 2001: §43).

were committed against the legal person or corporation. In the case of *Cantos*, the legal entity (the company) corresponded to the physical person (sole owner of the company, i.e. the 'sole shareholder') who was protected under Article 8 ACHR (right to a fair trial and access to Court) and Article 25 ACHR (right to an effective remedy) (Hein van Kiepen, 2011: 368). Mr Cantos, the owner of a large business group and principal shareholder, alleged violations under Articles 9, 11, 21, and 25[202] after administrative and accounting documents were seized without being inventoried. His business group suffered pecuniary damages due to operational and fiscal difficulties, and he petitioned the Court for compensation. During proceedings before the Commission, the IACommHR asserted that,

> (…) In general, the rights and obligations attributed to companies become rights and obligations for the individuals who compromise them or who act in their name. (…) [To not consider it so] (…) implies removing an important group of human rights from protection by the Convention" (2001: §27-28).

In other words, here again, the Commission recognised the rights of the company *through* its shareholder, Mr Cantos.

The IACommHR claimed where a juridical person cannot claim its rights, such as a company under the ACHR, those rights are transposed onto the shareholder who, as a physical person, can stake her claim in the corporation's stead. Breaking somewhat from its position in *Cesti Hurtado*, during Preliminary Objections the Court concurred with the Commission asserting,

> (…) This Court considers that, although the figure of legal entities has not been expressly recognised by the American Convention, as it is in Protocol 1, Article 1 of the European Convention on Human Rights, this does not mean that, in specific circumstances, an individual may not resort to the Inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law (2001: §29).

[202] The articles are the following: Articles 9 (due process), 11 (right to privacy), 21 (right to property), and 25 (right to judicial protection).

The shareholder was 'identified' with the corporation. In this way Mr Cesti Hurtado's individual Convention rights were exercised in place of those of the corporation. Shareholder identification pierces the corporate veil to identify the shareholder in order that s/he may claim his or her rights.[203]

Nonetheless, shareholder identification remains an exceptional circumstance. Emberland outlines two criteria for identification or lifting the corporate veil with regards to the Inter-American system. He suggests exceptionality must relate to a) the individual shareholder and b) the individual belief of victimhood (2004: 269-270). In the first case, what this means is that lifting the corporate veil can only occur in order to protect the individual rights of the shareholder. In other words, as Emberland explains, the shareholder's rights must have been effectively contested by the measure or violated by the government action (*ibid*: 269). In the *Cantos* case, the Court reasoned that unless the corporate veil was lifted to protect the rights of the individual shareholder "unreasonable results" would materialise (*Cantos v Argentina*, 2001: §29).[204] In the second case, the Commission and the Court must decide when the individual rather than (only) the company has been directly affected (Emberland, 2004: 270). In order to do this, the individual shareholder must establish that s/he considers her/himself personally affected by the contested action (*ibid*); or in other words, the shareholder must prove an individual belief of victimhood. Emberland argues that this requirement is for all intents and purposes identical to the requirement to have exhausted all available domestic remedies in the underlying dispute (*ibid*). In the case of *Cantos v Argentina*, the petition was admitted primarily because Mr Cantos had personally joined his company during the internal Court proceedings against the government (*Cantos v Argentina*, 2001: §30).[205] However, what these cases show is that the

[203] Despite this, Marius Emberland claims that shareholder petitions for identification are dismissed as inadmissible since they lie out of the scope of the tribunals' jurisdiction (2004: 265).
[204] The Commission confirmed that veil piercing can only occur in specific circumstances during the case *Caravallo Quintana v Argentina* (2001) where it stated "in principle, shareholders cannot claim to be victims of interference with the rights of a company *absent showing a direct effect on their rights*" (§54, emphasis added; see also *Bendeck-Cohdinsa (Zacarías E. Bendeck) v Honduras*, 1999: §18-9; also *Tabacalera Boquerón v Paraguay,* 1997: §27).
[205] Shareholder participation was also used in *Bendeck-Cohdinsa (Zacarías E. Bendeck) v Honduras* (1999: §18-19), *Bernard Merens and Family v Argentina* (1999: §3), and *Tabacalera Boquerón v Paraguay* (1997: §27, §36) to justify its inadmissibility. In *Carvallo Quintana v Argentina*, the Commission declared, "there must (…) be an identity of claims between those placed before the

legal structure of the corporation is such that in one way or another the corporation or its shareholders can access human rights courts.

This section has examined the Inter-American system's practice regarding corporate rights. The explicit rejection of legal persons in the Convention has provided the legal justification for dismissing corporate petitions. Shareholders, on the other hand, are privy to the protection of the Convention as individuals. The section has highlighted the sometimes-subtle tension between the Commission and the Court by detailing a few cases where it was necessary to identify the victim as either the corporation or shareholder. What became evident in this discussion was that in some cases shareholder rights were granted in lieu of the corporation. In other words, the corporation in some cases benefitted from the protection of the Convention *through* its shareholder's individual rights. The cases discussed in this section raise questions about the *responsibility* of the shareholder. Perhaps an unintentional outcome of the Inter-American system's piercing of the corporate veil to endow shareholders with rights is the identification of the particular position of the shareholder who is otherwise 'shielded from law' (Glasbeek, 2002; see Chapter 3). In other words, the Inter-American system's piercing of the corporate veil in order to ensure the rights of shareholders gives rise to questions about the comparable possibility of piercing the corporate veil to engage shareholders' responsibility in cases of violations of human rights.

On one hand, the ACHR explicitly excludes legal persons from its protection. This is a major difference with the ECHR, and it has had an impact on the cases admitted before the IACtHR. The concept of human rights is thus different form the European system since corporations are not considered victims of human rights abuses. The formal exclusion of legal persons is a concrete mechanism with which to challenge the intrusion of business into the human rights paradigm. On the other hand, shareholders are recognised as potential victims of human rights abuses in their capacity as individuals. The case of *105 Shareholders of Banco de Lima v Peru* (1990-1991) is an example of the Inter-American system's highly

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national judiciary and those placed before the Commission in order to demonstrate that domestic remedies have been invoked and exhausted as required" (2001: §54, §67-76).

individualised conception of human rights (see Chapter 6). [206] The individualisation of human rights has two implications. Firstly, the shareholder has the right to claim a violation of a human right without having any corresponding responsibility for the potential violations of human rights committed by the company in which s/he has invested. In other words, "[shareholders] have no responsibility for what is done, to whom or to what injury is done. They are legally immune and socially irresponsible" (Glasbeek, 2005). Shareholder immunity indicates, once again, a place where the law enables and encourages profit maximisation at the expense of accountability.[207]

Secondly, by generally not identifying the shareholder with the company, Emberland (2004) suggests, the Inter-American system maintains a 'business-friendly' approach. He believes the categorical separation of the shareholder from the company does not always fit with the universality of human rights protection. For Emberland, the formal distinction between the shareholder and company does not necessarily need to be upheld at the level of international human rights law because it can result in what he considers unreasonable results. Notwithstanding, although the Inter-American system maintains the corporate veil *stricto sensu* there are cases, such as *Cantos v Argentina*, that demonstrate the slippery slope appreciation of shareholder identification. This confirms the argument that despite a normatively different concept of human rights, the IACtHR as well as its Commission, and the ECtHR have both substantively adopted business-friendly models of human rights law.

Conclusion

This Chapter has detailed some of the relevant differences between the European and Inter-American systems of human rights protection with regard to

[206] The issue of collective rights surfaces in other situations, particularly Indigenous land claims (see Introduction).

[207] Marius Emberland (2004) suggests that an important point to keep in mind is the difference drawn at the IACtHR between shareholders rights and shareholder interests. He reasons the claimant is an individual, "but the nature of the claim, since it concerns protection for measures taken against a corporate entity, has strong corporative elements, [and] poses certain difficulties at the IACtHR" (2004: 265; see also *Barcelona Traction* §44).

corporations. The exclusion of legal persons from the ACHR is significant and is crucial to understanding the differences between how the ECtHR and the IACtHR have approached the question of corporate personhood and corporate human rights. However, the case law demonstrates that despite statutory differences there is a tendency, in both Courts, to enlarge the scope of corporate human rights, and thus ultimately reinforce a market-oriented human rights law. Consequently, despite what appears at first glance to be a significant difference, i.e. the exclusion/inclusion of legal persons, both the ECtHR and the Inter-American human rights system appear to be promoting business-friendly models of human rights protection.

The next chapter examines the current mechanisms in each Court for dealing with corporate harms through a detailed analysis of some of the relevant case law from each system. The existing mechanisms are firstly, the doctrine of positive obligations, which calls on the state to *act* in order to protect against, as well as to *abstain* from committing violations of human rights; secondly, the horizontal effect, which makes the state responsible for the acts and omissions of third parties; and thirdly the concept of due diligence and the duty to prevent.

CHAPTER 6: THE EFFECTS OF POSITIVE OBLIGATIONS

If human rights are to be understood as a challenge to power, as a mode of resistance to domination, then we must confront power in all its manifestations. But slowly, I think, the first steps are being taken to combat the problem. By the process of naming, by fighting from the margins, the destabilization of the hegemonic view has begun. Perhaps those who refuse to listen to these alternative conceptions of human rights, those who invoke the silencing strategy of definitional closure, those who control the international human rights agenda should get out of the way. Then they would be part of the solution, or at least not part of the problem.

-Richard Devlin, quoted in Neil Stammers, 1999

Introduction

This Chapter explores the possibilities under existing law for corporate violations of human rights to be considered by the IACtHR and the ECtHR. It develops a detailed discussion of some of the relevant case law from the regional human rights systems in order to scrutinise the current mechanisms, as well as to consider their potential. These mechanisms are the doctrine of positive obligations, the horizontal effect, the due diligence standard and the duty to prevent. The aim of this chapter is therefore to identify the cases and the conditions under which the regional human rights supervisory mechanisms, and particularly the Courts, have used their imagination to extend human rights into the so-called 'private sphere'. Correspondingly, it also seeks to identify the mechanisms used to do so within each Court. The case law examples highlight the important role of the ECtHR and the IACtHR in interpreting their respective Conventions in ways that ensure the respect of human dignity in both the 'public' and 'private' spheres, as well as pointing to a further potential for them to do so.[208]

The cases discussed in this Chapter provide a platform from which to scrutinise the significance and interpretation of human rights law in discussions of corporate accountability. Section I introduces the current system for dealing with violations in the 'private' sphere, known as the doctrine of positive obligations.

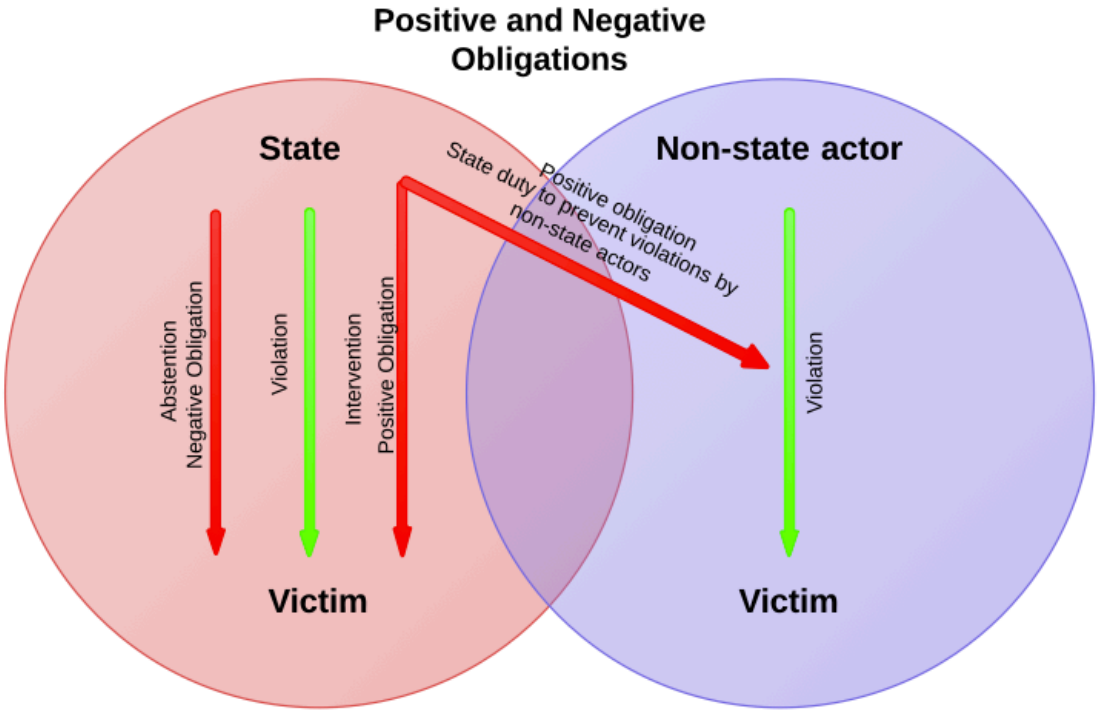
[208] For a critique of the distinction between the public/private spheres, see Polanyi (2001) and Foucault (2008); also Chapter 2 on the hierarchy of rights.

Section II explores the mechanism of the 'horizontal effect' – also known as the 'third party effect' or *Drittwirkung* (discussed below at Section II). The horizontal effect is a mechanism that attributes responsibility to the state for harms not caused directly by the state, but by a violation by a non-state actor to another individual. It is a controversial mechanism in both the European and Inter-American systems, endorsed under the umbrella of the doctrine of positive obligations in part because it breaches the public/private divide by addressing violations of human rights *between* individuals. The due diligence standard and the duty to prevent are explained and scrutinised using key cases from each system. These cases are used to analyse the application of these existing mechanisms and their potential for addressing corporate violations of human rights. Section III reflects on some of the differences and similarities between the Inter-American and European positions regarding the human rights responsibilities of non-state actors and what these differences and similarities imply regarding barriers to corporate responsibility.

I. From Abstention to Intervention: The Positive Obligations of States

This section outlines the doctrine of 'positive obligations' and how it relates to third party violations of human rights. Under both the European and Inter-American human rights systems when a state becomes a signatory to its respective Convention it takes on the obligation to both *abstain* from violating human rights (negative obligation) and to *protect* individuals from violations (positive obligation). In other words, the state is responsible for ensuring the protection of human rights within its jurisdiction either through omission or action. Positive obligations compromise a set of normative obligations for the state to ensure the enjoyment of rights by individuals through adequate legislation and enforcement. Olha Cherednychenko (2006: 1999) explains that the fulfilment of the positive obligations by the state may require an amendment of an existing law or the adoption of new legislation (e.g. *X and Y v Netherlands*,

1985)[209], changes in administrative practice (e.g. *Gaskin v UK*, 1989)[210] or constant financial efforts (e.g. *Airey v Ireland*, 1979)[211] aimed at enabling individuals to enjoy their fundamental rights in practice.



A positive obligation in human rights law involves a state's obligation to ensure, secure, or maintain the effective enjoyment of a fundamental right. It is a state's obligation to actively secure the effective enjoyment of a fundamental right, as opposed to the passive role the state plays in negative obligations. A positive obligation is a protective duty entrusted to the state as the guarantor of human

[209] This case dealt with the impossibility of having criminal proceedings instituted against perpetrator of a sexual assault on a minor girl aged more than sixteen. The girl was mentally handicapped and was unable to institute legal proceedings on her own. The ECtHR held that the Netherlands should have taken steps to protect individuals' private life and the Court imposed a positive duty on the state to take measures to prevent private parties from interfering with these rights.

[210] In *Gaskin* (1989), the Court found a violation of Article 8 because there was an absence of an independent authority to decide upon the access to records relating to the individual's personal and family life in cases where a contributor to the records cannot be found or refuses consent without justification.

[211] The applicant wanted to legally separate from her husband, since at that time divorce was illegal in Ireland. She could not find a solicitor who would act for given her modest financial situation and Ireland did not have legal aid for any civil matters. The Court held that the right of effective access to the Courts may entail legal assistance and thus a positive obligation of the state to provide this service.

rights. The emergence of positive obligations has been a development within human rights, since originally the duty of the state to protect human rights was characterised as a negative obligation to abstain from civil and political rights violations. Through positive obligations, the state has been held responsible for acts of third parties, as well as for some rare cases of violations of ESC rights (e.g. *Demir and Baykara v Turkey*, 2008).[212]

The recognition of some ESC rights (see also Chapter 2) mitigated challenges and pressures for change, and civil unrest due to growing inequalities and socio-economic polarisations in the 1970s. ESC rights identify the additional role of the state to promote and safeguard human rights not only from the government but also from further potential violations and other non-state violators. However, it must be emphasised that ESC rights are only a part of the doctrine of positive obligations and in fact most cases involving the doctrine of positive obligations do *not* involve ESC rights. With increased visibility and knowledge of the toxic effects of industrial and commercial activities (e.g. logging, pharmaceuticals, oil, etc.), particularly but not exclusively on the most vulnerable populations, ESC rights have gained momentum (e.g. right to a healthy and safe environment, right to health, right to ancestral lands) (see Pearce and Tombs, 1998; Green, Ward and McConnachie, 2007; Miranda, 2006, 2007; Tombs and Whyte, 2007). Although ESC rights have now generally been added to the rhetoric of human rights, in practice the supervision of these rights has been lacking. The rhetorical status of ESC rights becomes clear when examined in each human rights system. The CoE and the OAS (see Chapter 4) have had different approaches to ESC rights, although it is has been argued here that the outcomes are virtually indistinguishable when considering their practical implementations.

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[212] In the Maastricht Guidelines on the Violations of Economic, Social, and Cultural Rights[212] (International Commission of Jurists, 1997: §18), the protection against these violations equally addresses non-state actors, "The obligation to protect includes the state's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors." In its Commentary, addressing non-state actors, it reminds us "that violations of economic, social and cultural rights can be committed by individuals or private entities such as transnational corporations which sometimes are more powerful than some states and consequently may dictate to them".

The CoE decided early on not to incorporate ESC rights into the ECHR. It proposed and delivered instead the European Social Charter, discussed in Chapter 4. The CoE's claims that negative rights, i.e. those of the Convention, require "nothing more that that the state refrain from incursions on personal liberty and bodily integrity" (Donnelly, 2003: 30; see Chapter 2). In contrast with these negative rights, ESC rights are positive obligations in that they are viewed as demanding more significant costs than political and civil rights, and are considered more difficult to implement. However, as was argued in Chapter 2, this claim holds little water. The argument against the 'cost' of ESC rights is illogical since the means to guarantee negative rights is positive action. Arguments that negative rights are cost-free neglect the operational requirements of these rights (Evans, 1999: 32; Dembour 2006: 79).

ESC rights and the new collective rights extended heavily into the domain of the 'private', requiring state intervention to ensure their protection and guarantee. ESC rights are presented as 'positive' in that their protection and guarantee require active state intervention in ways that interfere with the 'freedom' of the market. This is one example of the perpetuation of the myth of public and private spheres within neoliberalism: state intervention is necessary to ensure social policies that sustain competition and thus allow for the economic processes within the free market to perform (see Chapter 2). This can be very costly, as seen during the 2008-2009 'bank bailouts'. Neoliberals berate demands for state intervention to mitigate socio-economic inequalities by reigning in economic processes from which they are produced, claiming interventions are dangerous obstructions to individual liberty in the private sphere. The CoE's reasoning for two separate human rights documents, i.e. the ECHR and the European Social Charter, complemented its belief in distinct private and public spheres (see Chapter 2).

Despite the divisions between rights made at the political level, judges at the ECtHR have nonetheless demonstrated the potential for the legal imagination to creatively interpret the law by applying the 'dynamic approach'. Lukas Loucaides, former judge at the ECtHR, explains that the dynamic approach means that the

Court "extends and applies the Convention, in light of political and social developments and changes of conditions of life, beyond the original conceptions of the period when the Convention was drafted or entered into force" (2007: 13). In other words, the Court's interpretation of the ECHR evolves or is supposed to evolve with the changes of society in order to maintain a contemporary relevance. The application of the dynamic approach has included interpreting specific ESC rights into the Convention through some of its case law. Wildhaber has commented on the role of the judge in expanding the scope of obligations through judicial interpretation. He suggests that,

> The Court is understandably wary of extending its case law on positive obligations. It has first to be convinced not only that there has been a clear evolution of morals, but that this evolution, where appropriate substantiated by an accompanying evolution of scientific knowledge, is reflected in the law and practice of a majority of the Contracting States. The Court will then interpret the terms of the Convention in the light of that evolution. It is not, I would say, the Court's role to engineer changes in society or to impose moral choices (2004: 86).

However, the judicial interpretations that led to the reading of positive obligations into the ECHR indicate that there is a role for judges in moving the law forward. It also indicates a diversification in strategies of adjudication (see Chapter 1 and 7).

The role of the judges at the IACtHR has demonstrated a similar method of interpretation that may act as a catalyst. The potential of judicial interpretation can be evidenced in cases such as *Acevedo Buendía et al. v Peru* (2009) wherein the IACtHR considered the issue of social security benefits. The Court decided to consider the applicant's claim under the right of property instead of ESC rights, although it took ESC rights into account when deciding on the content of the right to property.[213] The IACtHR noted that just as property rights can be limited by the law, so too can ESC rights (Lixinski, 2010: 595). The IACtHR eventually found that

[213] The IACtHR has made several broad interpretations of the right to property, including extending this right to shares in a company, discussed in Chapters 3 and 6 (see *Case of Ivcher-Bronstein v Peru,* 2001: §§120-122; *Salvador-Chiriboga v Ecuador*, 2008: §55; and *Chaparro-Álvarez and Lapo-Íñiguez v Ecuador*, 2007: §174; see also *Case of Palamara-Iribarne v Chile,* 2005 on intellectual property rights).

the failure of the state to comply with its own constitutional law, which protected social security as a property interest, violated the ACHR (*ibid*). Moreover, as Lixinski points out, concerning politically sensitive issues, such as those involving ESC rights or for example indigenous issues, the Court often relies on internal law as a means of giving content to the ACHR.

Interestingly, Lixinski (*ibid*) explains that the IACtHR also relied on the drafting history of Article 26 to argue that it suggested a commitment to the protection of ESC rights by the drafting states that wanted to give 'certain binding force' to the provision. Moreover, the IACtHR also recalled the indivisibility of human rights (*Acevedo Buendía v Peru*, 2009: §101), as well as the case law of the ECtHR on positive obligations[214] (*ibid*).[215] Moreover, Gonzalez-Salzberg points out that the IACtHR declared that states are under the positive obligation of adopting measures in order to guarantee the satisfaction of ESC rights, but that this obligation was subject to the economic and financial resources of the state (2011: 132). What is significant about this case is that the IACtHR stated that progressive development may be subject to accountability through the Court (*Acevedo Buendía v Peru*, 2009: §102).

In *Acevedo Buendía v Peru* (2009) the IACtHR affirmed the judiciable character of ESC rights by confirming that it is competent to analyse whether the policies adopted by the states are in conformity with the principle of the progressive protection of ESC rights (Gonzalez-Salzberg, 2011: 132). Notwithstanding, Gonzalez-Salzberg (2011) concludes that the Court missed an opportunity to establish a state *obligation* to a continued improvement of the protection of ESC rights. Similarly, Lixinski (2010: 595) argues that the IACtHR's judgement was

[214] Positive obligations are discussed in detail in Chapter 6. Briefly, a positive obligation in human rights is a state's obligation to secure the effective enjoyment of a fundamental right, as opposed to the classical negative obligation to merely abstain from human rights violations. Positive obligations are often associated with ESC rights, whilst negative obligations are often associated with civil and political rights.

[215] This point was related to Article 25(1) ACHR which "contemplates the duty of the States Parties to ensure to all persons subject to their jurisdiction an effective recourse against acts that violate their fundamental rights" (*Acevedo Buendía v Peru*, 2009: §69). The Court also stated that Article 25(2)(c) ACHR further establishes the state's obligation "to ensure that the competent authorities shall enforce such remedies when granted" (*ibid*: §70).

lacking due to the fact that the Court differentiated between the obligation of the progressive realisation of ESC rights and the immediate enforceability of the right to property. The IACtHR stated that these were different obligations and held that in case of *Acevedo Buendía* only the protection of property had been violated. Despite the final basis of the judgement on property rights, the case highlights the role for the judges to interpret the Convention in ways that may extend its protection, for example by affirming the justiciability of ESC rights.

Both Courts have specific provisions that govern the interpretation of the application of the ACHR and the ECHR in the private sphere, i.e. Article 29 ACHR and Article 17 ECHR. In both cases, the application of the respective Convention in the private sphere is an *indirect* application.[216] The state must ensure the rights of their respective Convention are upheld between individuals as part of its positive duty to intervene wherever there are violations of human rights (i.e. the positive obligations doctrine). Thus, the violation of a human right by a non-state actor triggers state responsibility for the violation because the state allowed said violation either by acting or omitting to act to prevent it. Attributing responsibility to the state for a violation by a non-state actor to a non-state actor victim is called the horizontal effect.

The horizontal effect has been applied at the ECtHR, although its application is controversial (below at Section 2.1.). The IACtHR has also applied the horizontal effect but has gone further by applying the mechanism of 'due diligence', which not only triggers the responsibility of the state for the violation of a right by a non-state actor, but also requires the state to provide a *remedy* for the violation (below at Section 2.2). Positive obligations and the horizontal effect appear as two sides of the same coin since Convention rights are mediated by the obligations taken by the member states in Article 1 ECHR[217] and Article 1

[216] Articles 17 ECHR and Article 29 ACHR prohibit the abuse of Convention rights not only by the state but also by private groups or persons. For rare cases where this provision has been applied at the ECtHR, Spielmann (2006: ftnt 25) suggests seeing *Garaudy v France* (2003) and *Norwood v UK* (2004).

[217] Article 1 ECHR reads:
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

ACHR[218]. However, the effects of different positive obligations doctrines are not identical. We examine the implications of these different positive obligations doctrines for each Court in more detail below.

II. Human Rights in the 'Private Sphere': the Horizontal Effect

There is a key difference between the doctrine of positive obligations and the horizontal effect: positive obligations require the state to intervene to protect human rights – to *do* something. The horizontal effect makes the state *responsible* for having allowed a violation by a third party to occur. It places responsibility on the state by considering that a government may be involved directly or indirectly in a human rights violation due to its failure to prohibit, prevent, or stop human rights abuses between individuals (i.e. in what concerns this thesis the non-state actor's violation of the right of a physical individual). Horizontality is a mechanism stemming from a principle in German law known as *Drittwirkung*.[219]

Drittwirkung refers to the German theory of the application of fundamental rights and values in cases between private parties. It was used for the first time in 1958 in the *Lüth* case at the German Federal Constitutional Court wherein the "objective order of values" was argued to protect constitutional rights between private parties.[220] The consequence of the *Lüth Case* has been to underline that

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[218] Article 1 ACHR reads:
(1) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
(2) For the purposes of this Convention, "person" means every human being.

[219] *Drittwirkung* distinguishes itself from the vertical effect that protects individuals from violations from the State or other public authorities. It is a highly complex and controversial concept in international human rights law, with a certain interpretation and application that may provide an interesting use for corporate accountability (for further discussion see Clapham, 1993b; 2006). The German theory of the horizontal effect was later adopted in some form by many European countries, Canada, the United States and South Africa, as well as the Council of Europe and the Organisation of American States (see Cooper, 2001: 64-68; Kumm and Ferrer Comella, 2005: 242; Spielmann, 1995; 2007; Trindade, 2003; González, 2008). Varying terminology may be used, for example in Germany: *Drittwirkung*; in the USA: 'state action doctrine'; in the United Kingdom, Canada and South Africa: 'third-party or horizontal effect'.

[220] In his discussion of the *Lüth* case Robert Alexy suggests, "one might say that the first basic idea of the *Lüth* decision is that constitutional rights have not only the character of rules but also the

fundamental or human rights do not apply between individuals directly, but rather through the mandatory rules of private law and the general application of private law. In this general application, private law must be interpreted in accordance with human rights. In the past twenty years, the horizontal effect has been broadly integrated into human rights law, although it remains a controversial doctrine.

Drittwirkung is a highly complex concept in international human rights law. Clapham (2006) specifies that it is indeed more accurately *Drittwirkung der Grundrechte*, or third-party effect of fundamental rights that might apply to the violations of human rights by corporations. He explains that there exists a difference, in the German doctrine, between *mittelbare Drittwirkung* and *unmittelbare Drittwirkung*. *Mittelbare Drittwirkung* means that the values and principles surrounding constitutional fundamental rights are to be considered by the Courts when they are deciding private law cases. Rights are consequently mediated through the law (Clapham, 1993b: 165; 2006: 521) – or in short *mittelbare Drittwirkung* implies an indirect mechanism of accountability. *Unmittelbare Drittwirkung* means that national courts can directly apply the rights against private bodies; the rights are unmediated. Dean Spielmann, current President of the ECtHR, (1995: 18-64) clarifies that this results in a *direct* horizontal effect in which national Courts can directly apply the Convention in private law. Monist legal systems implement the direct application of human rights conventions, which incorporate ratified treaties directly into national law.

This Chapter focuses on *mittelbare Drittwirkung*, since it is the principle that has been applied to violations of human rights by non-state actors (Clapham, 2006). The remainder of the thesis will refer to *mittelbare Drittwirkung* as the 'horizontal effect'. Although in the case law and in the literature horizontality and *Drittwirkung* are often used interchangeably, the terminology of the horizontal effect is used here for two reasons: firstly, to maintain coherence throughout the

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character of principles. The second idea, closely tied to the first, is that the values or principles found in the constitutional rights apply not only to the relation between the citizen and the state but, well beyond that, "to all areas of law." Thanks to this, a 'radiating effect' of constitutional rights over the entire legal system is brought about." (2003: 133).

Chapter; and secondly because it is argued here that contrary to the legal literature, the horizontal effect and *Drittwirkung* are not interchangeable. *Drittwirkung* is the concept used to analyse whether rights are self-executing and are given direct effect to individuals in their relations with other individuals (Engle, 2009). In other words*, Drittwirkung* attributes human rights obligations to the interactions between individuals that would otherwise fall under private law.[221] The implication of *Drittwirkung*, elucidated by the interpretations of the Courts, is that human rights must be respected in private law or in relations between individuals. The horizontal effect is a mechanism that, it is argued here, goes further than *mittelbare Drittwirkung*, strictly speaking, because it imputes responsibility upon the state for the violations of a human right committed by one individual against another individual. Responsibility is imputed upon the state as a result of the state's actions or omissions to guarantee the right that was violated or prevents the violation.

In the ECHR and the ACHR the responsibility of the state is triggered by an act or omission attributed or attributable to a public authority. In some cases, "responsibility is attributed to the sate where it can be clearly proven that a private body exercising the services or functions generally undertaken by the public authority has violated a human right" (Spielmann, 1995: 64-65). In these cases, responsibility for the violation falls under the rubric of the horizontal effect. The human rights convention is analogised to a kind of constitution of fundamental rights for member states and individuals on their territories (Alkema, 1990). This 'constitutional' status means that the responsibility for the rights enshrined in the human rights convention is not – as is the case of many national constitutions – directly applicable between individual parties because the conventions were intended as guarantees for the citizen against the state. The rights amenable to the horizontal effect are rights that must be generally observed and may be used by the national judge as an interpretative guide to the private rights and duties of individuals (Engle, 2009: 166).

[221] Although technically *Drittwirkung* gives direct effect of rights to individuals against states (vertical effect) or other individuals (horizontal effect), for the purposes here the violation under consideration is between a legal person and a physical person.

Although both private parties and states infringe liberties and rights, the horizontal effect places the onus on the member state to ensure the respect of Convention rights between non-state actors. States may be considered to have fulfilled their obligation to respect the Convention through various types of regulation, Ministerial decrees, legal norms, legislation or other enforcement mechanisms. However, the ECtHR has reinforced the onus of the responsibility of the state by insisting that preventative legislation is not necessarily enough to protect the human rights of one individual against another, and has noted that preventative *operational measures* may also be necessary (see *Osman v the UK*, 1998: §115)[222]. This has become known as the "duty to prevent" at the ECtHR, and shares some commonalities with the IACtHR's "due diligence standard", in ways that are explored in what follows. Ineta Ziemele (2009), judge at the ECtHR, points out that the in *Osmanoğlu v Turkey* (2008), the Court ruled that the nature of state obligations regarding the right to life (Article 2) depends on the level of risk.

International human rights law, in certain circumstances, requires states to take measures to prevent certain acts from happening (Schönsteiner, 2011: 292). These 'preventive' measures are also understood under the framework of due diligence (see below at Section 2.2.), which is referenced in the case law of the ECtHR as the duty to prevent. The state duty to prevent a violation of the ECHR applies most notably to violations of the right to life and the right to personal integrity. In *Osman v UK* (1998), the Court established that the state authorities must take preventive measures beyond establishing an effective criminal law system if private actors impose a 'real and immediate risk' to the life of a person, which is known or ought to have been known by the authorities (Schönsteiner, 2011: 292). Although in the *Osman* case the ECtHR did not find a violation, it

[222] In *Osman v the UK* (1998) the Court stated that,
It is common ground that the State's obligation [under Article 2, the right to life] (…) extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted (…) that Article 2 (…) may also imply in certain well-defined circumstances a positive obligation on the authorities to take *preventative operational* measures to protect an individual whose life is at risk from the criminal acts of another individual (§115, emphasis added).

applied the same principle in the *Öneryildiz v Turkey* (2004) where the ECtHR concluded that the positive obligation to safeguard the right to life extends to public *and* private activities. The Court concluded that "this [positive] obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites" (§71). The Grand Chamber further noted that states have a duty to establish a legislative and administrative framework that provides effective deterrence of violations to the right to life.

The ECtHR raised the due diligence standard and the duty to prevent in the landmark case *Opuz v Turkey* (2009) which dealt with the responsibility of the state to protect women from domestic violence. The ECtHR held, for the first time, that gender-based violence is a form of discrimination under the ECHR. Ms Opuz who with her mother suffered years of brutal domestic violence by her husband brought the case, and ultimately he killed Ms Opuz's mother. Despite their complaints the police and prosecuting authorities did not adequately protect the women. Citing various sources of international law, notably the IACtHR's decision in *Velásquez-Rodríguez* (1988, discussed below), the ECtHR framed a crucial question for the case as being

> (…) whether the local authorities displayed *due diligence* to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against [Ms Opuz's husband] despite the withdrawal of complaints by the victims (*Opuz v Turkey*, 2009: §139).

The Court took into consideration the foreseeability of a lethal attack by the husband as evidence that the killing would not have occurred if the authorities had acted otherwise. The Court, recalling its case law in *E. and Others v UK*, (2002: §99) noted that, "a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State" (*Opuz v Turkey*, 2009: §136). The Court went on to observe that the state should have provided "protective measures in the form of effective deterrence" (*ibid*: §177). In light of the events related to the

Opuz case, the ECtHR held that the national authorities did not display due diligence and therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 ECHR.

The ECtHR further expanded on the duty to prevent in *A v UK* (1998)[223] when it noted that,

> (…) Article 3 requires States to take measures designed to ensure that individuals within their jurisdiction are not subject to torture or degrading treatment or punishment, including such ill treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (§22; see also *X and Y v the Netherlands*, 1985).

Ziemele (2009) refers to the existing comparison between the IACtHR's notion of the obligation to prevent and the ECtHR's approach to the real and immediate risk criterion established by the *Osman* (1998) case. In both Courts, there exists a duty to prevent: the state has a duty to ensure effective deterrence and is responsible if that deterrence is found wanting. The difference between the Courts is that in the case of due diligence at the IACtHR, explained below at 2.2., not only is the state responsible for allowing the violation to occur, it also has the responsibility to punish, even *retroactively*, the private party as part of its obligation to provide an effective remedy. However, at the ECtHR, the responsibility of the state lies in monetary compensation for the victim and in providing national remedies for the third party's discriminatory policies *in the future*.[224] As a result, the horizontal effect at the ECtHR effectively dismisses the human rights responsibility of the perpetrator since the state assumes

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[223] *A v UK* (1998) deals with the issue of the corporal punishment of children. The applicant was a young boy who was beaten with a stick by his stepfather. The stepfather was charged with assault occasioning actual bodily harm and tried before a jury, but claimed as a defence reasonable punishment and was acquitted by the jury. The applicant claimed that the UK failed to protect him from ill treatment by his stepfather. The ECtHR held that the beating of the applicant by his stepfather constituted "inhuman or degrading punishment", in breach of Article 3 ECHR and that the UK domestic law at that time failed to provide adequate protection. The state failed to protect the applicant despite its positive obligation to protect, in this case children, in the form of effective deterrence, from such forms of ill treatment.

[224] This is one of the main critiques of the horizontal effect, since the remedy does not apply any responsibility whatsoever to the actor who directly violated a human right (see Alkema, 1990).

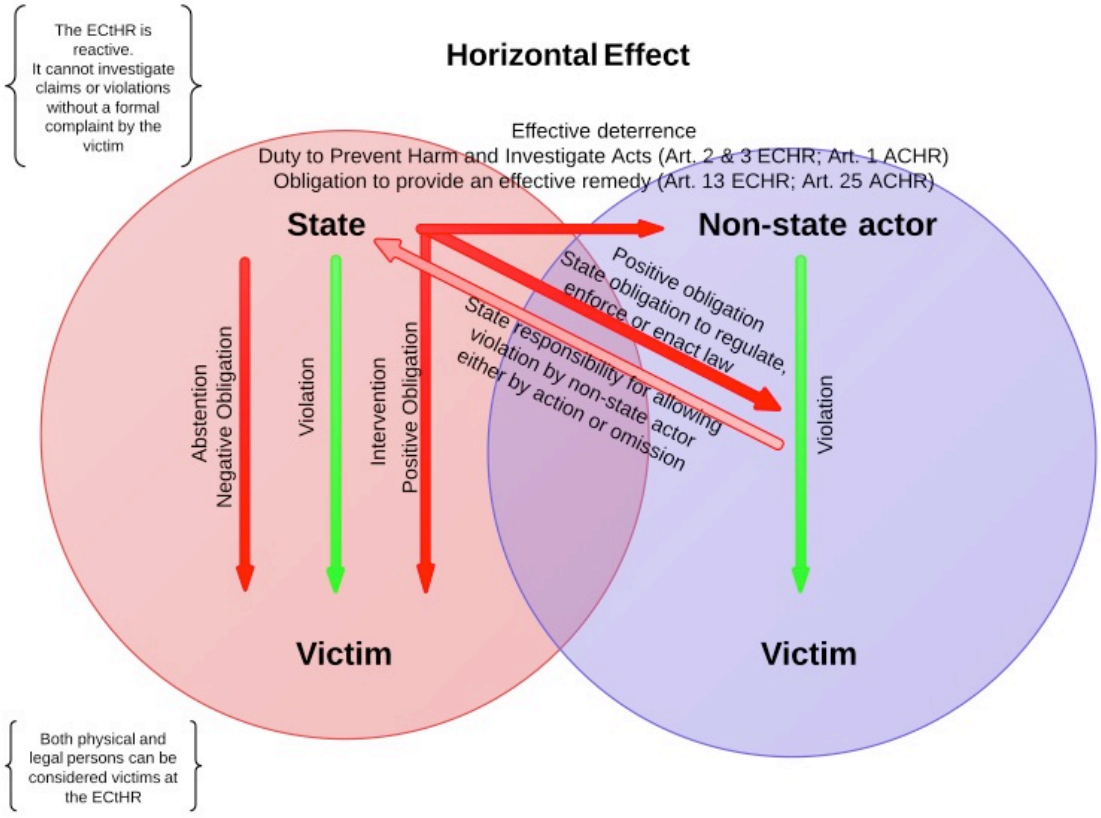
responsibility for the violation but cannot act retroactively to remedy the violation. In other words, because the ECtHR prohibits retroactive remedies, the potential non-state violator is not necessarily subject to any liability (discussed below at Section 2.2.).

At the IACtHR, states are under a general duty to respect and ensure the rights of the Convention set out in Article 1(1) ACHR. These general duties are guiding principles that establish the framework for attributing responsibility to the state under the ACHR. The general duty to respect enshrined in Article 1(1) entails a negative obligation on the state not to violate the rights recognized in the ACHR. Thus, "[w]henever a State organ, official or public entity violates [a Convention right], this constitutes a failure of the duty to respect (…)" (*Velásquez-Rodríguez v Honduras*, 1988: §169).[225] Moreover, the general duty to ensure, also enshrined under Article 1(1) ACHR, "involves a positive obligation to organize governmental structures, adopt appropriate measures and take action to guarantee the free and full exercise of rights" (Rodríguez-Pinzón and Martin, 2006: 138).

The duty to ensure obliges states "to prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation" (*Godínez-Cruz v Honduras*, 1989: §175; *Velásquez-Rodríguez v Honduras*, 1988: §166). The IACommHR has also commented on the duty to prevent noting that "the obligation to protect is the duty to prevent third parties from interfering with, hindering or barring access to the resources that are the object of that right" (*Report on Citizen Security and Human Rights*, 2009: IV§35). In other words, Article 1(1) ACHR imposes a double obligation upon the state. In accepting the Convention, member states undertake to "respect the rights and freedoms recognized by the Convention" (*Velásquez Rodríguez*, 1988: §165), but also to "guarantee" the free and full exercise of the rights enshrined in the ACHR to everyone in its jurisdiction including with

[225] The landmark case *Velásquez Rodríguez v Honduras* (1988) dealt with a disappearance by the Honduran secret police aided by civilians acting under police orders. It is discussed in detail below at Section 2.2.).

regards to the actions and omissions of third parties (*ibid*, §166; see also *Godínez Cruz v Honduras*, 1988: §175; and *Cantos v Argentina*, 2002: §49.).



Despite the horizontal effect, which places responsibility on the state for ensuring respect of human rights between individuals, there are gaps in human rights protection where non-state actors commit violations against physical individuals. Both Courts have referred to state responsibility for the actions and omissions of third parties in their case law acknowledging, to a certain extent, the gaps in the law, explored below. Although in the literature positive obligations and the horizontal effect are often presented interchangeably (Anardóttir, 2003: 96; Van Dijk and Van Hoof, 1998: 23), there is a subtle but important difference. This difference is notable in the interpretation and implementation by judges in both Courts, which affects how the horizontal effect and positive obligations are used, and consequently the outcomes of their use. Positive obligations require the state to act in order to fill a legislative void. The horizontal effect, however, may be more politically loaded since it ultimately renders the state *fully* liable for violations in the private sphere. In any case, considering the case law of the

ECtHR and the IACtHR, it appears that although in both Courts there are some cases that raise the horizontal effect, they are less likely to defend their judgements based on the doctrine of the horizontal effect rather than the more general concept of positive obligations.

The European and Inter-American human rights systems converge on their adherence to the doctrine of positive obligations. They promote the traditional application of international human rights law, stipulating that the responsibility for human rights falls on the state, as opposed to the individual or third party. In other words, the responsibility of individuals for human rights violations in an international human rights Court is not recognised in either system. This is a distinct aspect of human rights law since in other international instruments the emphasis has been on the direct liability of individuals,[226] and of particular relevance here, on corporations. The horizontal effect makes the state responsible for the violations of human rights by third parties, both physical persons and legal entities. In this respect, the horizontal effect has a unique potential to impute responsibility upon states where they may be considered liable for corporate violations of human rights. However, as will be shown in the discussion that follows, the IACtHR and the ECtHR do not always interpret or apply the horizontal effect in the same ways.

2.1. Negotiating the 'Private' Sphere at the European Court of Human Rights

The horizontal effect at the ECtHR is to an extent subsumed under the doctrine of positive obligations. The Court addressed positive obligations as early as 1968 in the *Belgian Linguistics Case* regarding Belgian linguistic legislation in the education system. The Court emphasised the state's positive obligation to ensure respect of the right to education. This was followed by *Marckx v Belgium* (1979) wherein the ECtHR endorsed the distinction between, and the equal importance of negative and positive obligations. It held that Article 8 "does not merely compel the state to abstain from (…) interference: in addition to this primarily

[226] Humanitarian law has extended the scope to include individual persons for certain grave violations of the rules of international law in times of conflict.

negative undertaking there may be positive obligations inherent in an effective 'respect' [of the provision]" (§31).

The application of the ECHR in the private sphere was consolidated in a series of Decisions and Judgements throughout the 1980s. The case of *Young, James and Webster v UK* (1981) addressed the dismissal of the three applicants at British Rail by their employer because they refused to join the designated trade union under a closed shop agreement negotiated by the employer. The responsibility of the state was triggered by the violation of the right of a physical person by a non-state legal entity because the dismissal breached the workers' freedom to choose whether to belong to a given trade union or not. The Court found that losing one's livelihood for refusing to join a trade union was incompatible with the freedom of association. The Court held "(…) if a violation of one of [the] rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the state for that violation is engaged" (§29). The ECtHR acknowledged that certain articles of the ECHR could apply to purely individual or 'private' relations.

The positive obligations doctrine identified in *Young, James and Webster* was confirmed in the landmark case *X and Y v the Netherlands* (1985), which dealt with the sexual assault of a child with a mental disability. In *X and Y* the application was made regarding the impossibility of instituting criminal proceedings in the Netherlands against the perpetrator of sexual assault on a minor with a mental disability. The Court recalled,

> (…) there may be positive obligations inherent in an effective respect for private or family life. (…) [T]hese obligations may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves* (§23, emphasis added).

Similarly in *Plattform Ärzte für das Leben v Austria* (1988), the Court clarified its position on positive obligations. This case dealt with the disruption of two demonstrations held by an association of doctors opposed to legalised abortion despite the presence of a large contingent of police. The ECtHR considered that

the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. The ECtHR emphasised that all international and regional human rights conventions grant individuals the rights to freedom of association and peaceful assembly, with certain permissible restrictions. It noted,

> Genuine, effective freedom of peaceful assembly *cannot* (…) *be reduced to a mere duty on the part of the State not to interfere*: a purely negative conception would not be compatible with the object and purpose of Article 11 [of the European Convention] (…) Like Article 8, Article 11 sometimes requires *positive measures* to be taken, *even in the sphere of relations between individuals*, if need be (§32, emphasis added).

The judgements of *X and Y* and *Plattform Ärzte für das Leben* call attention to the Court's position on the positive obligations of the state. According to these examples, CoE member states have a duty to secure the protection of fundamental human rights even in the sphere of the relations of private individuals.

The evolution of the ECtHR's case law is further highlighted in *Soering v UK* (1989) where the Court considered whether extradition to the USA to an American state that practiced capital punishment constituted a violation of Article 3 ECHR, which guarantees the right against inhumane and degrading treatment. Although it did not use the vocabulary of positive obligations, its reasoning indicates a move away from focusing on negative responsibilities by enlarging the scope of state responsibility for breaches of ECHR rights. The ECtHR has stated that the Convention applies between individuals in some situations, although it is explicitly reluctant to elaborate a set of principles for its applicability in the private sphere. The case of *Vgt Verein gegen Tierfabriken v Switzerland* (2001) addressed a complaint by an animal-rights association against the refusal to broadcast its commercial, which was considered by the Swiss Federal Court to have a clearly 'political character'. The ECtHR in its judgement declared,

> [It] does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which Convention guarantees should be extended to relations between individuals *inter se*" (§46).

This statement should not be taken to illustrate 'the Court' as a unified whole. Attention must be given to the specific composition of the Chamber deciding in the case. There is diversity in opinions and visions of the Court and the role of the judges reflected through Dissenting Opinions and conflicting case law.

For example, despite the judgement in *Vgt Verin gegen Tierfabriken*, the same year the Court extended the ECHR into the private sphere by interpreting the positive obligations of states and applying the horizontal effect in *Cyprus v Turkey* (2001). The case *Cyprus v Turkey* addressed the situation in northern Cyprus regarding the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus and the instabilities in the region. In this landmark case, the Court held that

> (…) The acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that state's responsibility under the Convention (*Cyprus v Turkey*, 2001: §81).

Despite the statements made one month before in *Vgt Verin gegen Tierfabriken*, the Chamber deciding the *Cyprus v Turkey* case opted for a different interpretation.

Overall, the horizontal effect remains highly controversial and does not receive widespread support within the Court. Lech Garlicki (2005), judge at the ECtHR, has suggested that despite some uncertainty, under the broad umbrella of the positive obligations of states it *does* comprise the horizontal effect in some form. He argues the ECHR affects private relations by reasoning that positive obligations are directed at the protection of individual rights against infringements by third parties. Garlicki suggests this protection is drawn from specific provisions of the Convention, particularly articles 2, 8-11, and 13.[227]

[227] Art. 2: requires that "everyone's right to life shall be protected by law". This protection seems to have a universal scope, thus going beyond prohibiting only the State from the taking of human life. Arts. 8-11: allow for the limiting of the rights and liberties guaranteed therein when necessary for the "protection of the rights and freedoms of others". It may be argued that the State

However, Garlicki makes a clear distinction between positive obligations and the horizontal effect. He explains the applicability of the horizontal effect depends on the organs enforcing the Convention, or the interpretation of the Court and the Committee of Ministers. He evaluates the application of the horizontal effect at the Court, stating that although,

> (…) *True horizontal effect* does not occur in Strasbourg (…) this does not mean the Court rejects the idea that the Convention has a 'radiating' effect on relations between private actors. Indeed, in the past thirty years there have been numerous examples of cases in which, as a matter of fact, the Court has been confronted with private actions violating the rights and liberties of other persons. In many of these cases it would have been possible, intellectually, to follow the German concept of 'indirect third party effect' to 'discover' the same concept in the 'living text' of the Convention and to draw from it some obligations of the Member States. However, the new Court, following the approach adopted by the earlier Court and Commission, *simply did not want to develop the Convention in this direction* (*ibid*: 142, emphasis added).

Garlicki defines "true horizontal effect" as *Drittwirkung* (refer to the discussion above), which was defined as human rights law binding individuals in their relations between themselves. Articles 3, 8-11 and 13, he argues, point to the possibility of judicial manoeuvring through more generous interpretations of the ECHR into the sphere of private persons. Instead of formally integrating the horizontal effect, he claims, the Court has assumed these provisions may be interpreted to impose positive obligations "not only on Member States, but also, indirectly, on private persons" (*ibid*: 132). In this way, some judges have attempted to negotiate the horizontal effect into the Court's case law by making violations of one individual's rights by another individual imputable to the state by its actions or omissions to guarantee the right or prevent the violation.

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is under a duty to adopt regulations, which secure the enjoyment by 'others' other their rights and freedoms. Art. 13: guarantees to everyone the right to an effective remedy before a national authority in case of a violation of any of the Convention rights and freedoms, "notwithstanding that the violation has been committed by persons acting in an official capacity". Thus, it may be argued that the persons *not* acting in an official capacity are also obliged not to violate the Convention (Garlicki, 2005: 131, emphasis added).

Taking a more decisive position, Spielmann has maintained that on the basis of the Convention's textual indications, i.e. the ECHR, particularly at Article 1, and its Protocols. Spielmann asserts that the,

> (…) Court has developed its positive obligations doctrine which has constituted a robust tool for the enforcement of the Convention rights, in conferring indirect horizontal effect on the substantive provisions [of the Convention] (2007: 428).

Nonetheless, he points out, private actors do not have direct obligations that stem from the Convention, even though they may violate it by infringing the rights it protects. For example, if a company rejects the candidacy of an individual based on sexual orientation it has infringed the ECHR rights of the individual, but the company is not responsible for a human rights violation. However, the Court emphasised in *Osman v UK* (1998) that

> Having regard to the nature of the right protected by Article 2 (…) it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge (§116 emphasis added).

Thus, based on the legal mechanisms available or lacking under national law, the ECtHR will decide whether the case triggers the horizontal effect. That is, the Court must decide whether, if by its actions or omissions, the state allowed the violation to occur. In practice, responsibility is imputed upon the state when it has failed to enact or enforce legislation that could have prevented or remedied the violation.

There is case law demonstrating that the ECtHR does, in some cases, directly mediate the terms of dealing with human rights violations between individuals. It has recognized that Convention rights may exert a much more profound impact on the relationships between private parties, even under private law. In *J.A. Pye (Oxford) Ltd. v UK* (2007), dealing with a land dispute, the ECtHR gave effect to Convention rights between private parties through the legitimacy of state legislation. In other words, where a violation of the Convention – public international law – is committed in the realm of private law, the Convention may

still apply. With the increasing privatization of goods and services, the horizontal effect may be one way for the ECtHR to negotiate its jurisdiction where human rights violations occur between human and legal persons. This approach indicates a space for the judicial imagination to develop human rights law for corporate accountability.

The judicial recognition of state responsibility for third parties is extensive and has remained consistent in the ECtHR's case law. In the case of *Costello-Roberts v UK* (1993) regarding the corporal punishment of a seven-year-old child, the Court confirmed that, "(…) the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals" (§27, see also *A v UK*, 1998). The ECtHR again considered the relationship between private parties in the case of *Woś v Poland* (2005). This case dealt with a legislation change that interfered with the applicant's compensation for forced labour during the Second World War. The ECtHR considered,

> (…) that the fact that a state chooses a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of state responsibility *ratione personae*. In the Court's view, the exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility *regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law*. The Convention does not exclude the transfer of competences under an international agreement to a body operating under private law provided that Convention rights continue to be secured. The responsibility of the respondent State thus continues even after such a transfer (§72, emphasis added).

The significance of *Woś v Poland* (2005) is that it reinforced the Court's position that the privatisation of a state function cannot absolve the state of responsibility for the protection and fulfilment of human rights (see also *Öneryildiz v Turkey*, 2004: §71).

This Section has demonstrated that there is a reluctance to accept the horizontal effect as a general concept in the ECtHR case law. The Court's uneasiness is evidenced in *X and Y v Netherlands* (1985) where, although the horizontal effect was mentioned during the hearing, the case was ultimately decided upon the

doctrine of positive obligations (Garlicki, 2005*:* 132). Nonetheless, there is enough evidence in the ECtHR case law to demonstrate that its applicability is possible and worthwhile. The mechanism of the horizontal effect is potent because it empowers judges to interpret the ECHR to provoke a response from the state for violations occurring in the 'private sphere'. By so doing, the case may result in changes in national legislation and in this way perhaps even address some legislative gaps.

This section has discussed the subtleties of how the horizontal effect works within the doctrine of positive obligations at the ECtHR. It has done so using the Court's case law to point out how the two mechanisms are used in different ways and for different purposes. The horizontal effect can have powerful political consequences since it places responsibility on the state for the actions or omissions of third parties. Consequently, the state must act (i.e. positive obligation) to ensure human rights protection along with its traditional responsibility to refrain from human rights violations (i.e. negative obligation). The next section examines the horizontal effect and the positive obligations doctrine in the Inter-American System.

2.2. Horizontality in the Inter-American System of Human Rights

The horizontal effect in the Inter-American system has received less attention in the literature than the European human rights system. Nevertheless, there is a jurisprudence and case law demonstrating the incorporation of the horizontal effect at the IACtHR. Moreover, some IACtHR judges have directly endorsed the horizontal effect, and the forms that these endorsements have taken will be explored below. The form of horizontality in the Inter-American system is identifiable through the doctrine of 'due diligence' and the recognition of *erga omnes* obligations.[228] The due diligence doctrine recognises that a violation of a

[228] In Judge Cançado Trindade's Concurring Opinion on IACtHR's Advisory Opinion on the *Juridical Condition and Rights of Undocumented Migrants* (2003), discussed below, he added, "The obligations *erga omnes partes*, in their horizontal dimension, find expression also in Article 45 of the American Convention, which foresees the mechanism (not yet utilized in the practice of the Inter-American system of human rights), of inter-State complaints or petitions. […] In any case,

human right by a private party can be attributed to the state if it cannot show sufficient measures were taken to prevent the violation. The doctrine places the onus on the state to protect citizens against violations of human rights by third parties before they happen. In this way, there is a manifest correlation between the responsibility of the state and the violation. The state's responsibility includes providing redress for the victim, and where possible pursuing the violator, i.e. providing a remedy. Thus, the state in the Inter-American system has a positive obligation to intervene in the private sphere where a non-state actor has violated the right of another non-state actor *and* the state must provide a remedy for the violation.

The concept of due diligence goes beyond the horizontal effect as it is understood at the ECtHR because it provides for the legal pursuit of the non-state actor for violations of human rights. The due diligence standard requires states to prevent, prosecute and sanction violations of human rights by non-state actors. Thus, in theory providing for the responsibility of the state for allowing or not preventing the violation by a non-state actor; as well as, the responsibility of the non-state actor *even retroactively*. Thus, the state is responsible for ensuring legislation to guarantee the rights enshrined in the ACHR and to prevent possible violations of those rights. If no such legislation exists, and *a fortiori* no enforcement mechanism, then the state can be considered responsible before the Court for deficient legislation and lack of due diligence. In other words, a government may be considered responsible for a violation of a human right either directly or indirectly, by failing to prohibit, prevent, or stop human rights abuses between individuals.

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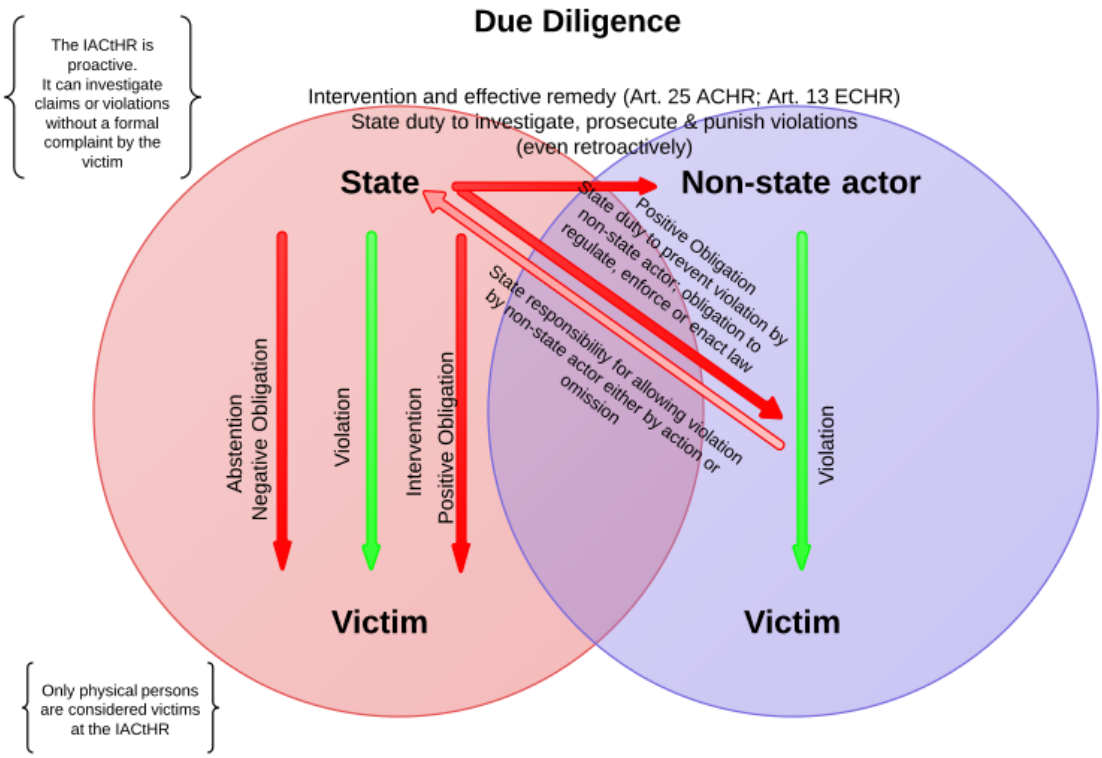
these dimensions, both horizontal and vertical, reveal the wide scope of the obligations *erga omnes* of protection." (§79).



However, the due diligence standard does not result in imputing the state with responsibility for every human rights violation that occurs in the private sphere. Indeed, it is also settled doctrine at the Inter-American system that positive obligations should not be interpreted in ways that impose impossible or disproportionate burdens on contracting states (Sende, 2009: 35). Rather, the state must act or have acted in a way that supports the integrity of human rights and human dignity (see Vazquez, 2005: 27; Ratner, 2001: 470). Thus, due diligence obligations require effective remedies to identify and sanction perpetrators under national law.

Many of the cases involving the due diligence standard at the IACtHR have been brought forward by Indigenous peoples, particularly for issues related to their lands. The extraction of natural resources on Indigenous lands by TNCs has been met with resistance.[229] Corporations have thus sought the protection of

[229] In an attempt to delegitimise the protests and resistances to the destruction of Indigenous lands and the related violations of human rights, some resistances have been labelled by some governments as criminal activity and in some cases even terrorism (see Fulmer *et al.*, 2008: 91).

governments and paramilitaries, who exert violence against Indigenous populations to protect corporate activity.[230] According to Dinah Shelton, Inter-American Commissioner, the protection of corporate projects "is a cause of death, forced internal displacement, and the like. [Indigenous] lands are being appropriated by 'legal' companies backed by paramilitary violence in order to develop their agro-industrial, mining, or infrastructural projects" (2010: 33). She goes on to say that,

> With respect to the duty of the State to protect the right to life with respect to the Indigenous peoples, the Inter-American Court has reiterated that 'the States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; (…) and to protect the right of access to conditions that may guarantee a decent life.' In this regard, the State has the duty to take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority (*ibid*: 34).

Several communities have "los[t] their lands, their liberty, their identities, and too often their lives" (*ibid*: 33) in cases of state-corporate collusion against Indigenous communities across the Americas. The specificity of the Indigenous populations in the Americas is thus a unique context that has its own set of human rights considerations, which the Inter-American human rights system has had to address. This specificity has forced the IACommHR and IACtHR into contact with cases of corporate violations of human rights more often than in Europe; and the Inter-American judges, were often more forthcoming with their personal and professional positions regarding this issue, which will be explored below in the next Chapter.

[230] In March 2007, Chiquita Brands International, Inc. admitted publicly that it had made payments to paramilitaries from 1997-2004. The President of Chiquita justified the payments to the paramilitaries due to their capacity to intimidate, claiming either they paid or risked seeing their employers killed or kidnapped. After admitting payments to the paramilitaries, Chiquita also admitted having paid the FARC (Martin Ortega, 2008: 5, ftnt 33). The relationship between major transnational corporations, such as Del Monte, Chiquita, and Dole, has been revealed during the confessions of paramilitaries in the context of demobilisation (*ibid*: 6).

The horizontal effect and the due diligence standard were elaborated in the landmark case *Velásquez Rodríguez v Honduras* (1988)[231], which dealt with a disappearance by the Honduran secret police aided by civilians acting under police orders. The IACtHR stated the breach of the ACHR,

> (…) Is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a state is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law (§170).[232]

The Court went on to detail that a human rights violation,

> (…) initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) 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 violation or to respond to it (…) (§172, emphasis added).

Former judge at the IACtHR A. A. Cançado Trindade has explicitly indicated that international responsibility may arise from acts by third parties (i.e. individuals, groups of individuals, and *corporations*) *not* attributable to the state, due to the failure of governments to fulfil their positive obligations under international human rights law (Dissenting Opinion *Personas haitianas y dominicanas de orígen haitiano en La Republica Dominicana*, 2000: §25).

The IACtHR thus established the horizontal effect in *Velásquez Rodriguez* by holding that the violation of a human right between individuals was the responsibility of the state by virtue of Article 1(1) ACHR. The Court specified that,

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[231] The *Velásquez-Rodríguez* Judgement has served as a basis for other international and regional human rights monitoring bodies, illustrating its important role in the evolving international human rights jurisprudence. Chirwa (2004) notes that the due diligence test was also adopted by the African Commission in the *'SERAC' v Nigeria* (2001).

[232] This was an important (political) statement considering the definition of state responsibility outlined by the International Law Commission in 1980. It defined state responsibility as limited to the conduct of a person or group of people acting on behalf of the state (Spielmann, 1995: 64).

> Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a state party. In effect that article charges the State Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights, which can be attributed under the rules of international law to the *action* or *omission* of any public authority, constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention (§164, emphasis added).

In this statement, the IACtHR implied that the state is not only responsible for a lack of due diligence, but also assumes responsibility of the violation itself. In other words, the initial violation of the human right is imputable directly to the state. This direct imputability differentiates the IACtHR's interpretation and application of due diligence from that of the ECtHR's "duty to protect" by considering that the state itself has committed, for example a violation of the right to life, together with the third party. In this way, the IACtHR has interpreted and applied the due diligence standard in a way that has pushed the boundaries of traditional human rights law. The IACtHR has built its reputation based on these innovative interpretations, particularly regarding Indigenous rights and judgements for violations committed by the caudillos of many Latin American regimes in the late 20th century (see Introduction chapter).

The IACtHR and the IACommHR have determined that states shall be responsible for acts of private persons or groups when these non-state actors act freely and with impunity to the detriment of rights; in other words where the state has failed to act with due diligence to prevent such violations (Anicama, 2008). The Court has insisted that,

> If the state apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the state has failed to comply with its duty to ensure the free and full exercise of those rights (…) This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, whose parties are aided in a sense by the government, thereby making the state responsible (*Velásquez Rodríguez*, 1988: §176).

Due diligence is interpreted by the IACtHR as a mechanism that "may lead to the punishment of those responsible and the obligation to indemnify the victims for damages" (*ibid*: §175).[233] These statements by the Inter-American judiciary acknowledge a kind of horizontality with the potential to be a powerful mechanism to uphold state responsibility and even corporate accountability.

Cançado Trindade has consistently appealed for the evolution of the law to deal with violations of human rights by non-state actors. In *Haitians and Dominicans of Haitian Origin in the Dominican Republic v Dominican Republic*,[234] he concluded his Opinion for the request of Provisional Measures stating,

> It is, moreover, urgent to conceptually develop the law regarding the international responsibility, in a way to also include, *at par with the state, the responsibility of non-state actors*. From the perspective of the protection of human rights, this is one of the major failures of public power and of the juridical sciences in this 'globalised' world in which we live (2000: §25, translated by author from Spanish, emphasis added).[235]

Cançado Trindade's statement is a critique of the lack of imagination and arguably the lack of resolve both from the judiciary and the legislative regarding the advancement of human rights protection by recognising 'new' violators of human rights and therefore dealing with the violations that occur.

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[233] Moreover, the Court has emphasised a state's duty to investigate the violation must be undertaken,
(…) In a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the state as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof without an effective search for the truth by the Government (*Bámaca Velásquez v Guatemala* at §212).

[234] This case involved a request for Provisional Measures in order to avoid the deportation or expulsion of the petitioners and to enable them to return immediately to the Dominican Republic to be reunited with their children. Interestingly, Úbeda de Torres (2011: 208) points out, that these Provisional Measures differ somewhat from those developed by the ECtHR. Unlike the ECtHR, the IACtHR does not require the existence of a risk of torture or of inhuman, cruel or degrading treatments before granting Provisional Measures. This flexibility has allowed the IACtHR to grant Provisional Measures, for example in several cases involving Colombia, not only to protect the lives and physical integrity of the populations but also to prevent their forced displacement, or if they had already been displaced, to organise their return whenever possible (see Order for the Provisional Measures in the matter of the *Indigenous People of Kankuamo regarding Colombia,* 2000; Order for Provisional Measures in the matter of the *Jiguaminadó and Curbaradó Communities regarding Colombia*, 2003).

[235] The quotations from this case have been translated from the Spanish version of the case *Personas haitianas y dominicanas de orígen haitiano en La Republica Dominicana* (2000).

The horizontal effect has been deemed by some judges at the IACtHR as a necessary means to ensure the protection of human rights under the ACHR. In a Concurring Opinion in the *Peace Community of San José de Apartadó* (2002)[236] concerning Colombia, Cançado Trindade suggested the state's obligation *erga omnes* to protect all persons subject to its jurisdiction,

> (…) requires a clear recognition of the effects of human rights in the American Convention vis-à-vis third parties (*Drittwirkung*) without which the obligations to protect under the Convention are reduced to little more than a dead letter (§5, translated by author from Spanish).[237]

The resolution adopted by the Court in *Comunidad de Paz de San José de Apartadó* established that the legal development of the *erga omnes* obligations of protection had to assume a greater importance because of the diversification of the sources of human rights violations. The formal acknowledgement of the spectrum of offenders is also an informal recognition of the incapacity for human rights law to deal with the abuses.

In the Opinion noted above, Cançado Trindade draws attention to the vertical and horizontal dimensions of *erga omnes* human rights obligations. He references his Concurring Opinion in the IACtHR's Advisory Opinion OC-18 on the *Juridical Condition and Rights of Undocumented Migrants* (2003), which has become the leading case for the horizontal effect at the IACtHR.

> (…) The obligations *erga omnes* of protection, in a horizontal dimension, are obligations pertaining to the protection of the human beings due to the international community as a whole.[238] In the framework of conventional international law, they bind all the States

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[236] In December 1997, the IACommHR requested the adoption of preventive measures on behalf of the members of the Peace Community of San José de Apartadó. The request came after the killings of 43 members of the Community, which had declared its neutrality in the armed conflict in Colombia that same year. In 2000, the president of the IACtHR requested Provisional Measures for 189 members of the community.

[237] The quotations from this case have been translated from the Spanish version of the case *Comunidad de Paz de San José de Apartadó* (2002).

[238] *Case of Blake v Guatemala* (1998) Separate Opinion of Judge A.A. Cançado Trindade at §26, and §27-30. Ziemele (2009: 9) explains that in the *Blake* case, the IACtHR found that a paramilitary group that had an "institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision" (*Case of Blake*, 1998: §§68-78)

> Parties to human rights treaties (obligations *erga omnes partes*), and, in the ambit of general international law, they bind all the states, which compose the organized international community, whether or not they are Parties to those treaties (obligations *erga omnes lato sensu*). In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations).

In this Opinion, Judge Cançado Trindade noted that human rights protection *erga omnes* encompasses all the parties for whom the legal norms were intended (*omnes*), whether they be members of the public organs of the state or private persons (§76). Moreover, as emphasized by Judge Pesantes in his Concurring Opinion for the *Juridical Condition and Rights of Undocumented Migrants* (2003),[239] the importance of the Advisory Opinion is in "establishing clearly the effectiveness of human rights with regard to third parties, in a horizontal conception (…) (*Drittwirkung*)" (§17). Pesantes goes on to warn, "[t]he environment of free will that prevails in private law cannot become an obstacle that dilutes the binding effectiveness *erga omnes* of human rights" (§18).

In the Advisory Opinion on the *Juridical Condition and Rights of Undocumented Migrants* (1999), the Court declared that fundamental rights are direct limits on the actions of the state *and* of individuals. In a powerful reminder of state responsibility for human rights in *Mariela Morales Caro et al. (La Rochela Massacre) v Colombia* (2007) the IACtHR considered that,

> (…) it is sufficient to prove that public officials have provided support to or shown tolerance for the violation of rights enshrined by the Convention, that their omissions have enabled the commission of such violations, or that the state has failed to comply with any of its duties (§68).

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was a *de facto* agent of the state and that the actions of a member or members of this group should therefore be imputable to the state.

[239] In this Advisory Opinion the IACtHR responded to a request made by Mexico concerning the juridical status of undocumented migrants on its territory. The Court held that the migratory status of a person cannot constitute a justification for depriving him/her of the enjoyment and exercise of his/her human rights, including those rights related to work. The Court clarified that the migrant, upon taking up a work related role, acquires rights by virtue of being a worker that should be recognised and guaranteed independently of his or her regular or irregular situation in the state of employment.

The relationship between the state and non-state actors regarding the responsibility of human rights is here made clear. The state, under the Inter-American system fails to fulfil its duty where it has not taken the necessary precautions to protect human rights (duty to prevent harm or effective deterrence), including violations between private persons.[240]

It is worth noting, the Court has referred to 'third parties' 'private individuals', 'private persons' or 'private groups', but has yet to refer directly to corporations in its judgements. This omission is, however, mitigated by Judge Cançado Trindade's Concurring Opinion on the *Kichwa Peoples of the Sarayaku community and its members / Matter of the Indigenous Community of the Sarayaku People v Ecuador* (2005; hereafter *Kichwa Peoples of Sarayaku*).[241] Unlike in similar cases, where the violations were committed by paramilitaries, this case referred to the violations of human rights by a corporation. Cançado Trindade reasoned that, "'states have the obligation *erga omnes* to protect all persons under their jurisdiction; an obligation that involves not only the relationship with the state but also with the actions of third parties'. In [his] point of view, this involves any third party, *including individuals that constitute businesses or commercial enterprises*" (§14, emphasis added, translated from Spanish by the author). This Opinion is an active recognition of the role of corporations in human rights violation and a reminder of the role the state has in reigning in corporate power. It is a clarification loaded with potential for the Court to interpret the ACHR and begin the task of developing the law in relation to achieving more effective human rights protections for corporate violations. Ultimately, in its 2012 Judgement, the Court found violations to the right to prior consultation, prior

[240] In the case of *Maritza Urritia v Guatemala* (2003) the Court emphasised the existence of positive obligations for third parties stemming from Article 7 ACHR. It stated that Article 7 establishes "obligations of a positive nature that impose specific requirements on both State agents and third parties who act with the tolerance and agreement of the former and who are responsible for carrying out detentions" (§41).

[241] A complaint was brought against Ecuador by the Kichwa Peoples of Sarayaku for having granted a concession for oil exploration and exploitation and allowing an Argentinean company to begin seismic exploration within the Sarayaku people's territory without having consulted with the Sarayaku or obtaining their consent. The Court found in favour of the applicants for violations of the right to prior consultation, prior consent, community Indigenous land, cultural identity, life, and personal integrity.

consent, community Indigenous lands, cultural identity, life and personal integrity.

The Inter-American human rights system has been confronted time and again with cases of human rights abuses by third parties. These cases have most often dealt with paramilitary violence attributable to the protection of the interests and privileges of the wealthy and powerful (Hristov, 2009; Martin Ortega, 2008). The most notorious of these cases have dealt with the violations of human rights of Indigenous populations across the Americas, usually with reference to the extraction of natural resources or other land issues that have lead to further violations, e.g. *Mapiripán Massacre v Colombia* (2005, discussed below); *Pueblo Bello Massacre v Colombia* (2006)[242], *Santo Domingo Massacre v Colombia* (2002)[243]. In 2000, the UN Special Rapporteur on Indigenous Populations noted in her Final Working Paper,

> In the Working Group, numerous speakers have pointed to the forced expulsion of native peoples from their lands so that Governments could increase logging and oil concessions to multinational corporations. Others have spoken of removal purportedly to protect Indigenous communities from military manoeuvres or armed conflict (UN, 2000a: §71).

The Indigenous populations of the Americas have suffered from multi-tiered state-corporate exploitation. A few of these cases are discussed here to highlight

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[242] On 14 January 1990, 60 army-backed paramilitaries travelling in two lorries entered the community of Pueblo Bello. The IACtHR established that the paramilitaries belonged to the "*Los Tangueros*" paramilitary group under the command of Fidel Antonio Castaño Gil, the owner of the Santa Monica Farm. The villagers were terrorised before forty-three people were selected by the paramilitaries and taken to the Santa Monica Farm, in another province, passing unhindered through at least two military checkpoints (*Pueblo Bello Massacre*, 2002). At the farm, the victims were torture, killed, and disappeared. The disappearances were reportedly carried out in retaliation for the theft of 43 head of cattle belonging to paramilitary leader Fidel Castaño by guerrilla forces.

[243] The case has to do with the dropping of a cluster bomb on the village of Santo Domingo carried out on 13 December 1998 by the Colombian Air Force, killing 17 civilians. After the initial cluster bomb exploded, the military continued bombing civilians who were trying to help the wounded and those trying to escape the village. Following these events, the entire population of Santo Domingo moved away; in 1999 some returned to rebuild their homes. There is proof that this massacre was done at the request of, and with financing from, the US corporation Occidental Petroleum (Beisinghoff, 2009: 165). The Colombian government receives direct funding from Occidental in return for protecting the pipeline. A second company, AirScan, Inc., was also involved in the attack. AirScan, Inc., working in its capacity as a security contractor and agent of Occidental, supplied the coordinates for the bombing; and, allegedly three AirScan pilots accompanied by a Colombian military officer serving as air force liaison to Occidental (*ibid*: 166).

how the horizontal effect has been used and its potential in the Inter-American system.

The targeting of Indigenous populations for their land has resulted in extreme violence and atrocities. The years of dictatorships across the region, associated with death squads, torture, disappearances and the execution of political dissidents have been replaced by democracies. However, paramilitary violence endures. Paramilitary groups continue to intimidate, brutalise and murder in several member states, most notably in Colombia, Guatemala, Peru, Ecuador, and Bolivia. In 2005, in a Report on Colombia, Amnesty International stated that, "the vast majority of non-combat politically-motivated killings, disappearances, and cases of torture have been carried out by army-backed paramilitaries" (2005, 3-4). In these countries, paramilitary violence, together (and often related) with the exploitation of natural resources on Indigenous lands have led to a systematic targeting of Indigenous peoples in order to forcefully remove them from their land. In Colombia, for example, massacres by paramilitary groups, the fear they have instilled and the indifference of the state, have led to massive internal displacements and particularly Indigenous peoples (Hristov, 2009: 76; IDMC, 2005: 36, 39). One example of paramilitary violence in the IACtHR's case law is the case of *Mapiripán Massacre v Colombia* (2005) that dealt with the brutal massacre of civilians. The army was ordered by one of its generals to stand down until the massacre was over. Information released in 2012 by the US State department has substantiated the coordination of the Mapiripán massacre with the Colombian Army (Evans 2012).

Internal displacement is a deliberate policy to remove people from their lands because it "accomplishes everything. (…) [I]t frees land that can subsequently be taken over by the landed elite, mining companies, cash-crop plantation owners and [T]NCs" (Hristov, *ibid*; see also Ortega 2008). Paramilitaries protect the interests of the powerful, including local and foreign enterprises, by brutalising, intimidating and disappearing any social force that might block or challenge them, e.g. trade unions, women, Indigenous peoples, youth, peasant organisations,

educators, journalists, human rights activists, and intellectuals (*ibid*: 78). Martin Ortega similarly argues that,

> The reality is that over the last 30 years the paramilitaries have acted as private security forces for elites and landowners and [have been] used to suppress social protest in rural areas. These services have allegedly been provided to companies too. In this sense, certain multinational corporations have been involved in the use of these paramilitary groups to resolve labour disputes, but also allegedly have used their terrorising power to displace entire local populations in order to use their land for their investments. The displacement of the population has generally followed military campaigns by the army and paramilitary groups against guerrilla groups, which resulted in the coercion of peasants into selling their land or their direct expulsion through threats, intimidation, and even summary executions. Banana companies and more recently palm growers (…) followed the vacation of the land to establish their plantations (2008: 6, emphasis added).

Ortega's comment emphasises the direct corporate involvement in abuses that have been supported by state military actions. The IACtHR has established a unique case law in light of the circumstances of its member states. The Court has interpreted the due diligence standard, discussed above, in order to impute responsibility directly on the state for violation itself. As such, the IACtHR has considered the state as one of the principal actors in the violation along with the third party.

In the Inter-American system, some of the most salient examples of positive obligations and due diligence stem from cases addressing the exploitation of Indigenous lands or other violations against Indigenous peoples. Examples of cases regarding the exploitation of Indigenous lands are cited in the *Third Report on the Human Rights Situation in Colombia* (1999). In this Report the Commission reviewed the U'Wa petition against Colombia wherein the Community challenged the government's concession to Occidental of Colombia (a subsidiary of the American company Occidental Petroleum). The Colombian government's involvement in the project was executed through the Ministries of Mines and Energy and of the Environment and was further involved through ECOPETROL as a joint venture partnership with Occidental.

The Commission noted the individual petition of the U'wa Indigenous community, "(…) in relation to exploration which international oil companies, in cooperation with the Colombian State oil company (ECOPETROL), seek to carry out on their traditional lands" (X: §32). In the Inter-American system, Indigenous peoples have a "right to consultation" regarding their land (IACommHR, 2009: IX).[244] With regard to the right to consultation, the Commission further stated,

> The Indigenous community alleges that it was not properly consulted when ECOPETROL granted a license to the international oil companies to begin exploration of the area with a view to oil drilling in the near future (…) if proper consultations were carried out, it would be come clear that oil drilling cannot take place on their land without causing irreparable damage to their religious, economic and cultural identity and rights.

The Commission ultimately recommended that the parties pursue a friendly settlement.[245] The international community began using mediation to pursue friendly settlements of disputes involving human rights violations shortly after establishing the international human rights regime in the late 1940s. However, as Standaert (1999) points out, the horrific nature of human rights violations raises questions about the ability of mediation to encourage respect for human rights, assign responsibility to abusers, and bring a sense of justice to the victims. Moreover, the appropriateness of friendly settlements in human rights cases is questionable and is discussed below.

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[244] The idea of consent refers to a three-pronged test outlined by the Inter-American Court regarding violations of property rights of Indigenous peoples that was set out in *Saramaka People v Suriname* (2007). Diego Alcala (2009) summarises the test: Firstly, the state must ensure the effective participation of the Indigenous community regarding any development plan or project. The Court stressed that the state has a duty to consult the Indigenous people during the early stages of any proposed plan, respecting their customs and traditions. In certain cases, the state is not only required to consult, but to obtain the "free, prior and informed consent" of the affected group (*Saramaka People*, 2007: §134). Secondly, the state must guarantee that the community will receive a reasonable benefit from such plan and rejected compensation packages that were similar to those awarded in expropriations cases. The difference is that Indigenous people must be compensated not only for the deprivation of land, but also for the loss of regular "use and enjoyment of their traditional lands and of those natural resources necessary for their survival" (*ibid*: §139). The compensation is not only for the individual, but also for the community's relationship with the land. The third and final part of the three-pronged test requires the state to issue independent environmental and social impact assessment plans before placing any restriction regarding any proposed restrictions of the Saramaka people's property rights, particularly regarding proposed development or investment plans in or affecting Saramaka territory.

[245] Friendly settlement procedures have been integrated into the ACHR at Article 48(1)(f) and the ECHR at Article 39.

Although initially it appeared as though oil exploration had stopped, the Colombian government along with Oxy soon continued drilling on U'Wa lands, demonstrating a lax or even non-existent commitment on the part of the state to protect Indigenous lands.[246] Lillian Aponte Miranda points out that

> While Occidental ultimately abandoned the oil drilling project due to its inability to find sufficient oil to render continuation of the project economically worthwhile, other multinational corporations continue to lobby the Colombian government for the rights to drill oil on U'Wa traditional lands" (2007: 662).

The persistent threat to U'Wa traditional lands, despite the IACommHR's and IACtHR's decisions in favour of the U'Wa, highlights the inability of the international human rights regime to take effective action when dealing with state-corporate violations (Miranda, 2006). Miranda persuasively argues that, "meaningful legal accountability against a corporate actor engaged in a joint state-corporate enterprise often proves elusive" (2006: 654). The international human rights regime recognises the responsibility of the state and relies on the state to hold the corporation accountable (see discussion on the state-centred approach Chapter 2), but it has proved insufficient to protect human rights from corporate wrongs. This is a good example of the potential positive impact the *UN Norms* may have had if it had been pursued at the international level since it aimed to provide for the primary responsibility of the state with a set of binding norms, but also the responsibility of corporations (see Chapter 2).

In the Inter-American system, if a settlement is reached, the IACommHR submits a report with limited content including a statement of the facts and of the solution reached (Article 49 ACHR). Once a friendly settlement is reached, the case is considered closed. Standhaert (1999: 523) observes the appeal of a friendly settlement for the state party since if no agreement is reached, the state faces the

[246] Despite these important recognitions, the observance by the states of the recommendations and judgements is devoid of commitment where economic or financial opportunities present themselves (e.g. Occidental Petroleum in Ecuador). For example, although the U'Wa had raised a strong political and legal battle against Occidental Petroleum (Oxy) and Royal Dutch Shell, and despite the Commission's Report, Oxy continued drilling with the consent of the state. It was only after it appeared commercially unviable that the project was withdrawn.

possibility of mandated "recommendations", publication of a negative report, or an unfavourable ruling from the Court with which it must comply (Article 68(1) ACHR). However, Standhaert argues that there is a contradiction in using friendly settlements for human rights cases. She focuses her analysis on the Inter-American system. She points out that the IACommHR's position has not always looked favourably upon friendly settlements since historically, the IACommHR's role was to investigate human rights violations that it perceived not to be conducive to friendly settlements. The ACHR's friendly settlement procedures were written using a different philosophy that viewed human rights violations as capable of being resolved in a 'friendly' manner (*ibid*: 524).

Standhaert (1999: 524) argues that the IACommHR's initial reluctance and concern with the propriety of its new role as mediator is demonstrated in the first case it submitted to the contentious jurisdiction of the Court: *Velásquez-Rodríguez* (1988). Upon submission of the case to the Court by the IACommHR, the Honduran government complained that there had been a breach of procedure claiming the IACommHR had ignored the friendly settlement provision. The IACommHR argued that, "the special circumstances of this case made it impossible to pursue such a settlement" (*Velásquez-Rodríguez*, 1994: §43). However, following a challenge to the IACommHR's discretionary power by the government of Colombia in *Caballero Delgado and Santana v Colombia* (1994), the IACtHR ruled that the IACommHR must ask the parties if they have an interest in pursuing a friendly settlement. As a consequence of *Caballero Delgado and Santana*, the discretion to use friendly settlement procedures is now in the hands of the parties (Standhaert, *ibid*: 527). The potential issue with shifting the discretionary power to the parties is that by definition the parties are not equal, i.e. the state is more powerful than the applicant, which was the very reason for human rights regimes in the first place. In cases involving third parties, such as corporations, the combined power of the corporation and the state is enough to suggest the potential to exert a strong influence on the petitioner to opt for friendly settlement procedures.[247] For the victim, there are therefore very

[247] Standhaert (1999) acknowledges the role of the Commissioner as a well-trained mediator who is sensitive to the power dynamics between states and petitioners and whose role it is to respond

practical incentives for settling out of Court (e.g. financial, time constraints, knowledge of rights, power imbalance, etc.)

The power imbalances between the parties calls into question the appropriateness of using mediation in human rights cases and points out that it may "even [be] destructive to the promotion of human rights" (Standhaert, 1999: 528). Cases settled through mediation do not carry with them the obligation of the due diligence standard. States are thus not obligated to investigate the violation, which has two major consequences. Firstly, friendly settlements do not necessarily "(…) provide for the punishment of those responsible (…)" (*ibid*: 538). Secondly, the extent and nature of the government's involvement in the infringement of the petitioners' rights is unresolved both for the petitioner and for society at large. In addition, the proceedings of friendly settlements are confidential and thus are not disclosed to the public. Finally, as Standhaert (*ibid*: 540) asserts, negotiating with states that have committed gross violations of human rights actually condones their actions. When a corporation has the means to settle out of Court it implies a capacity to bypass any accountability by avoiding litigation. Thus, there are sufficient indications that perhaps human rights cases cannot be resolved through mediation (see also *Velásquez-Rodríguez*, 1988). Corporations can exploit these issues to evade the Courts, avoid the negative publicity, and elude a potential scandal that would require the state to admit its responsibility for the violation.

There is unrelenting pressure and demand from corporations for concessions to natural resource-rich Indigenous lands. Ultimately, Miranda argues (2006: 652), challenges to the observance of Indigenous peoples' land rights are likely to persist where corporations are able to bypass any meaningful accountability for their abuses under both domestic and international legal accountability

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in a manner that generates equal exchange. The Commissioner's moral and political force within the OAS is a potential element that may help balance the power dynamics. Again, the very nature of human rights cases and the fact that it is very often an individual petitioner, suggests that even with the Commissioner, the power imbalance is too great to mediate. Even where friendly settlements are conducted in an environment of transparency and where the state is committed to justice and reconciliation, the argument can be made that human rights violations are too important to be resolved in a friendly way. See Standaert (1999) for details of the shortcomings to the friendly settlement procedure.

frameworks. However, there are incremental changes taking place. Increasing numbers of petitions are being filed at the IACommHR and cases presented to the IACtHR concerning violations of Indigenous land rights. The proliferation of these cases is an indication of the number of these violations, but not only. The growing numbers also show that Indigenous peoples are using human rights Courts in attempts to defend themselves against corporate incursions on their traditional lands, and their plight is being made visible and garnering public support. Indigenous peoples' struggles against corporate land concessions are being waged at the international level using international human rights law.

In the *Case of Community Mayagna (Sumo) Awas Tigni v Nicaragua* (1998 IACommHR; 2001, IACtHR) the state had rented Indigenous land to a Korean corporation for extraction of natural resources. The petition alleged that the Government violated the ACHR due to the lack of measures needed to guarantee the Community's rights over its traditional lands, including the lack of procedures for demarcation or titling of land, and for the granting of a logging concession in those lands to the company Sol del Caribe, S. A. (SOLCARSA). The petition also alleged that Nicaragua violated the ACHR in failing to guarantee an effective judicial remedy to respond to the Community's claims over its traditional lands and natural resources. In its *Report Mayagna (Sumo) Awas Tigni v Nicaragua* (1998) the Commission concluded a violation of a combination of rights. It stated,

> (…) the state of Nicaragua is actively responsible for violations of the right to property (…) by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tigni lands, without the consent of the Awas Tigni Community (§142, translated from Spanish by author).

The IACtHR went further in its judgement finding that

> Members of the Awas Tigni Community have the right that the state abstain from carrying out, until (…) delimitation, demarcation, and titling [of the Community's territory] ha[s] been done, actions that might lead agents of the state itself, *or third parties acting with its acquiescence or its tolerance* , to affect the existence, value, use or enjoyment of the their property located in the geographical location where members of the Community live or carry out their activities (2001: §153, emphasis added)

The IACtHR found that Nicaragua had a positive obligation and an obligation under due diligence to prevent corporate actors engaged in state-corporate enterprises from infringing the land rights of the Awas Tigni (Miranda, 2007: 171).

The *Awas Tigni Case* is a clear example of state-corporate collusion and has become a landmark case.[248] The Commission lodged the case with the IACtHR after delivering its Report and the Court found Nicaragua guilt. It was the first time the Court found a state guilty of violating the ACHR because it failed to adopt effective measures to secure the rights of the community to its ancestral lands and resources, as well as a failure to engage in any meaningful consultation with the community (see Appendix 2). It is worth noting however, that the IACtHR has been reluctant to engage in reparations. For example, although the Court recognised the state's responsibility for allowing the violation of U'Wa land rights by SOLCARSA, the Court was unwilling to engage in a reparations phase (Anaya, 2004:269); and although the mechanism of due diligence requires remedy, the Court limited reparations to a modest monetary reparation and minor sums to cover recoverable costs incurred by the Awas Tigni during the lengthy legal process (*ibid*).

Other cases in the Inter-American system dealing with state concessions to corporations in the extractive industry include the *Kichwa Peoples of the Sarayaku* (2004, IACommHR; 2012, IACtHR), the *Yakye Axa Indigenous community of the Enxet-Lengua People v Paraguay* (2005, hereafter *Yakye Axa*), and the *Yanomami v Brazil* (1985, hereafter *Case of the Yanomami*). In the case of the *Kichwa Peoples of Sarayaku*, a complaint was first lodged with the IACommHR, wherein the Commission found a violation of the rights of the Kichwa Peoples and submitted the case to the IACtHR. The complaint was made because Ecuador granted a joint-venture concession for oil exploration and exploitation to Empresa Estatal de Petróleos del Ecuador (PETROECUARDOR), Compañía

[248] Another aspect of these cases is that it illustrates that states actively participate in constructing the elusive legal character of multinational corporate authority (see Macklem, 2001: 477-78).

General de Combustibles (a subsidiary of Chevron in Argentina), and Petrolera Ecudardo San Jorge, S.A., allowing these companies to begin seismic exploration within the Sarayaku people's territory. No consultation was sought with the Sarayaku and their consent was not granted.

Similarly in the case of the *Yakye Axa* (2005) the Court concluded Paraguay had violated the rights to property and Court protection, as well as the right to life, since it had prevented the community from access to its traditional means of livelihood. Again, in the *Yanomami* (1985) case, the Commission stated that Brazil's approbation of the development in the Amazonian region caused various life and culture-threatening harms to the Yanomami population, including their displacement, the break-up of social organisation, the introduction of prostitution and disease, and the destruction of encampments. In the *Pueblo Indígena Kichwa de Sarayaku (Kichwa Peoples of the Sarayaku)* (2012), the *Yakye Axa* (2005) case, and the *Yanomami* (1985) case, the respective states were held responsible for having allowed corporations to carry out activities on the ancestral lands of Indigenous peoples without their consent. The IACtHR held that the states lacked due diligence and found the states guilty of failing to adopt adequate measures to ensure their respective domestic law guaranteed the community's effective use and enjoyment of their traditional land, thus threatening the free development and transmission of Indigenous culture and traditional practices.

In *Mayas Indigenous Community of the Toledo District v Belize* (2004), another case dealing with concessions to oil and timber companies, the IACommHR reaffirmed the responsibility of states for violations committed by third parties, i.e. the horizontal effect (§165(5). This case dealt with the logging, oil, and hydroelectric concessions granted by Belize to several different corporations in 2001. The concessions denied Mayan farmers access to their ancestral land. The Commission concluded that,

> (…) the right to use and enjoy property may be impeded when the state itself, or *third parties* acting with the acquiescence or tolerance of the state, affect the existence, value, use or enjoyment of that property without due consideration of and informed consultations with those having rights in the property" (§140, emphasis added).

The *Mayas Indigenous Community*, the *Awas Tigni* and the *U'Wa* cases are evidence of a growing jurisprudence at the IACommHR and a growing case law at the IACtHR that is recognising the violation of human rights by third parties. The acknowledgement of the violation of human rights in all of the above-mentioned cases, coupled with the application of the horizontal effect, is an indication of the potential for human rights law to provide a means of struggle for corporate accountability.

However, the IACtHR has no coercive mechanisms for ensuring state compliance with its judgements, which leads to questions about the effectiveness of the IACtHR judgements, i.e. to what extent states implement or abide by judgements of the Court, states' rates of recidivism, etc. Of course, there are examples of compliance (e.g. *Cesti Hurtado v, Peru*, 1999; *Loayza Tamayo v Peru*, 1997: §5; *Cantoral Benavides v Peru*, 2001: §76). Nevertheless, where the Court has ordered the state to investigate, prosecute and punish the individuals responsible for the violations, impunity reigns. Morse Tan emphasises that in Latin America "the state power structure lacks the means or the will to bring the perpetrators of human rights violations to justice" (2005: 329). This is a fundamental obstacle to human rights protection. Moreover, even where states affirm their intent to comply with judgements, the integrity of their affirmations remains questionable, as in the case of the *Kichwa Peoples of the* (2004, IACommHR; 2012, IACtHR). Although in this case Ecuador affirmed that it would include prior consultation processes in the XI Round of Oil Concessions (2012), the government published Executive Decree No. 1247 on 19 July 2012, which purported to regulate prior consultation rights. The Decree effectively turned the right to prior consent into a formality or process of informing the Indigenous populations rather than seeking their consent (ESCR-Net, 2012).

The IACommHR has addressed the lack of robustness regarding third party violations of human rights. The Commission, recalling its mandate to observe the human rights human rights situation in member states and investigate in specific situations, has pointed out impediments to its ability to fully promote human

rights. It has attributed these barriers to, in part, the lack of political will of the OAS member states. The IACommHR outlined its position in the early 1990s during a time when it was receiving increasing numbers of petitions regarding violations of human rights by guerrilla warfare and militia groups. Thus, at that time, the IACommHR began having to deal more directly with violations of human rights in the private sphere.

In its 1992-1993 Annual Report, the Commission asserted,

> One should bear in mind that the primary function of the Commission is 'to promote respect for and defence of" human rights which members of the OAS have undertaken to respect in the terms set forth in the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights. Though the Commission is *willing* and *anxious* to expand its focus, when relevant, to deal with any violation of human rights, nothing may be done that could possibly minimize its primary function (V: II, emphasis added).

In this Report, the Commission alluded to the political barriers that have limited its mandate to only consider issues related directly to states. In other words, the OAS member states have deliberately and consistently sought to limit the Commission's investigations into violations by third parties. The IACommHR reiterated its position in 1999 in its *Third Report on the Human Rights Situation in Colombia*. It referred to its OAS mandate to point out the political origins of its lack of competence to hear complaints between individuals directly.

> (…) OAS Members opted deliberately not to give the Commission jurisdiction to investigate or hear individual complaints concerning illicit acts of private persons or groups for which the state is not internationally responsible. If it were to act on such complaints, the Commission would be in flagrant breach of its mandate, and, by according these persons or groups the same treatment and status that a state receives as a party to a complaint it would infringe the sovereign rights and prerogatives of the state concerned.
>
> This limitation on its competence to process individual complaints does not mean that the Commission has been indifferent or silent in the face of atrocities and other violent acts committed by dissident armed groups, drug traffickers and other private actors in Colombia and other OAS states (IV: §5-6).

The Commission also points to its active role in investigating human rights claims. The Commission has recognised the importance of continuing to address violations in the private sphere, despite its inability to pursue investigations into the acts of third parties.

To conclude this overview into the case law of the European and Inter-American systems of human rights in the so-called private sphere, the final section points to where the two Courts intersect and where they differ on how they attribute liability for third party violations.

III: Divergences and Convergences at the ECtHR and the IACtHR

Extending the responsibility for human rights into the private sphere is a politically delicate issue. The Courts and the Commission are mandated to deal with certain rights, in certain ways. The indirect approach to the responsibility for human rights violations in the private sphere differs from one Court to the other. In this brief analysis of the case law, we can identify four major differences in the two systems.

Firstly, there is a difference in the robustness of the position regarding the effects of human rights on third parties. The IACtHR categorically declares its use of the horizontal effect as part of a state's positive obligation, although it does not go so far as to attack the structural issues that enable corporate violations. The IACtHR has stated it is "the positive obligation of the state to ensure the effectiveness of the protected human rights gives rise to *effects* in relation to third parties (*erga omnes)* (Advisory Opinion OC-18/03: §140, emphasis added).[249] Whereas in the ECtHR private actors do not necessarily have direct obligations stemming from the ECHR (e.g. *Vgt Verein gegen Tierfabriken v Switzerland*, 2001), in the Inter-

[249] This is corroborated by Judge Cançado Trindade's Concurring Opinion, "at the operative level, the obligations *erga omnes partes* under a human rights treaty such as the American Convention also assume special importance, in face of the current diversification of the sources of violations of the rights enshrined into the Convention, which requires the clear recognition of the *effects* of the conventional obligations vis-à-vis third parties (the *Drittwirkung*), including individuals (e.g., in labour relations)" (§83, emphasis added).

American system, individuals are bound to ACHR obligations *erga omnes* (Advisory Opinion OC-18/03). At the ECtHR, the horizontal effect remains a contested mechanism. Its application has been dependent on the makeup of the Chambers deciding cases, although it is now generally accepted that there is some kind of horizontal effect in Strasbourg at least through positive obligations.

Secondly, although in both systems only a state can be condemned for a violation of its respective Convention (i.e. the state-centred approach), in the Inter-American system the state's responsibility addresses the prior violation of an individual's right by another individual (González, 2008: 21). In other words, there is a retroactive effect to state responsibility for violations in the private sphere. In the European system, the state is responsible for insufficient or deficient legislation or its enforcement *ex post facto*. Positive obligations have become embedded in both systems; however, the ECtHR and IACtHR have interpreted them slightly differently. The horizontal effect allows for a certain consideration of violations of human rights in the private sphere, but the IACtHR has developed the concept of *due diligence* that moves beyond this. Complementing state responsibility for prior violations of human rights, *due diligence* does not just make the state responsible for the violation, it makes it *accountable* for preventing it and requires it to take action to remedy the wrong. In some cases this means the state imputing the private party; for example, state duties "to apply due diligence to prevent, investigate and *impose penalties*" (Article 7 *Convention of Belém do Pará* on the violations of the rights of women, emphasis added). The European system does not seek a penalty from the third party, although it requires the state remedy the legislative deficiency.

Thirdly, there are procedural differences. Article 34 ECHR establishes individual application scheme for admissibility to the Court. The ECtHR may only consider violations of human rights if the victim has petitioned it. Therefore, it is *reactive*, meaning it cannot act *de officio*. Consequently, although states are required to investigate human rights violations (see *Fedorchenko and Lozenko v Ukraine*,

2012)[250], the Court cannot enforce this duty unless the victim petitions it. The IACtHR, on the contrary, has reaffirmed the *proactivity* of the Inter-American system, e.g. the Commission can investigate human rights violations without necessarily being petitioned to do so. The IACtHR has also insisted that states must be proactive in protecting human rights under the ACHR. It outlined the state's role in *Velásquez Rodríguez* (1988):

> (…) An investigation must have an objective and be assumed by the state as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. (…) Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the state responsible on the international plane (…) (1988: §177; see also *Báldeon Gárcia v Peru,* 2006: §91).

In other words, in order for the state to properly fulfil the due diligence standard, it must establish an investigation into the human rights breach(es) *independent* of an initiative by the victim. The significance of the reactivity of the Inter-American human rights system is that it seeks to actively engage the state in the protection of human rights irrespective of a victim's petition. In the European human rights system, the ECtHR must ultimately comply with its passive function, in which states are obliged to respond to violations of human rights only once the case is admitted to the Court.

Finally, the definition of 'person' in the two Conventions is radically different. In the European system, legal persons are entitled to the same guarantees and protections as physical persons (P1-1). Although not all ECHR rights are attributable to legal persons, e.g. Article 2 ECHR does not apply, there are indications of interpretations to enlarge the scope of the Convention even with

[250] In this decision, the European Court of Human Rights considered the procedural obligations of the right to life. It held that States have a duty to conduct an independent and effective investigation into all deaths, and in particular deaths associated with State agents. The Court also considered the application of article 14 in circumstances where a violent crime may have been motivated by racial or ethnic hatred or prejudice. The Court indicated that in such circumstances, the State has an obligation to investigate the role played by such motivations, and that failure to do so would be "to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights" (§65).

regards to the rights heretofore reserved for physical persons (see the discussion at Chapter 5 on the Concurring Opinion for *Comingersoll S.A. v Portugal*, 2000). Nonetheless, certain Convention rights are still, for the moment, exclusive to human beings (see van den Muijsenbergh and Rezai, 2011: 49-51). Even so, the business-friendly attitude towards human rights at the ECtHR is incontestable. In contrast, the Inter-American system does not recognise the entitlement of legal persons to the rights enshrined at Article 1.2. ACHR (see *Tabacalera Boquerón S.A. v Paraguay*, 1997). In the Inter-American system, shareholders are protected in lieu of the corporation itself (see Chapter 5 for a nuanced critique).

Despite their differences, the Courts converge on applicability of the doctrine of positive obligations in human rights law. It is now incontestable that states have both negative obligations, i.e. to abstain from committing violations, but also positive obligations, i.e. the duty to protect and guarantee human rights. Both the IACtHR and the ECtHR have developed their case law in ways that demonstrate a favourable attitude towards applying the horizontal effect. Most importantly, both Courts have concluded that violations of human rights take place in the private sphere and are perpetrated by third parties. The recognition of violations of human rights in the private sphere has led the IACtHR, on the one hand, to develop the due diligence standard, and the ECtHR, on the other hand, to expand upon the duty to prevent. Thus, the doctrine of positive obligations, the horizontal effect, the due diligence standard and the duty to prevent are existing human rights mechanisms at the IACtHR and the ECtHR that can be applied to cases dealing with corporate violations of human rights.

Conclusion

This Chapter has detailed the existing mechanisms in international human rights that have been used to establish state responsibility for corporate violations of human rights. These mechanisms are the doctrine of positive obligations, the horizontal effect, the due diligence standard and the duty to prevent. The Chapter has demonstrated that the IACtHR and the ECtHR have interpreted their

respective Conventions in light of these mechanisms in order to address and respond to third party violations human rights. These interpretations, and the resulting case law, indicate a struggle over the definition of rights. Moreover, they illustrate the open-texturedness of law since it is through legal interpretation that the Courts have pushed the boundaries of human rights law beyond the literal meaning of the text *stricto sensu*.

The development of the doctrine of positive obligations in human rights law is the result of the interpretation of human rights conventions by human rights judges. The application of the horizontal effect has unmasked the role of third parties in human rights violations and has provided victims with the possibility of redress against the state in some cases. The horizontal effect is a compelling mechanism that highlights the potential for human rights law to be used to challenge corporate power. The mechanisms outlined in this Chapter, and the interpretation of the Conventions by the corresponding judges in the case law, suggest a potential role for human rights Courts to use these existing mechanisms in cases involving corporate violations of human rights. The next Chapter explores these possibilities, and their obstacles, in detail through discussions with the respondents. The next Chapter will build on the case discussion above to explore the opinions of judges from the ECtHR and IACtHR.

CHAPTER 7: ANALYSIS & DISCUSSION OF THE INTERVIEWS

Corporations have "no soul to be damned and no body to be kicked".

-Edward, First Baron Thurlow, 1731-1806

Introduction

This Chapter analyses interviews with a total of fifteen judges from both the ECtHR (9 judges) and the IACtHR (6 judges). Further details of the profile of those interviews and the methods used are fully outlined in Chapter 1. The aim of the Chapter is to probe the perspectives of the judges on applying human rights to corporate responsibility. The judges' comments on many of the issues raised in the interviews indicate differing perspectives on the way that human rights law and human rights Courts might be used to improve corporate accountability. The Chapter will analyse the points of consensus amongst the majority of the respondents. It will also unveil dissenting opinions in the sample, by focusing on the often subtle, but sometimes radical, differences in the interviews.

The chapter is organised around seven themes: judicial appreciation and interest in corporate violations of human rights (Section I); the dynamic approach and views on judicial activism (Section II); the conceptual application of human rights to legal persons (Section III); the judicial awareness of developments regarding corporate accountability for human rights violations (Section IV); the practical difficulties faced by the Courts (section V); questions of jurisdiction and extraterritoriality (section VI); and the alternative venues for corporate accountability suggested by the respondents (section VII).

I. Judges' Appreciation and Interest in Corporate Violations of Human Rights

The majority of respondents from the ECtHR expressed a lack of interest regarding the contradiction of corporations as rights-holders, and/or a lack of

knowledge regarding corporate violations of human rights. The participants explained that these had never been issues of concern or of interest for them or for their Court. One respondent remarked that, "I have to say that [corporate accountability for violations of human rights] is not a subject that particularly interests me" although he conceded that "while I was on the UN Human Rights Committee we talked about it" (ECtJ4). Others expressed a lack of awareness of the issue commenting that, "We are totally in a theoretical discussion here, because I have no knowledge of the issue" (ECtJ1), or "[the] topic is a little bit far away from us [at the Court]. (…) It is a new field in fact" (ECtJ6). In other cases, respondents were uninformed or unconcerned, a position made evident by one respondent from the ECtHR who noted, "I simply haven't thought about the issue [of corporate accountability and human rights]. (…) I haven't, hmmm, I have no firm view on this" (ECtJ3). Only two judges expressed a prior interest or concern for corporate accountability, with one respondent remarking that "there is a clear need for improving human rights protection against private entities" (ECtJ2).

At the IACtHR, there was more interest in the subject although respondents acknowledged a general lack of attention in the law given to corporate violations of human rights. The respondents explained that a result of this lack of attention in the law is a lack of attention in Courts generally and the IACtHR in particular. One respondent summed up this lack of attention as "a gap in human rights law [when it comes to corporate violations of human rights]" [IAJ2]. During a few interviews, respondents pointed to a complete void in human rights law regarding the issue of corporate violations of human rights stating that, "here [at the IACtHR] this theme is untouched!" (IAJ6); or again,

> Quite frankly I don't think anyone has really mentioned [corporate violations of human rights] to me as a judge. [During my participation in women's rights campaigns] I came into contact with it and into discussions, but since I've been at the Court nothing. No nothing! (IAJ1).

Here, the responses revealed that corporate violations of human rights have not been treated or framed as human rights issues by the law, indicating the lack of attention to these violations *through* law. During a few interviews, the

respondents admitted that they were being confronted with the issue of corporate responsibility for the first time; for example, one respondent remarked "the question [about corporate accountability] has never been asked until now, at least not to my knowledge" (ECtJ4). This comment reveals that despite serious violations of human rights by corporations, and TNCs more specifically, the idea of using human rights law remains a relatively novel one within the human rights community.

The initial reactions of the respondents point to different but related circumstances regarding corporate violations of human rights within the Courts. The comments that came out of the interviews from the ECtHR indicate a nonchalance and even indifference regarding human rights violations by corporations from some human rights judges. The fact that the majority of respondents at the ECtHR conveyed an indifference to the subject indicates a prevalent judicial perception of corporate violations of human rights as a non-human rights problem. The observations from the IACtHR respondents illustrated their lack of contact with corporate violations of human rights, which may be due to the way the issue is framed at the international level. There has been an attempt to view corporate violations of human rights in isolation from human rights law. However, this disassociation ostensibly creates an abstract barrier to considering these violations within the framework of human rights law.

Despite this discouraging lack of interest and awareness from the majority of respondents on the issue of corporate violations of human rights, there were a handful of respondents from both Courts who expressed an interest at personal level. Noting a social demand for corporate accountability for violations of human rights, one respondent from the IACtHR commented that,

> I have heard about this issue [of corporate accountability]. People have more access to information and they are more educated about their rights, which I think is a principal point [regarding awareness on corporate accountability], which is more social than juridical; it is related to economic movements and social dynamics (…), in reality, that is in the cases I have seen. (…) [Corporate accountability and human rights] is a very important issue because it deals with the dynamic of social conflict, not only in Latin

> America, but in Africa too! Hmmmm, the issue of corporations: natural resources, the environment, etc. This is an explosive issue – it's everywhere! (IAJ4).

Other respondents explained that although their Court was not concerned with cases regarding corporate violations of human rights, although they generally agreed that it was a growing problem of concern that required an international response (see Section VII). At the ECtHR, one respondent appeared to consider the issue of corporate accountability for the first time during the interview:

> I must admit that I simply haven't thought about [corporate accountability], but I can see that with the power that MNCs have they can also have an impact on whether rights are [being respected] in their field – I mean vis-à-vis their employees. So, whether corporations respect human rights, hmmm, I'm not in a position to give you an answer. (…) It is a challenge today because there are a lot of examples of corporations who move not only their headquarters for financial reasons but also their factories to places where labour is cheap. I think, discussing it now, I have come to a certain degree entranced by the very discussion! But to my knowledge, there has been no pressure to consider improving corporate accountability for human rights violations. That would be a totally new concept (ECtJ5).

This comment reflects the relative unawareness at the Courts of corporate accountability for violations of human rights. Nonetheless, a minority of these respondents believed that corporate accountability was an issue for the Courts, and that they themselves might have to work towards this end. This potential was corroborated by another respondent who insisted that in developments in human rights law, "the state will remain the only responsible party, but the way to get to that responsibility will perhaps be more flexible" (ECtJ3). The flexibility that this respondent highlighted points to the open-texture of the law, indicating a potential for the Court or the judge to strike a balance in light of competing circumstances (Hart, 2012).

Observations from respondents from the ECtHR referred directly to the gap in the law that has effectively resulted in the impunity of corporations for their violations of human rights. One respondent considered how to impute corporations, suggesting that,

> (…) [H]mmm, private military companies for example like the Americans and Blackwater? [To consider them at the European Court] [w]e need to see the relationship between the company and the state; because I definitely agree that increasingly, transnational corporations are powerful and they have the possibility to do terrible things; but what to do? (ECtJ1).

In this comment, the respondent maintains the necessity to frame the discussion within the state-centred approach to make it admissible to the Court. Another respondent suggested that,

> There is a clear need for improving human rights protection also against private entities. I have always great reservations, to begin with, when private entities are involved in activities that traditionally belong to the state, for instance prisons – private prisons, hmmm, very problematic – [or] when they become involved in armed conflict [such as private military companies]. (…) Everything related to human rights (…) (ECtJ2).

Here, the respondent acknowledges a clear gap in the law and considers the relationship between the delegation of public services to corporations and violations of human rights (Section III). In their recognition of corporate violations of human rights, the responses indicate possible ways to develop the law within its already existing framework; in the first case, using the state-centred approach; and in the second, using the doctrine of the delegation of authority (Section III).

Several factors influence the outcome of a case, including the willingness of the judges to be imaginative about the law. Without questioning the professionalism of the judges to hear a case and apply the law, the particular political leanings of a judge will impact upon her conception of the law and her interpretation of it. Thus, the composition of the Court can make a real difference on the outcome of a case – a point made by respondents during the interviews.

> [It depends] on whether judges are more liberal or conservative in their approach towards the Convention and how they see the impact of the Convention regarding certain rights [ECtJ7].

> [There are] Grand Chamber judgements where this transpires, hmmm, this activist approach. [The Court] also [has] other judgements – it depends on the composition. This is a factor to be taken into account. (…) Sometimes I can predict the outcome of a case based on the Chamber it is in [ECtJ2].

However, there are significant differences in the composition of the Courts between the IACtHR and the ECtHR. In the IACtHR, all seven judges sit for all cases, so the composition of the Court is determined for the length of the mandate. At the ECtHR, cases are heard by one of the five Chambers, and in some difficult cases or cases that may have a particularly significant impact for European society, they are submitted to the Grand Chamber. However, the full Court of 47 judges never sits together at one time. The composition of the Chamber at the ECtHR is decided by the Section adjudicating. Some respondents were defensive of their professionalism, asserting that judges are "professional enough to know how to deal with cases" (ECtJ9). This respondent referred to the neutrality and objectivity of the judge, a hallmark of the institution of law within liberal democracies (see Chapter 1).

The fluidity of the law and its open texture was discussed in relation to what is called the 'dynamic approach' at the ECtHR, which is discussed in more detail in the next Section. The interviews revealed that broadening the interpretations of their respective Conventions using the dynamic approach is a point of tension and disagreement amongst the judges. It is a tension that reflects ideological differences in the points of view of the respondents on the politics of adjudication (see Chapter 1).

This section has examined the respondents' knowledge of corporate violations of human rights. The general lack of awareness in both Courts is symptomatic of the lack of attention given to corporate human rights violations in law. A result of not framing corporate violations of human rights as a matter for human rights law is that human rights judges are detached from related issues of corporate responsibility. However, a handful of respondents pointed directly to the legal lacunae that have resulted in the relative impunity of corporations for violations of human rights. 'Filling the gap' in the law will require either new legislation,

which for the human rights Courts is unlikely in the near future; or, the development of the law through judicial interpretation so that it can respond to these 'new' corporate violations in contemporary society, i.e. the dynamic approach. The next section will detail the interview discussions of this possibility.

II. The Dynamic Approach

The dynamic approach is an interpretative technique that is somewhat comparable to the concept of judicial activism, although it does not seem to have the negative overtones that have plagued the latter in the United States.[251] A respondent at the ECtHR referred to these negative overtones, stating,

> I don't like the word 'activism' because it gives a negative connotation in the sense that the Court is trying to get involved in issues that have nothing to do with its role. (…) Here, the judge interprets the Convention in light of present-day conditions" (ECtJ1).

The Black's Law Dictionary defines judicial activism as,

> A judicial philosophy, which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies, which are not always consistent with the restraint expected of appellate judges.

[251] In his exploration into judicial activism in international law, Fuad Zarbiyev (2012) makes note of three variants towards reading the law in legal theory. The first is the formal perception of the law, which considers that the law is whole, providing the answers necessary to judicial issues or questions of law and thus leaves little or no room for judicial manoeuvring. The second is the Kelsenian conception of law, which considers that every judicial act is a choice and thus is necessarily an expression of the judge's political perspective. Under Kelsen's theory, the judge cannot help but do politics since the law does not dictate which laws to use but simply provides a range of statutes to choose from. Finally, Zurbiyev references H.L.A. Hart's "middle ground", which acknowledges that judges enjoy a certain discretion but only in very particular situations since the law is constituted of a constraining core which leaves no room for discretion (Zarbiyev, 2012: 250-251). Differentiating between formal and substantive judicial activism Zarbiyev suggests,

> In the formal type of judicial activism, 'the judge deals with legal issues (…) other than those which could suffice to constitute the logical structure leading up to his ruling' in order to contribute to what the judge conceives to be the development of law. Substantive judicial activism refers to an activism at a different level. 'Being unsatisfied with existing law, or with what he sees as lacunae in the existing law', a judge engaged in a substantive judicial activism 'will be ready' writes Thirlway, 'to indulge in something close to pen law-creation in order to base his decision' (quoting Thirlway in Zarbiyev, 2012: 250).

Judicial activism is a polemic issue discussed extensively in relation to domestic law and the United States in particular, but much less with regards to international tribunals (Zarbiyev, 2012: 250-251). It is sometimes considered a threat to democracy, and sometimes a necessary counterweight to political laxity. Most respondents from the ECtHR dismissed 'judicial activism' at the Court, whilst the majority of respondents from the IACtHR expressed a certain necessity for it. This necessity was described by these respondents as "fundamental" (IAJ4) to the development of the law since "the Court opens conceptual roads, establishes general principles and norms" (IAJ4) for human rights. One respondent commented that, "(…) without [the dynamic approach] we wouldn't have the developments that we've had (…) And I think we need that in the law. Otherwise it is static" (IAJ1). Thus, these respondents at the IACtHR endorse the dynamic approach as a way for the judges to develop the law to ensure its relevance to and ability to respond to violations of human rights.

During the interviews, the dynamic approach and judicial activism were discussed as separate issues; however, it became clear through the respondents' explanations and descriptions of these concepts that judges use the terms to mean the same thing and sometimes use them virtually interchangeably. For this reason, as well as for coherency throughout this chapter, the judicial role in developing the law will be referred to as the "dynamic approach." The dynamic approach is thus a tool of interpretation. At the ECtHR, it has become a fundamental concept related to the belief that the Convention is "a living instrument" (see also Chapters 1 and 5).[252] The Court's earliest reference to the dynamic approach was made in *Tyrer v UK* (1978). It is a mechanism that refers to the application and interpretation of the ECHR to modern day circumstances. Loukis Loucaides, former judge at the ECtHR, explains that the dynamic approach means the Court,

[252] In *Tyrer v UK* (1978), the Court accepted the Commission's emphasis that the Convention is a "living instrument" (§31), which must be interpreted with consideration of "present day circumstances".

> (…) Extends and applies the Convention, in light of political and social developments and changes of conditions of life, beyond the original conceptions of the period when the Convention was drafted or entered into force (2007:13).

As such, the dynamic approach depends on the judicial perspective of those developments, as well as individual interpretation of the law. In the words of one respondent, "the dynamic approach is a realistic interpretation" (ECtJ1); in other words, it was explained that it is an interpretation that should not be too broad but that should reflect the evolving moral and ethical standards in a society. The dynamic approach, the respondent continued, is something that is "(…) not obliged by the Convention, but which influences judges' opinions" (ECtJ1). It is a concept that is not officially referred to at the IACtHR, however when asked about the dynamic approach respondents related to the law as 'a living instrument'. One respondent explained the IACtHR's understanding of a 'dynamic approach' as "(…) becoming capable of saying that [a right exists], which would otherwise be considered a complete novelty" (IAJ4). Understood in this way, it refers to an active judicial role in developing the law. Although generally where the ECtHR respondents referred to the dynamic approach, the IACtHR respondents referred to judicial activism, perhaps because of its place in American law.

The concept of the dynamic approach was raised during the interviews to discuss the potential role of human rights judges in interpreting their conventions to consider corporate accountability for human rights violations. Most respondents were of the opinion that the dynamic approach applied mainly to already-justiciable rights (i.e. civil and political rights). One respondent from the ECtHR suggested that "[the Court] can have strong principles or rules, but it is not the role of the Court to construct those principles (…)" (ECtJ4; see Chapter 1 on politics and adjudication). Other respondents echoed this position commenting that,

> The European Convention must be interpreted according to the light of the rights as they are written today. (…) The question is to know how we should react and what we can do [regarding corporate violations of human rights]! The Court does what it can, but we cannot consider [the Convention to apply] over certain limits. And, especially we cannot

> ask the Court to do anything more than its obligation [of protecting civil and political rights] (ECtJ1).
>
> (…) More and more you see a tendency to bring all other kinds of new fields into the scope of the Court. (…) More and more you see that new doors are opened. Well, that people [judges] try to open new doors, but we would take care not to go too far and not to open too many new doors and not to explore too many new fields. Yes, we should apply the European Convention according to present day conditions and sometimes we should open new doors, but not too many. I myself would be rather careful to extend the scope of the Convention also to actions of private entities. That would for me be one of the points where I would say take care, don't do it, because I think we should also have the legitimization by the contracting states. So we should always, always keep in mind that we are asked only to interpret the provisions of the convention and no more than that (ECtJ6).
>
> The role as a judge regarding violations of human rights by corporations is connected with the rights that are granted by the convention in a way. If they tackle some of the rights, indirectly or directly, we [as judges] do feel responsible. But it should be first the state (…) and then if all legal remedies are exhausted then [the victim] may raise the issue before one of the international Courts, because it is difficult to say it is a human rights dimension in such a case [of corporate violations]. It might be something else. It might be an economical issue, not a human rights issue in this case. I'm a bit sceptical [(ECtJ7).

These respondents from the ECtHR did not recognise the corporate violation of human rights as a human rights issue *per se*, and therefore they were unwilling or unable to consider how or if the application of the dynamic approach could be used in cases of corporate violations. The underlying issue from these respondents may be that they do not conceive of how corporations can breach civil and political rights. And correspondingly, for those respondents, corporate accountability was simply not an issue for their Court. These comments indicate that the respondents do not conceive of how corporations can breach civil and political rights. The respondents generally referred to violations by corporations as violations of ESC rights, which coloured their perspective of the issue.

The problem, according to many respondents at the ECtHR regarding corporate accountability, was the kind of rights that corporations violate, i.e. ESC rights. In other words, throughout the interviews the participants tended to collapse

corporate violations into the category of ESC rights. This is interesting for two reasons. First, judges have an incomplete idea of how corporations can violate rights since there seems to be little reflection on the very real civil and political violations incurred by corporations (e.g. discrimination, occupational health and safety, etc.). A consequence of this partial understanding of how corporations violate human rights is that this issue is often considered to occur in developing nations or 'newer' democracies as opposed to in the established liberal democracies of Europe or North America (discussed below at Section 6.1). The second interesting point is that some of the interviews were unnecessarily focussed upon ESC rights. This point was confirmed by one respondent's clarification that, "when I myself am asked to give my first reaction to human rights violations by big companies, I immediately think of social rights" (ECtJ6). Because of this, the majority of respondents explained it would be up to another text and another tribunal to deal with corporate violations (discussed in Sections IV and VII). Ultimately, framing corporate violations of human rights as necessarily violations of ESC rights impacted the respondents' openness to considering corporate violations within their Court.

During one interview, the impact of equating corporate violations with ESC rights on the willingness to use the dynamic approach to develop human rights law was made evident by a respondent's assertion that,

> Even though there is some indirect evidence [in the case law] that the Court is ready to make one or two steps in that direction [to use the dynamic approach], it is still in a very careful way because it is very clear that the original intent of the convention was not to cover those [ESC] rights (ECtJ8).

This remark reveals the highly subjective dimension of the dynamic approach. Every judicial interpretation is a motivated choice to develop one or another solution to the legal problem at hand (Kennedy, 1996). Inevitably, the judge's decision moves the law in a particular direction. The above comment is indicative of a conservative perspective towards the ECHR that is in conflict with other respondents' positions, which will be defined in what follows.

Many of the respondents were against developing human rights law using the dynamic approach if it was to expand the Convention to include ESC rights. One respondent insisted that this was "going too far" [ECtJ6]; another asserted ESC rights should be kept "under control" [ECtJ9]. Despite the cautiousness with which the majority of respondents at the ECtHR addressed the application of the dynamic approach to integrate ESC rights – and thus their outlook to consider corporate violations of human rights – there were a few respondents who were willing to consider it. The reasoning was explained in one interview, where the respondent stated that, "one cannot strictly divide the social and economical rights from the civil and political rights. From time to time they cross each other or they are connected somehow" (ECtJ7; see Chapter 2 for a discussion on the ideological division of rights). Although it is a minority of judges who may be willing to consider developing the ECHR to include some ESC rights, there have nonetheless been a few symbolic cases through judicial interpretation (e.g. *Demir and Baykara v Turkey;*[253] *López Ostra v Spain*;[254] *Guerra and Others v Italy*[255]).[256]

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[253] *Supra* ftnt 169.

[254] In 1990, Ms López Ostra claimed in front of the ECommHR that the State's failure to take any measures against the smell, noise and contaminating smokes originating from a solid and liquid waste treatment plant located a few meters away from her home violated her rights to physical integrity (Art. 3 ECHR), and to respect for private life (Art. 8). In 1993, the Commission stated there was a violation of the right to respect for private life, but not of the right to physical integrity and referred the case to the ECtHR. The ECtHR considered that neither the claimant's moving out nor the closing down of the waste treatment plant changed the fact that the claimant and her family had lived for years a few meters away from a source of smell and smokes. The ECtHR found the State responsible for violating the right to respect for home and private life, since serious pollution can impact an individual's well-being and prevent him or her from enjoying his or her home in such a way that his or her private and family life is damaged. The ECtHR further stated the State had failed to find an adequate balance between its interest to promote the city's economic development and the claimant's effective enjoyment of her rights, ordering the State to pay compensation for damages and judicial costs. The ECtHR however held that the conditions suffered did not amount to degrading treatment as stated in Article 3 ECHR. This case is significant because it shows the interdependence between civil and political rights on the one hand, and economic, social, and cultural rights on the other hand. The case reveals a successful and holistic strategy to claim ESC rights through civil and political rights where the regional human rights system does not provide an effective protection of ESC rights.

[255] The applicants lived in an at-risk area since a privately owned chemical industry was operating near their house. They requested environmental information about the hazardous industrial activities carried out by the industry in question. The City refused the request. The failure by the state to ensure that information was provided to local residents about the hazardous industrial activities carried out by a privately owned chemical works in the area breached the applicants' right to private life under Article 8. Article 10 ECHR prohibited a Government from restricting a person from receiving information that others wished to impart to him. The government was under an obligation to provide certain environmental information to the applicants, residents in the 'at-risk' area, even though it had not yet collected that information.

[256] The Court did make reference to the Social Charter in the landmark case *Demir and Baykara v Turkey* (2008) where the Chamber adjudicating stretched the interpretation of the Convention to

In these cases, there was a strategic justification in the judgements that some ESC rights can be interpreted directly from the Convention.[257]

It has been stated above that almost all of the respondents equated corporate violations of human rights as violations of ESC rights, and that this influenced the viewpoint of the respondents regarding the potential of the dynamic approach to consider corporate violations of human rights. Some of the respondents demonstrated a conservative approach on the question of corporate violations of human rights:

> [Human rights judges] are vested with such power to see what is done as far as the convention is concerned. And these are already fantastic powers. If we were to use that also to invent ourselves as the legislators of Europe, hmmm, we are judges, then I think we go three steps too far. [Corporate accountability] is social rights and [at this Court] we have classical human rights [e.g. civil and political rights]. We are not the ones who are vested with the authority to extend from our own motions this [view] to the European Convention. (…) We should not impose our opinions too heavily. This is not our task as far as I'm concerned. It is possible [to use the dynamic approach] in the important fields, but to extend the Convention without the contracting states having expressly agreed is one door to watch! (ECtJ6).

> We have colleagues who would like to, hmmm how should I put it, energise or add to every convention right a social component or more energy; you can literally feel the energy around it to make it more potent, but I don't see it like that. I think that there are clearly social rights included in some of the articles of the convention, but I think that we should be very careful about it. I'm rather conservative in that respect. It isn't the purpose of the convention and again I don't think that's what states want. (…) But there are judges who see and think different[ly]. Judicial activism, hmmm, (…) of course it depends on

include some ESC rights. The case dealt with Article 11 ECHR and the right to engage in collective bargaining. It affirmed the fundamental right of workers to engage in collective bargaining and take collective action to achieve that end. The Court confirmed an inherent right to collective bargaining within the freedom of association. Given the accession of the European Union to the Court with Protocol 14, a certain conciliation of case law between the ECJ and the ECtHR will have to occur. The ECJ has limited the right to collective bargaining in *International Transport Workers Federation v Viking Line ABP* (2008) and *Laval Un Parneri Ltd v Svenska Byggnadsarbetereforbundet* (2008) holding there is a qualified right to strike, but one which can only be exercised when it does not disproportionately affect the EU business right to freedom of establishment or providing services.

[257] For example, in *Demir and Bayara v Turkey*, the Court interpreted that the Convention included collective bargaining with an employer because it had become one of the essential elements of the right to form and join trade unions, guaranteed under Article 11.

> what I think is a human rights violation. And it depends if the judge sees one and if she considers there to be one and where I would or would not (ECtJ9).

> [The dynamic approach], hmmm, as long as it falls within what the law permits. That is to the measure that the judge applies the law or the convention. Yes [I am ok with that]. But, dictating a position without the backing of a law is irresponsible (IAJ3).

These respondents criticised what they implied was an overzealous broadening of the conventions by their colleagues who were, they claimed, basing their interpretations on their personal considerations and not on the text itself. They criticised this trend as a dangerous application of the dynamic approach. However, the comments refer to the personal opinion of the judge and his/her perception of a human rights violation although they insist upon the judge's fidelity to law at the same time.[258] This judicial discretion is a crucial point in the discussion on the dynamic approach since the dynamic approach is by definition an interpretative tool. Thus, the judicial discretion exercised through the dynamic approach allows for more subjective interpretations by the judges (see also Chapter 1).

There are cases at the ECtHR where some judges have applied the dynamic approach to successfully push the boundaries of the Convention, and a few respondents shared their optimism for this approach. The enthusiasm for the dynamic approach was captured in one respondent's comment,

> (…) Why should we be dependent on what was decided in 1950. The ECHR was written in 1950 and it addressed the needs at that time. (…) From that point of view, it would be good to say now we are in 2010 and so one should think anew [ECtJ5].

Here, the respondent's comment is in direct conflict with some colleagues who did not share an enthusiasm for innovations in the ECHR. Indications of these internal discordances are externalised in the case law where over a brief period of time a contentious issue may be treated differently depending upon the

[258] Duncan Kennedy (1996) addresses this contradiction when he argues that judges claim fidelity to law only once they have made the law they want to be faithful to.

Chamber (e.g. *Bankovic and Others v Belgium*, 2001[259] and *Al Skeini and Others v UK*, 2010[260]). In the former case, one judge commented that *Al Skeini* would give the Court the opportunity to "correct" (ECtJ2) its case law, alluding to the decision in *Bankovic* (2001) regarding effective control[261] (discussed in more detail below at Sections III and VI).

In a separate interview, another optimistic respondent described his opinion on the Court's perspective on the dynamic approach through an example stating,

> (…) Article 5 is the right to security, not to be detained abusively by state authorities, mainly by state authorities. It was always thought *not* to apply in a horizontal relationship, but the case law developed in the sense that even Article 5 might be applicable [between private persons] (ECtJ2).

This judge is referring to the case *Rantsev v Cyprus and Russia* (2010)[262], which addressed human trafficking. The Court interpreted Articles 2, 3, and 5 ECHR to

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[259] The *Bankovic* case dealt with the death of 16 civilians from the Former Republic of Yugoslavia after NATO bombed a radio station during the war in Kosovo. Six family members of the deceased brought a claim against the seventeen member states, which were also members of NATO. The Court declared this case inadmissible *ratione personae* since the Former Republic of Yugoslavia was not a member state itself at the time of the bombing. Moreover, it ruled that the jurisdictional competence of a state (and *a fortiori* the Court) was "primarily territorial" (§59).

[260] The *Al Skeini* case dealt with the killing of six Iraqi civilians by British soldiers in southern Iraq, including the brutal death of Baha Mousa during his detention at a UK army base. In 2007, the House of Lords held that the Human Rights Act 1998 did not apply to the soldiers' actions save those on the army base. However, the ECtHR Grand Chamber held that the UK Government had a duty to conduct an effective investigation into the deaths of all the civilians killed by British soldiers, whether or not they were within the confines of a UK military base. It based its decision on the fact that the UK had assumed responsibility for the maintenance of security in Southern Iraq and was exercising 'control and authority' over Iraqi civilians.

[261] Effective control was explained by the ECtHR as incurring the obligation to secure the rights and freedoms set out in the Convention; an obligation deriving from the fact of such control "whether it be exercised directly, through its armed forces, or through a subordinate local administration" (*Loizidou v Turkey (Preliminary Objections)*, 1995: §62).

[262] The case *Rantsev v Cyprus and Russia* deals with the death a Russian immigrant to Cyprus who worked as an 'artiste' in a cabaret. Ms Rantsev started work in March 2001 only to abandon her place of work and lodging three days later leaving a note that she was going back to Russia. The manager took her to the police station to have her declared an illegal immigrant, although the charges were not held. She died due to a fall from a building in unclear circumstances. A separate autopsy carried out in Russia concluded Ms Rantseva had died in strange and unclear circumstances requiring additional investigation; this was forwarded to the Cypriot authorities in the form of a request for mutual legal assistance under treaties in which Cyprus and Russia were parties. There are several published reports referring to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus, and the role of the cabaret industry and 'artiste' visas in facilitating trafficking in Cyprus. The ECtHR reiterated that as well as deciding on the particular case before it, its judgments served to elucidate, safeguard, and develop the rules instituted by the Convention. It also emphasised its scarce case law on the question of the

apply to cases of human trafficking *by analogy*.[263] It was a groundbreaking case that demonstrated the application of the dynamic approach to the ECHR in order to widen the scope of Convention protections, in light of present day circumstances, to a previously unidentified violation of human rights.

The ECtHR is a *reactive* Court (see Chapter 6). It can neither instigate an investigation nor demand a member state to do so even where there is evidence of misconduct, unless the victim appeals to the Court and the case is admitted. This reactivity has implications for violations of human rights by corporations being heard by the Court, because, as one respondent explained,

> (…) [I]t's rather unlikely [the violations of human rights by corporations will be considered at the European Court]. If the [member state's] Courts don't want to look at it, then it would be virtually impossible for us. I wouldn't see how [ECtJ9].

The respondent is referring to the ECtHR's principle of subsidiarity that structures the European human rights system (see Chapter 4), and it was a position that was returned frequently throughout the interviews. Few cases exist whereby applicants have solicited the Court because of a violation originating with a corporation, even through the horizontal effect (see Chapter 5). Because of this, the respondent continued to explain that the ECtHR is not petitioned for "these types of problems [of corporate violations of human rights" [ECtJ9]. This issue raises questions regarding how cases involving corporations are dealt with at the national level; that is, either appropriately and with satisfaction for the victims or not (see also related questions of "friendly settlements" discussed

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interpretation and application of Article 4 to trafficking in human beings. It concluded that, in light of the above and the serious nature of the allegations of trafficking in the case, respect for human rights in general required it to continue its examination of the case, notwithstanding the unilateral declaration of the Cypriot Government in which it took responsibility. The Court did not accept the Russian Government's submission that they had no jurisdiction over, and hence no responsibility for, the events to which the application pertained as it found that if trafficking occurred it had started in Russia and that a complaint existed against Russia's failure to investigate properly the events, which occurred on Russian territory.

[263] The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation, or tolerance of trafficking (§284).

above at Chapter 6). In any case, the way corporate harms are dealt with at the national level remains an issue worthy of close(r) scrutiny.

One respondent neatly summarised the general consensus in the ECtHR interviews, commenting that, "[The Court's] contact with international corporations is rather limited. (…) There are very few cases with this problem" [ECtJ8]. It could be that the national systems are adequately dealing with cases of violations of human rights by corporations under torts or criminal law and that justice is being served, but it is unlikely since there is evidence that often corporations avoid the Courts altogether by offering pay outs to victims to avoid unwanted negative publicity (e.g. the 2009 Royal Dutch Shell settlement in the Saro Wiwa case) [264]. By not going through the national system, these cases are necessarily exempt from reaching human rights Courts, in whatever way that might be possible, e.g. horizontal effect.

Unlike the discord within respondents from the ECtHR, there seemed to be a much more consensual view of the dynamic approach at the IACtHR. All of the respondents at the IACtHR emphasised the importance of the judge in applying the dynamic approach to their interpretations to move the law forward, as one respondent put it "when there is a necessity" (IAJ6). Another respondent explained the importance of judicial interpretation because, "(…) [Judges] need room [to manoeuvre]" (IAJ1); here, the judge is alluding to a position that considers that the law provides principles but does not always have an appropriate rule for every situation.

Respondents from the IACtHR referred to the political pressure from the OAS to adjudicate certain cases in certain ways. During one interview, a respondent criticised the subtle directives from the OAS, or particular member states, urging judges to be mindful of the political effects of their decisions, remarking,

[264] Although until recently the USA's Alien Torts Claims Act (ATCA, 1789) has been a solicited mechanism and reference for human rights victims and advocates, the United States Supreme Court recently ruled against using the ATCA for foreign human rights cases. The Court remained silent on the question of whether corporations can be held liable for breaches of customary international law under the statute. See *Kiobel v Royal Dutch Petroleum Company* (2013)

> (…) Once you are a judge of the Court you have to think independently and apply the principles and uphold the rights of individuals and that's it! (…) I have been told that one *should* concern oneself with the political effects, because of the political circumstance of the Court and the OAS deciding on all sorts of things, including the finances of the Court. But, quite-frankly, I don't bother about and I don't think that politics are part of my real function as a judge to think that way. And I won't! (IAJ1, emphasis in original).

This comment refers to the direct political pressure exercised by the OAS on the IACtHR, a situation alluded to during several interviews when respondents raised the issue of the tenuous finances of the IACtHR and its chronic underfunding (Section V). This respondent was keenly aware of the political pressures hovering around the Court, but was adamant about ignoring them. So whilst judicial decisions can influence the direction of social and economic change, political influence can also result in tacit pressures on judges, which then become intimately linked to their application of the dynamic approach.

The importance of public perception is another example of a source of pressure on judicial decision-making for the respondents, and it appeared to play a role in how they reflected upon their decisions. A few respondents connected the public's expectations from the Court to develop the horizontal effect to address issues of corporate accountability (below at Section IV). Others explained their belief that there was an expectation from the public to develop their Court's approach to ESC rights to develop corporate accountability. These respondents observed that,

> [The public expects the Court to] streamline the potential human rights abuses and control potential human rights abuses from private entities including corporations [but also other private individuals]. (…) When it comes to the interpretation of social rights, the Court hopefully will develop this idea and broaden the scope of the existing rights, including also the social dimension [ECtJ2].

> I think there is an increasing knowledge about human rights and violations by corporations. There is an increasing awareness with consumers about these issues, and in the last ten years or so consumers have realised that they can influence corporations and that they have power if they decide to make their choices according to specific criteria. This evolution is something the judge may consider. These issues often touch on

> economic, social, cultural rights. In the long term, I see no benefit in having two different documents or instruments [referring to the European Charter and the ECHR]; (…) but I mean this is really regarded [as] very radical for many of my colleagues. [ECtJ3].

> There are many examples in which we have interpreted the convention in the context or light of other international law instruments. But this would have been a very indirect process of reasoning. Because then we would have to say that there is nothing in the convention or in our case law but there is something in international law or in the case law of the UN Human Rights committee, for example. So somehow it could be absorbed into our understanding of the convention. Well it is not impossible, because we had a case from Turkey, *Demir and Baykara*. Of course it was not about corporations but union rights, but we used this way of reasoning by saying that rights to collective bargaining being recognised by other international law jurisdictions is now part of Article 11 ECHR. So if it was possible in respect to rights of trade unions why not use it in the same way in respect to other situations (ECtJ8).

> Yes, as judges we have a real role to play [in moving the law forward]. I found a kind of umbrella clause to [pursue the dynamic approach] and protect ESC rights by means of the guarantees of the due process of law. It is important to show that we [as judges] are really thinking about [how to interpret the law to protect the victims] and give satisfaction to the parties and show concern [IAJ2].

For these respondents, there was a clear expectation from the public for the Courts to engage with the conventions to develop their interpretations using the dynamic approach in order to ensure that the Conventions correspond to present day circumstances. The respondents point out that it is not only judges who play a role in moving the law forward, but also civilians and civil society groups who compel developments in human rights law through public scrutiny and demand. Complementing the idea of the role of society in propelling legal developments forward, these respondents pointed out that present day circumstances (e.g. globalisation) may also facilitate the judicial interpretation of corporate violations of human rights as a human rights issue.

The interviews illustrate an important and active application of the dynamic approach by the judges in both Courts. The dynamic approach provides the justification for judges to develop the law in ways to ensure the promotion and protection of human rights according to present day circumstances. That said, the

judges are nonetheless bound to the law; thus, in Europe, for example, access to the ECtHR and the protection of the Convention is an unquestionable right for legal persons. In several interviews, it was clear that the respondents did not see any problem or contradiction with the legal status of corporations and other legal entities as persons. However, there were a few judges who either did not agree at all with granting human rights to corporations or who were at least willing to question its propriety. The next section considers the respondents' views on the corporate personality, as well as the position of the respondents on how human rights law applies to corporations.

III. Applying Human Rights to Legal Persons

Traditionally human rights have been designed as a tool for protection against the arbitrary power of the state (see Chapter 2). As we have seen in earlier chapters, despite empirical evidence of the violation of human rights by corporations, and due to the legal architecture of human rights law explored in earlier chapters, corporations cannot be defendants in human rights Courts. And as we saw in the previous chapter, in theory, the state is legally responsible for the violations of rights by its citizens (physical and legal persons) under international law, known as the horizontal effect (Chapter 5). The interviews focused on two facets of the legal personality, which are used here to organise the analysis. Sub-section 2.1. analyses the positions of the respondents regarding the applicability of human rights to legal persons and the impact this has or can have on corporate accountability. Sub-section 2.2. scrutinises the evolution of human rights law regarding quasi-public organisations[265], sometimes referred to as para-statal groups[266], and what this might mean for the development of corporate accountability through human rights law.

[265] The term 'quasi-public' is used here to designate an organisation providing public goods or services although under private ownership or control. It refers essentially to the (public) services rendered by privately owned companies.

[266] The term 'para-statal' is used here to designate organisations that work with the government in an unofficial capacity. They are "entities which exercise elements of governmental authority in place of state organs, as well as situations where former state corporations have been privatised but retain certain public or regulatory functions" (ILC in Clapham, 2006: 242).

3.1. Legal Persons as Rights-Holders

The considerable differences between the conventions' definition of rights-holders was addressed in Chapter 4, where it was explained that the ECHR guarantees convention rights to legal persons whilst the ACHR does not. This difference explains, in part, the different perspectives of the respondents from both Courts. Discussions with respondents from the ECtHR are first considered before moving on to the interviews with the IACtHR.

The inclusion of legal persons as rights-holders in the ECHR is a paradoxical feature of the ECHR. In its *travaux préparatoires*, there is no indication of a debate concerning the inclusion of legal persons in P1-1 (see Chapter 5), a detail that prompted lively discussions in some interviews at the ECtHR. Many respondents found no problem with the law granting corporations the same protections as any other individual. They equated the situation of corporations claiming human rights with other rich and powerful physical individuals, such as the *Von Hannover v Germany* (2004)[267] case, and so did not see any conflict. These respondents remarked that,

> In ninety-nine percent of cases in which some corporation is involved, it is rather a case where the corporation is a claimant before this Court and then, [the judges'] only question is how must we protect them. (…) [So because of Protocol 1, Article 1 of the Convention] quite a large degree of protection should be offered [to them]" (ECtJ8).

> (…) The transnational corporation, even as powerful as McDonald's, is a private person. If we consider the company its claim is against the state (…) because the individual needs protection. Individuals need tribunals like ours. It is in the situation of their inferiority vis-à-vis the state. Human rights are there for that, to protect the weak. So in the case of *Steel and Morris v UK*[268] it was McDonald's versus the state [in the national case]; and (…)

[267] The judges referred to the case concerning the protection of the private life of Princess Caroline of Monaco from the publication of photos taken of her during her daily life by the paparazzi and not during official public events. The ECtHR decided that everyone, including celebrities, had a "legitimate expectation" that his or her private life would be protected. They ruled that there had been a violation of Article 8.

[268] In the case, referred to by the press as the "McLibel case", the ECtHR unanimously voted that the UK violated Article 6 (fair trial) and Article 10 (freedom of expression) of the ECHR in the libel

> [even though] companies are very powerful, at least at the level of rights, they have the same rights and obligations as other individuals (…) (ECtJ4).

> Corporations as legal persons have access to the convention like physical persons, yeah, that's all right, and that's what they have. And they do come [to the Court]! I think human rights are for everyone, not just the weak. [Corporations] deserve the same protection as everybody else. Once we start distinguishing who is weak and who is powerful, hmmm, that is not our job. Our job is to protect everybody. (…) They are certainly allowed to bring [their cases] here and we examine them blind [neutrally]. We don't look at the person but at the case and if it has merit. (…) We have very strong magazines complaining about their human rights being violated by the Courts and why shouldn't they complain about it? (ECtJ9).

These comments reveal a general tendency to take for granted the legal personality of the corporation. They illustrate that the judges consider the inclusion of legal persons in the Convention as necessary to ensuring their protection from state violations through human rights law. Moreover, these respondents indicate that corporations and other legal entities have "just as much right" (ECtJ9) as any other individual. The respondents make no distinction between the protection of a physical person or a legal person. At the ECtHR, only a few respondents revealed an uncertainty of or discomfort with the consequences of constructing the legal personality as part of the commonsense of human rights (see Chapter 2).

All of the ECtHR respondents accepted the inclusion of corporations as beneficiaries of Convention protections because it is explicitly written in the text of the ECHR. However, there were three respondents who disclosed their reservations on applying *human* rights to corporations (ECtJ3 and ECtJ5) or to the extension of certain rights to legal persons (ECtJ2), for example the right to life (see Chapter 5 on *Comingersoll S.A. v Portugal*, 2000). Two respondents explicitly recognised the contradiction of providing corporations with the same protection as humans under human rights law. They observed that,

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case opposing the McDonald's Corporation against Helen Steel and David Morris, who had distributed leaflets as part of an anti-McDonald's campaign.

> (…) Some people are asking why are we dealing… – we have thousands of applicants, prisoners for example who are living with terrible conditions: no fresh water, overpopulation, no decent food, etc. and then we have to take responsibility and accept that corporations can bring cases here. There is a certain contradiction. [There are some cases] where corporations might be in a situation to bring cases [to the Court], [but using the Convention for corporations would be] to the detriment of the *real*… – those cases that human rights should really protect. (…) There has been a development here to accept such cases [corporate claims], and this has to do with the connection between the European Convention and European Union law. Whether corporations should or should not have the right to bring cases before the Court. I have to admit, I'm a bit sceptical, because I see our Court first and foremost as a *human rights* Court. And when we speak about human rights, we speak about humans. So, with that starting point I would say that we should… – I hope we will not end up being a Court where corporations can go increasingly (…) and bring cases against states. (…) We accept that corporations can bring cases here and there is a certain contradiction (ECtJ5, emphasis in original).

> (…) I think with the limited resources that the Court has I think it could be debated whether [corporations] should have the same access. And if I would have been, hmmm, if a wish of mine could come true then I don't see why we give equal space to the corporations. But right, it's a bit sensitive you could say (…) Because, well I mean you hear it already now in the *Yukos* case, you know "what is this Ct doing dealing with these matters?"; a) maybe we're not properly equipped to [consider these cases], we don't have the expertise etc. etc. and b) when there are other *real*, *core* rights violations sitting there waiting for us to adjudicate (ECtJ3).

These respondents explained that on a personal level they believed that although the inclusion of legal persons was not a problem as such, i.e. NGOs, the extension of Convention rights to corporations through the case law was perhaps inappropriate. Nevertheless, in their professional capacity they were compelled to accept and even endorse the human rights of corporations with respect to the ECHR.

In the Inter-American human rights system, the Convention omits corporations. In so doing, the ACHR rejects the possibility for corporate petitions for human rights protections. Respondents at the IACtHR were unaware and in disbelief that the ECHR includes corporations as rights-holders and thus has enabled some cases in which corporations have claimed rights as legal persons. The

presumption that human rights conventions are for physical persons was made clear by one respondent who remarked that "The [American] Convention says it [protects] natural persons, I'm sure in the European Convention it is the same (…)" (IAJ4). Respondents at the IACtHR unanimously expressed concerns that if corporations were admitted to the Court as victims of human rights abuses this would mean, as one respondent put it, "big business for lawyers" (IAJ2) and not better protection for individuals. There was an overwhelming consensus from respondents at the IACtHR that legal persons should not be rights-holders under international human rights law. This consensus was a notable contrast with the acceptance of legal persons as rights-holders at the ECtHR.

There were also differences in the way that the respondents across both Courts referred to the development of legal persons as rights-holders. In Europe, the respondents systematically referred to the political negotiations that led to P1-1's inclusion of legal persons in the ECHR. However, the inclusion of corporations may actually have been the result of the interpretation of the judges in the early years of the Court and has been systematically supported in the case law (see discussion at Chapter 5; also Schwelb, 1964). In the Americas, the respondents addressed the discussion on including legal persons in the ACHR as one that seemed to involve them. During one interview, one respondent referred to this issue, emphasising that "[the IACtHR] had this discussion [on whether to include legal persons] but we decided follow the approach we have had since the beginning. You see, [this has been the position] from the beginning for the Inter-American Court" (IAJ2). All of the judges interviewed at the IACtHR were against the inclusion of corporations as rights-holders in international human rights conventions. A minority of respondents from the ECtHR also promoted the rejection of corporations as rights-holders. In both Courts, the respondents explained that corporations should not be using human rights Courts for their rights since they have other tribunals and mechanisms for their grievances (discussed below at Section VII).

Some respondents acknowledged the complexities and contradictions of a law that has developed to support the role and omnipresence of corporations in

present day circumstances. They alluded to the fact that despite the importance of applying human rights exclusively to *human* persons, the architecture of law is such that sometimes it is difficult to differentiate the person, i.e. the shareholder, from the corporation (see Chapter 3). Shareholders are protected under the ACHR as individuals. These issues were raised in approximately half of the interviews at the IACtHR. These respondents explained that,

> (…) Human rights are those that inhere to the human person and so [it was] concluded [in the OAS] that these applied to the human person – physical person, not juridical person. This is where I think the system is correct: by not extending protection to juridical persons because this can lead to abuses there. And we had these discussions in considerations of the *Cesti Hurtado v Peru* and *Cantos v Argentina* cases. If the convention is used to protect companies, No! But if it is to protect individuals, yes! (IAJ2).

> (…) I think it's wrong [for corporations to use human rights Courts] because the juridical person is a condition created by legal fictions. It is not a reality. It is a fiction that benefits a particular group of people, like a company (…) (IAJ4).

> The state only has a human rights obligation to the individual, and the state can only violate the rights of subjects of the state, I mean the individuals not a private corporation. But the state can be responsible for the shareholder of the company because she or he is an individual. But companies do not have human rights. Human rights are substantive of individuals. That is the foundation of human rights! (IAJ5).

A striking element in these responses was the discussion on shareholders' rights, which illustrated that there is in fact a similarity between the IACtHR and the ECtHR regarding the rights of corporations although the Courts differ in their justifications. In this way, although at first glance the Courts appear to approach corporations as rights-holders in completely different ways, in fact they have both ultimately developed their case law in ways that endorse a capitalist notion of human rights law (see Chapter 3).

The respondents were unanimously against corporations as rights-holders, but for the protection of shareholders' rights. In this way, all six judges were in favour of piercing the corporate veil to protect shareholders, although not necessarily to engage their responsibility (see Chapter 3, also Glasbeek 2002, 2003b, 2005,

2007). The impact of the corporate veil on human rights protection was only explicitly raised during one interview. The respondent commented,

> The corporate veil? Oh no no no, never! Even in domestic law I don't feel that it should be [upheld], especially the way the world has progressed. I don't think we should, hmmm, but I do feel that directors of a company should be brought to bear. They can't hide behind the corporate veil. Not necessarily the shareholders [should be responsible], but definitely the officers and directors of a company. The shareholders very often do not even interest themselves in what is going on. They don't know! Their advisors or investors or the company buys shares in another company and they might not even know that they have shares in that company. Directors who run the company should be responsible, not only as a corporate entity but also individually (IAJ1).

This comment is representative of the overwhelming consensus amongst IACtHR respondents that shareholders can be victims of human rights violations but cannot be held responsible for transgressions because they are not the decision-makers. In other words, the shareholder has rights but not responsibilities. This position is illustrative of Glasbeek's (*ibid*) arguments that the corporate veil shields shareholders from legal responsibility, and thus the corporation is a legally created site of irresponsibility (see Chapters 3 and 5). In addition, the IACtHR judges' approval of shareholder rights without responsibilities reveals that the legal architecture of the corporation has effectively succeeded in introducing market discipline into human rights law.

There was a deep respect for the state-centred approach in human rights law, which was manifested by the respondents' insistence that the crux of human rights law is to protect physical persons from state violations of human rights. It was explained during one interview that,

> A corporation does not violate a right because it is the state that did not exercise its power in enforcing the laws. If the state is complicit in the violations of human rights by a company the state is responsible, always (IAJ5).

In a few interviews at the IACtHR, it was explained that the difficulty of trying to use human rights law to address corporate violations of human rights was, according to one respondent, an inherent problem in the definition of 'a violation

of human rights'; he went on to comment that, "It is impossible for a company to violate human rights because the only way to consider a 'violation' is through the action or lack of action by the state" (IAJ6). Offering a similar position, yet another respondent suggested that, "the state needs to do something official. It is the state that has to guarantee rights, naturally. (…) While there is no precedent [at this Court], my personal opinion is that the state is always responsible for corporations" (IAJ4).

Respondents at ECtHR also supported the principle of state responsibility as a tenet of international public law. Although a few respondents noted the potential for human rights law to develop in ways to introduce corporate responsibility for violations. These respondents explained that,

> [There is no] theoretical problem with [considering bringing corporations before a human rights Court]. Quite to the contrary! [I]t would be a major development. And after all, the fact that an individual can bring a state before an international Court was also fifty years ago a revolutionary idea. So I mean, and again, the fact that high officials can be tried in international Courts is also a major development in the history of international law. So, I don't have an obstacle in principle – no, I don't have a theoretical obstacle! But there are practical obstacles, which are from a political point of view – which are absolutely, very difficult to overcome! [ECtJ2].

> Hmmm, considering a reform whereby you could consider corporations as respondents. Well, why not? I haven't thought about it I must confess. Of course today it's not [an issue], but in the not too distant future, hmmm, in ten years from now, why not? I think there would be more benefits than problems. But of course, we have seen the problems of getting P-14 ratified and you can imagine the work and the political hassles of putting a new Convention in place. I think it is possible, but of course this is me here when I sit here as a judge not thinking about the political realities. Because I think politically it's a non-starter unless politically something dramatic happens and you have to sort of start from the beginning (ECtJ3).

> I think that it would be a long and painstaking effort to redo the text. It is not easy. This type of endeavour would only be possible if there was a serious event – I mean it is like a constitution. It can't just be redone like that. There has to be a war, a revolution, there we can rewrite a constitution. The Convention was written after WWII, so to just like that say that we will make a single system with the rights of the Charter and the rights of the

> ECHR, and, I don't know say the rights of minorities, which is also protected by a separate document – hmmm no I don't think so. I think that would require a kind of tsunami, a war, or a revolution. Hmmm, is it not a good idea to fuse all those committees and make one kind of embryo of a universal Court of human rights? (ECtJ4).

The respondents clarified their position, stating that although they were not against the idea *per se* of using the ECHR to develop corporate responsibility, they were certain that there would be little encouragement from states to develop the Convention in this way. What is significant in these comments is that despite the state-centred approach in international human rights law, there are no theoretical obstacles to bringing corporations before human rights Courts.

Nonetheless, it is important to acknowledge the difference between the theoretical potential of human rights law and the practical obstacles of developing the law in ways to address corporate violations. One interview elaborated upon the potential for human rights law, wherein the participant confirmed that,

> From a philosophical point of view, I don't see any difference, when it comes to human rights violations, between non-state actors and state actors. A human rights violation is a human rights violation notwithstanding that the author of it may be a private entity. (…) [In the violation of a human right] the state might be held responsible not only through positive obligations but [responsibility] may be imputed on the state as such, even though [the violation] has been committed by a private entity [ECtJ2].

There are definitely practical obstacles related to the development and implementation of new international agreements (i.e. political will, international consensus, perseverance, negotiation, etc.). However, the above comment indicates that there is also, and perhaps more importantly to the development of law as such, a certain amount of legal creativity and imagination that is necessary to work through the flexibility of the law to respond to the challenge at hand. In this respect, a few respondents elaborated upon the potential of bolstering the horizontal effect as a mechanism to address corporate violations of human rights (see Chapter 6; discussed below at Section IV).

Respondents from the ECtHR pointed to current examples of the Court's development of the law with regard to cases involving the delegation of authority, as well as related issues of effective control, e.g. *Bankovic v Belgium*, 2001[269]; Al *Skeini v UK*, 2010[270]; *Al Jedda v UK*, 2011[271] (also discussed at Section VI). These examples illustrate how the Court is using existing mechanisms, as well as the dynamic approach, to develop its human rights law in ways that respond to present day circumstances. These cases highlight a potential for the development of corporate responsibility in analogous ways. At the IACtHR, respondents referred more often to the disconcerting role that corporations have been given with the advent of mass privatisations. The respondents specifically pointed to the human rights challenges presented by the privatisation of services, coupled with the complicity in human rights violations between states, paramilitary groups, and corporations in Latin America. The IACtHR has not yet dealt directly with the issue of the delegation of authority *per se*. However, the delegation of authority and issues of effective control are relevant to human rights protection in the jurisdiction of the IACtHR since private actors are now in control of services hitherto reserved for the state.

In what follows, the analysis will explore the significance of the delegation of authority and related issues of effective control for the discussion of human rights and corporate accountability. In order to do so, the next section draws upon the viewpoints of the respondents on the quasi-public status of corporations. In this way, it seeks to scrutinise the opinions of the respondents on the impact of privatisation on human rights.

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[269] *Supra* ftnt 258; *Bankovic* is also a key case in discussions of extraterritoriality, discussed below at Section IV.

[270] *Supra* ftnt 259.

[271] *Al Jedda* involved the indefinite detention without charge of a dual British/Iraqi citizen in a Basra facility run by British forces. In 2007, the House of Lords held that the detention was lawful because the UK Government had been authorised to act by UN Security Council Resolution 1546. However, the ECtHR Grand Chamber held that the Security Council Resolution did not displace the Government's obligations to protect the right to liberty under Article 5 ECHR. The judgments confirm that the UK Government's human rights obligations are not limited to the territorial UK but can exceptionally extend overseas to situations in which British officials exercise 'control and authority' over foreign nationals (Blackstone Chambers, 2011).

3.2. The Impact of the Delegation of Authority on Corporate Responsibility

During an interview at the ECtHR, the participant reflected upon the corporate take-over of public services, e.g. water-privatisation, commenting that, "Corporations are very powerful, [and become] kind of states within state" (ECtJ5). This situation describes what has been referred to at the ECtHR as the 'delegation of authority'. There is a delegation of authority when the state transfers responsibilities of public service to private organisations and can cover a broad range of corporate activities.[272] During a few discussions, the principle of the delegation of authority was raised as a potential way to establish responsibility for private parties. The respondents suggested that,

> You can see that already in some judgements where we [the Court] say that if, in the unlikely even that we privatise the police – of course we can't privatise the police, but some think that what the police did or traditionally did is now done by private entities and I think that if you can see that this is so and that the state has delegated, hmmm, through that venue you could establish responsibility. Yeah, why not? (ECtJ3).

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[272] The International Law Commission (ILC) has attempted to address the issue of the delegation of authority by developing the international law of state responsibility to cover privatised state corporations, which retain public or regulatory functions (Clapham and Rubio, 2002). Article 5 of the ILC's final Commentary, annexed to a UN General Assembly Resolution reads:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance (quoted in Clapham and Rubio, 2002: 5).

Expanding the intended scope of the article, the Commentary explains that:

(2) The generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations (quoted in Clapham and Rubio, 2002: 5).

Clapham and Rubio's findings revealed "that states do not consider these formulations as reflecting the current approach of international law to this topic" (2002: 5). Similarly, most respondents from the Courts described human rights law as unable to apply this approach to the delegation of authority.

> When a state transfers part of its sovereignty to a third party, (…) the state is responsible for what that third party does concerning people under its jurisdiction. If we imagine that one day a state transfers a part of its sovereignty to a transnational corporation, here we could say that the state in a way assumes responsibility for the transnational corporation [including the respect of human rights]. (…) (ECtJ1)

These comments reveal the potential for an interesting outcome in that privatisation creates the possibility to bring corporate violations of human rights under the Court's radar. In other words, the very process of privatisation, i.e. state outsourcing of responsibility for human rights protections and violations, may in fact produce the necessary circumstances to petition the ECtHR. Whilst the delegation of authority outsources the responsibility for human rights to the private entity, the state nonetheless remains ultimately accountable. Therefore, violations of human rights by the private entities responsible for the services remain attributable to the state and thus can trigger a human rights case before the Court.

The privatisation of corporations is symptomatic of the evolution of corporations as political actors (see Chapter 3). The politicisation of the corporation was alluded to in a few of the interviews:

> I think [corporate liability] is justified [at the ECtHR] especially because private enterprises and private undertakings are increasingly getting involved in activities that belong to the exclusive jurisdiction of the state authority. (…) If the state authorities delegate their power to private entities (…) there is a clear need for private entities to also be accountable in terms of human rights. (…) And so there is a clear need for improving human rights protection also against private entities [ECtJ2].

> I would say that [corporations are quasi-public persons with human rights obligations] (…), but of course that is my personal opinion – I'm not sure that would be shared by many of my colleagues here. Because my reasoning would be to say that with the power they have their impact is so big. I mean, so of course it's important if your right to life or health is violated then of course one human being is one human being. But if you have Ikea or Yukos or another big corporation with a problem like [violating human rights] the potential impact is so big for so many people that I think a good case could be made (ECtJ3).

> (…) [Corporations] are sometimes far more powerful and far more full of resources than states (…) [and] sometimes far more dangerous. Maybe [human rights law should consider corporate accountability for violations because of] the way [corporations] touch peoples lives and affect them – sometimes for the good but very often for the bad. Sometimes their effects can be quite a disaster nationally or for a group of people nationally. (…) We have to find a way, because these corporations are very powerful (IAJ1).

In these comments, the respondents point to one effect of the privatisation of services, which has been the anchoring of the political role of corporations as quasi-public entities. In other words, the respondents acknowledge that the corporation has evolved from an economic institution to a political actor (Chapter 3). The substantive implication of this development is that governments internalise the requirements of market-oriented systems so that business power is integrated into political priorities (Wilks, 2013; see Lindblom, 1977).

During one interview, the participant pointed to the relationship between states' weak institutional machinery and states' lax supervision over private entities in cases of delegation of authority as a source of violations of human rights. The respondent commented that,

> [Companies] have in fact territorial control, which makes them like the heads – [with regard to a particular company in Peru] they have 6000 hectares where the private police of the company [are in charge]. There is no presence of the state. The police of small towns can't do anything (IAJ4).

In Latin America, these private police, known as private military companies (PMCs) or private security companies (PSCs), are often in fact paramilitaries.[273] The problem the respondent is identifying is that in these cases there is an absence of state supervision and/or monitoring. The paramilitaries are thus relatively free to implement their own vigilante rules. Moreover, it is now well established in the case law at the IACtHR that the state has been complicit in human rights violations by paramilitaries (e.g. *La Rochela Massacre*, 2007;

[273] For an analysis of the role of PMCs in war see Walker and Whyte (2005) and Whyte (2003); for an analysis of the outsourcing of services to PMCs and/or PSCs see Klein, 2007.

Mapiripán Massacre, 2005; *Pueblo Bello Massacre*, 2006). There is also evidence of corporations hiring paramilitaries to intimidate, terrorise and even murder employees, trade unionists, Indigenous peoples or anyone else the corporations consider troublesome (e.g. *Sinaltrainal v Coca-Cola Co.*, 2003; *Does 1 v Chiquita*, 2007), often with the complicity of the state. These examples illustrate what Laslett (2011) argues is the functional interdependency of states and corporations, meaning it is rare for the deviant actions of one to occur without some assistance (whether by commission or omission) from the other (Laslett, 2011; see also Kramer et al, 2002: 270; Green and Ward, 2004: 28; Whyte, 2003: 579-80).

The interviews revealed differences between the Courts on the interpretation of what compromises the delegation of authority, and how it can trigger state responsibility. On one hand, there were perspectives that alluded to the belief that privatisation cannot generally be considered under human rights law. During an interview at the ECtHR, a respondent explained that:

> If you have private persons then of course the state is responsible for a mistreatment or any other problem. If a private corporation is allowed something, given something, or sold something by the state but it does not involve delegation of authority then it is simply a commercial transaction and the state's responsibility is very limited – as long as it is within the law [ECtJ8].

This statement indicates that privatisation is generally understood as a matter of commercial law or, as another respondent phrased it, a "normal commercial transaction" [ECtJ1]. The implication of this is that privatisation is simply a matter of commercial law, not human rights law. Thus, the responsibility of the state for a violation by a third party occurring within the parametres of a delegation of authority becomes an exceptional circumstance. What this understanding suggests is that the Court can use the horizontal effect in cases involving the delegation of authority, but only exceptionally.

On the other hand, there were other respondents who did not view the delegation of authority necessarily as an exceptional circumstance but rather as a

presumption. This belief was conveyed at the ECtHR during one interview where the respondent explained that,

> (…) There is a strong presumption that the state is responsible as such whenever we are [dealing with private entities]. I identify for instance prison supervision, or other activities that are closely related to human rights, and there is a strong presumption that the state remains responsible and the state cannot wash its hands by saying well I delegated. And [the European Court has] case law on this. We have to identify those cases, but we have case law on it. (…) [The delegation of authority] does not only concern state prerogatives that are delegated; it also concerns commercial activities, which might be even a greater threat to human rights than what states do [ECtJ2].

The respondent's comments are categorically opposed to those above. According to this judge, all commercial activities can and may fall under the rubric of the delegation of authority because of the threat they pose to the protection of human rights.

The majority of respondents at the IACtHR shared this position. They considered that the state was responsible for violations of human rights in the private sphere, including for commercial activities. The opinion was nicely summed up during one interview:

> There is no discussion, the responsible [party] is the state, because [the corporations] are doing the state's mission and the state has to guarantee the responsibility of the company in fulfilling that mission. (…) If a mining company subcontracts to [another] company, it is also the state [that] is responsible. The state has to secure [human rights]. Here [in Latin America], society often does not understand the rules and regulations. It is very important. Every time the state acts less and less directly. Every time there is more privatisation of everything [IAJ4].

This position considers the responsibility of the state for the protection of human rights irrefutable even in the case of privatisation. In other words, the judges at the IACtHR generally viewed privatisation as a means to trigger state responsibility by proxy. The state is *always* responsible.[274]

[274] The IACtHR's relationship with the horizontal effect was discussed in Chapter 6. It was noted that the IACtHR has had a special relationship with the horizontal effect because of the specificity

During many interviews it became clear that the issue of the delegation of authority and the quasi-public status of corporations was understood by the respondents as being related to the deficiency of international law to address the problem. The next section explores the views and awareness of the respondents vis-à-vis the international developments in debates on corporate accountability.

IV. Judicial Awareness of International Developments With Regards to Corporate Accountability for Human Rights Violations

The different socio-political histories of the regions and the makeup of the cases of the IACtHR and ECtHR have meant that cases dealing with non-state actors are quite different from one Court to the other. The unique situation of Latin America and its experiences with paramilitary groups has led to some innovative legal strategies regarding non-state actors that could be analogised to corporations (see Introduction chapter).[275] However, a few respondents at the IACtHR were not optimistic about using human rights law to develop the responsibility of what Andrew Clapham has called "de facto regimes" (2006: 59). One respondent explained that,

> In Latin America we see that there is the trend to try to responsibilise organisms of power, such as the guerrillas, which have a situation that is similar to the state's activities.

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of the Latin American experience with military juntas, and in particular due to the Court's experiences with death squads (see Introduction Chapter). Decades of civil war in many Latin American countries and the violence and violation of human rights by paramilitaries has presented the IACtHR with a difficult task to uphold human rights within the classic state-centred approach. In response, the general perspective towards the horizontal effect has been to consider violations of rights undertaken by non-state entities to see if they conform to a pattern. If a pattern is found, the Court may then impute the violations to the state. The Court's position was clarified during one interview where the respondent explained that "if [violations by non-state actors] conformed a pattern of violations then [the Court] has considered that the state was responsible for the omission [to safeguard human rights]" (IAJ2). The finding of a pattern of abuse was invoked, for example, in the *Marino López et al. (Operation Genesis) Case* (2011). The Commission filed an application with the IACtHR, concluding the acts of the Colombian government with paramilitary groups "constitute a crime against humanity, since they are part of a *pattern* of massive, systematic, and widespread violence and were carried out in the context of the armed conflict" (IACommHR, 2011, emphasis added). Identifying a pattern of human rights violations was an innovative approach to human rights law to address violations by private parties, which, while maintaining the primary responsibility of the state, formally acknowledges and requires remedy for the violations of the non-state entity.

[275] See for examples where the Court has addressed violations of human rights by paramilitary groups: *La Rochela Massacre v Colombia; Case of the Ituango Massacres; Massacre of Mapiripán.*

> So, they exercise, over the territories that they occupy, a control practically the same as the state's, [but] (…) this is not completely under public international law. This is not, umm, well, in some states like Argentina there was an attempt to bring this under the microscope by certain national judges to responsibilise the state for individual actions. But I don't think this can be appropriated by international law (IAJ6).

Here, the comment displays a lack of faith in international law and particularly human rights law to deal with corporate accountability, which was a generalised opinion across the interviews. A respondent from the IACtHR explained the problem with developing human rights to address corporate violations of human rights. According to this participant,

> The problem is with the addressees of developing norms are the states. From the drafting, the working, and the spirit of these instruments, these human rights treaties – all of them. But why is it so difficult to adopt a treaty providing, hmmm, forcing responsibility of corporations? [This is] an example of the hypocrisy of international affairs! (…) (IAJ2)

There was a certain defeatism conveyed during the interviews, linked in large part to individual experiences and disappointments in the failure of the international community to address corporate accountability over the last forty years. These respondents were discouraged by the lack of support at the international level. Despite their opinion that human rights were not a suitable venue to consider corporate responsibility, they nonetheless believed it was important to maintain legal supervision at the international level (Section VII).

Half of the respondents from the IACtHR were aware of developments in corporate accountability at the international level. One respondent commented on the G-77's attempt to address corporate power in the 1970s for a "Code of Conduct for Multinationals" (IAJ2); relating his disaffection with the process this respondent explained,

> A few years ago I spent three months in Geneva negotiating the Code of Conduct for multinationals and all that, and in the end there was no [political] *will* to adopt anything – this was in the agenda for years and years and years. (…) And this was a big disappointment. There was no good faith in the negotiations. They [states] were not there

> to reach concrete results. And I became a bit sceptical of [the whole process and its potential] (IAJ2).

Others shared their awareness of the issue of corporate accountability with comments on the "agenda item in the UN and Special Rapporteur for [business] (IAJ4); and "the attempt made by Secretary General Kofi Annan (…) in the UN and other important attempts for corporate responsibility, which was to raise awareness" (IAJ6), although this respondent went on to say that "it was not and it did not establish responsibility – definitely not!". These statements demonstrate that although some judges have had some contact or exposure to how corporate accountability for human rights violations is being addressed at the international level, there is actually very limited knowledge of these issues in the human rights Courts.

The limited knowledge of human rights judges regarding developments at the international level to deal with corporate violations of human rights was corroborated by the fact that only one of the respondents at the ECtHR had ever heard of the UN *Norms*, but expressed a lack of interest in the topic (see above at Introduction). Despite the general lack of awareness about the developments at the international level, several of the ECtHR respondents noted that the Court does look to other international instruments to help them with interpretation. Some respondents shared that,

> We [the judges] sometimes look to found our judgements on some other instruments either in national or international law. So this declaration or document of which you speak could of course be considered in the same way. The fact that it is not a national treaty but rather more of a declaration [that is not binding] does not mean that we cannot consider it in a way that could help us. That is definitely possible (ECtJ1).

> We [the judges] have to interpret international law and we often cite UN conventions and other conventions, resolutions and even soft law. So it is not at all excluded that if the occasion presented itself, the Court could or would refer to these *Norms*. We often do research in comparative law, first international law, and then the lawyers pull everything that exists from hard law to soft law and we cite it, hmmm, it happens that we cite conventions that have not yet come into effect (ECtJ4).

> There are many examples in which we [the judges] have interpreted the Convention in the context or light of other international law instruments, but of course as an indirect process of reasoning. Because, we would have to say that there is nothing in the Convention or in our case law but that there is something in international law or in the case law of the UN Human Rights Committee so to somehow absorb it into our understanding of the Convention. Well, it is not impossible (ECtJ8).

One respondent asked to receive information about the UN *Norms* remarking,

> I must say I am not aware of this document (…) but please send it to me. (…) For our Court, all sources that might be helpful for certain cases are used. It does not matter if certain documents are not binding force, if it is for certain cases important because it can clarify a situation (ECtJ7).

Thus, although the majority of respondents from across the Courts had reservations about using human rights Courts to develop corporate accountability, there were also a notable number of respondents who were open to the idea (discussed in detail at Section VII). Those judges that were inclined to consider the possibility emphasised the already-existing practice of drawing upon other relevant documents from outside the Court that help to interpret their respective Conventions. In this respect, despite the lack of knowledge of the UN *Norms*, the respondents were relatively enthusiastic about the potential of a document that would specifically address corporate responsibilities for human rights.

The next section explores how certain practical aspects of the Courts (e.g. administrative, bureaucratic and financial) have, in some ways, become obstacles to developing the case law. At both Courts, many respondents insisted on the lack of resources to deal with already-existing human rights violations. According to these respondents, it would be unwise to burden human rights Courts by trying to re-write treaties to include non-state actors or by expanding interpretations to consider corporate violations of human rights since the Courts are already bogged down by an ever-increasing case-load of state violations.

V. Practical Obstacles at the Courts: Backlog and Finances

The Courts are facing major challenges that cause trepidation amongst some judges towards expanding the realm of human rights to consider new areas of law, including corporate violations. A recurring point of tension during the interviews revealed significant exterior pressures on the Courts (referred to in Section I), including the massive caseload backlog at the ECtHR and the weak finances at the IACtHR. This section addresses the implications of the problems the Courts are facing on the possibilities for corporate accountability using human rights law. The pan-European jurisdiction of the ECtHR has led to the exponential multiplication of its caseload, generating problems including questions of its legitimacy. The IACtHR faces financial problems and difficulties arising from its lack of jurisdiction, which has put pressure on the judges regarding the adjudication of cases and Advisory Opinions.

The international consensus on human rights post-1990, together with the spread of neoliberal globalisation has instrumentalised human rights as a means to expand market-oriented policies and practice, as well as to extend the geo-political power of the dominant states (Fitzpatrick, 2004: 126; see also Chapter 2).[276] In Europe, the process of tying human rights to trade has developed a new symbolic position for the ECtHR,[277] and with its success, the ECtHR's caseload has risen exponentially every year. In 2012, the Court had a backlog of over 150000 cases. The backlog at the ECtHR has had an impact on the legitimacy of the Court, particularly regarding issues such as the length of time for hearing and its efficiency. Several respondents referred to the pressures judges are facing because of the ever-growing caseload and the burden it has become for the Court. They explained that,

[276] For example, for over a decade, scholars have been debating using the WTO to encourage human rights by implementing certain rules of trade (Alston, 2002; Cottier, 2002; Dommen, 2002; Hafner-Burton, 2005; Howse and Mutua, 2000; Petersmann, 2002; Zagel, 2005).

[277] For example, membership to the European Union is conditional upon signing the ECHR and accepting the jurisdiction of the Court. This has elevated the prestige of the ECtHR, but it has also made the Court a victim of its own success.

> I think with the limited resources that the Court has, I think it could be debated whether [corporations] should have the same access [as victims]. But, my view of the whole problem as it is now, with the fact that we can't deal with the cases we get, is that I think that the Court should go in the direction of being more a constitutional Court with the right to pick and choose and leaving all the rest either for another human rights Court, or in the best of worlds for the domestic Courts to deal with (ECtJ3).

> You see, to speak frankly, our Court is overburdened with thousands and thousands of applications coming from private persons against states. We only deal with applications against states. We also have some, a few cases where the applicant is a corporation against the state. And there has been a development here to accept such cases. And this has to do with the connection between the Convention and EU law (ECtJ5).

The backlog was thus a major preoccupation for the judges regarding the feasibility of an active judicial impetus to use existing mechanisms at the Court to establish a practice of corporate accountability. The ECtHR's backlog presented a practical obstacle that they cited as one of the pivotal reasons why the ECtHR could not be a suitable venue (suggestions for alternative *fora* explored below at Section VII).

However, in a strong appeal to the legal imagination, Ineta Ziemele (2009), judge at the ECtHR, has argued that there *is* a possibility of connecting the company to the state in certain circumstances, despite institutional independence. She proposes that,

> The question of the access to the European Court of Human Rights should (…) be looked at. In this context, the issues of jurisdiction and imputability will have to be solved. *A priori*, where it can be established that the staff of a military company had a control over the victims of human rights violations and the Court would be prepared to accept that the contract between the State and the company whereby the State pays the company for its services can be assimilated to the test of a political and financial support, its jurisdiction could be established, even if the company is institutionally totally independent from the respondent State. Again, also for the jurisdiction purposes of the Court a particular legislative framework in Europe would be useful since it would allow the Court to look into positive obligations of the States as concerns the behaviour of private military contractors in carrying out their contracts (Ziemele, 2009: 25).

Connecting the company to the state – or the violation of a human right by a company to the negligence of the state – might open up the possibility of using what Ziemele refers to as a "legislative framework" to make these cases justiciable in already existing human rights Courts, such as the ECtHR. Ziemele's position is exactly the kind of judicial imagination that is working *within* the law and *with* the law to consider ways to make corporations accountable for human rights violations. Section VI will return to Ziemele's discussion with relation to questions of jurisdiction and the relevance of extraterritoriality to corporate accountability debates.

One respondent suggested that in order to create a space at the ECtHR to apply existing mechanisms in ways that might allow for corporate accountability, the Court would have to be considered as analogous to a constitutional Court. What this means is essentially that the Court would disentangle itself from what Greer and Wildhaber have referred to as the constraints of "the still important role of state consent" (2012: 670).[278] They argue that the ECtHR should have more control over its case docket, although this is highly controversial since it would mean rejecting the principle of unrestricted individual access.[279] And that the Court should adjudicate their cases in a more 'constitutional' or principled manner – "that is to say by seeking the best, and most consistent, interpretation of the Convention as a whole and with a view to maximising the effects of each judgement both in the respondent state and in the Council of Europe states generally" (*ibid*: 686). During the interview, the respondent referred to this possibility of the constitutionalisation of the ECtHR, proposing that,

> [Judges] pick[ing] and choos[ing] the cases we want to deal with (…) and in this way [the judges will] never have too many. (…) Once we get there, then the question of extending the cases to include issues like corporations may arise, because then judges will have all

[278] Greer and Wildhaber (2012) advocate the transition of the ECtHR to a system of constitutional pluralism. They suggest that while the CoE is an association of states without a formal constitutional document, its core membership conditions nevertheless include "constitutional" practices (*ibid*: 684-685).

[279] Greer and Wildhaber argue that "Since the Court cannot fully adjudicate more than 1,500 applications per year, we believe it should be able to select the 1,500 it considers the most important and reject the rest" (2012: 686).

> the time in the world to juggle all these cases and then questions will arise (ECtJ9; see also Sweet, 2009).

Thus, by accepting a constitutional character for the Court, judges would have more chances to be creative with the law or at least to be more imaginative. In sum, for this respondent a crucial obstacle hindering the development of corporate accountability for human rights violations within the context of ECtHR is not theoretical or even legal, but *practical*. So, despite several respondents being favourable to the idea of expanding the scope of the Convention to more directly deal with corporate accountability, they ultimately recommended that a new forum would be more suitable and more effective (see Section VII).

According to respondents at the ECtHR, the Court has been bogged down by copycat cases (discussed in Chapter 4; see ftnt 173). Moreover, the backlog evidently was a source of continuous stress for the judges, a sentiment expressed during one interview in which the respondent explained that, "I'm afraid that if we [consider corporate accountability], this Court will be simply, totally unable to cope with the situation. It is already enough as it is today" (ECtJ5). It was further explained in other interviews, that there are on-going discussions and debates at the ECtHR stemming from the immense pressure of having such a serious accumulation of cases. Although there was interest in considering corporate accountability in human rights Courts, the reality of the situation at the ECtHR was expressed as overpowering any practicability. A few respondents commented that,

> [The backlog) means that we don't really have to think about what cases we would like to have. We have more than enough on our plate as it is. Of course, we can think about and discuss whether we are dealing with the right cases. But I wouldn't – and there is such a discussion of course among judges and other staff in the Court (ECtJ3).

> In the immediate future, [the investigation of human rights violations by private entities] is entrusted in the domestic Courts, mainly under the positive obligations [scheme]. Admittedly when we find a violation against the state, this carries a specific stigma, and from this perspective it might be interesting in the future to entrust international Courts with the function of [or] with the task of highlighting violations by private entities. But

> (…) taken from a practical point of view, I do not think it is feasible since we are over-flooded with so many cases [ECtJ2].

One of the main criticisms of the ECtHR, on an efficiency level, has been that rather than 'set the rule' which the national Courts then implement, the ECtHR often deals with cases that are similar to its already existing case-law, i.e. copycat cases. It neither has the time, nor the resources to 'think outside the box' in order to consider how law might be developed to deal with anomalies, to generate multiple versions, pathways and solutions (Rakoff and Minow, 2007: 602).

Unlike its sister Court, the IACtHR has a manageable caseload, in large part due to its procedure; a case must first pass before the Commission in Washington D.C. and only reaches the Court upon its recommendation. The IACtHR is facing two challenges. The first is related to the limited finances of the Court and the related political issues. It is worth repeating that while the USA is the Inter-American human rights system's largest single funder and hosts the IACommHR, for decades the USA (and Canada, another prominent funder) has refused to sign the ACHR (discussed in Chapter 4). Moreover, the European Union funds almost one-third of the Inter-American system's budget, although it is otherwise unrelated to the system.[280] This external funding and the problems it may engender, including the control and definition of the Inter-American human rights system's policies, was alluded to by one respondent who remarked,

> We don't receive the quantity of cases they do in Europe – we can't because we are (…) the poorest international Court in the world. This building [that houses the IACtHR] for example was a gift from Norway. That's how it is. So we don't have the possibility to deal with so many cases. (…) [The Commission is] indispensable! Not because I like it. I would prefer that people come directly before the Court, but we can't! This is a Court that has very little money. (…) When the Court first started, the judges came, discussed, and set

[280] Commenting on recent reforms of the Inter-American human rights system, Ricardo Patino, the Ecuadorian foreign minister called the Inter-American human rights system's current situation ridiculous and unacceptable. He commented that, "The control and definition of its policies are not in our hands, but rather are in the hands of others." Carey Biron notes that, "The impact of this funding discrepancy, Patino suggested, is that the Inter-American system reflects the ideology and priorities of its primary donors rather than of the rest of the member states. For instance, he noted, the IACommHR rapporteurship on freedom of expression – seen as a darling of the United States and European Union – receives far more funding than do others on women, children or economic justice" (Inter-Press Service News Agency, 23 March 2013: Internet).

> out an Advisory Opinion but we have released several important judgements (…). We are setting out judgements everyday [IAJ4].

Making a similar point, another respondent commented that,

> [States] have a different political agenda, which is more important – getting money for themselves, which interests them more than human rights. In principle, or in theory, [human rights] are logically the most important, and they themselves claim so, but in reality and in the OAS the funds are just simply lacking. And moreover, not all of the states have ratified the Convention – Canada has not, the USA has not and 8 Caribbean states still have not (IAJ3).

It was made clear in the interviews that given the lack of resources the majority of respondents do not think the Court has the capacity to deal with an individual complaint system, and thus they are dependent upon the Commission. Its small structure and lack of resources has translated into an emphasis from the IACtHR on its 'guiding judgements'. In this way, the respondents explained, the Court deals with only the most 'serious' cases, 'sets the rule', and its implementation is left to state legislation and national Courts.[281]

One respondent alluded to the financial problems at the Court as a practical obstacle to using the dynamic approach to consider corporate violations of human rights. He commented that,

> [The IACtHR] has a small bite. (…) [It] is a small structure and the poorest international Court in the world. We have the least money in the world. (…) This is a Court that has very little money (…) with unpaid interns, judges without salaries, so [taking on more cases] is unrealistic" (IAJ4).

The politics of the OAS members inevitably adds pressure on the judges, whether they pay heed to it or not. There are longstanding frustrations within the OAS over the United States' control of the Inter-American system that undoubtedly plays a role in the lack of funding and the political pressure exerted on the judges.

[281] In theory, the ECtHR and the IACtHR work similarly in that they set the precedent with their judgements, which is then meant to be included and implemented into state law using the principle of subsidiarity. In other words, each state decides how best to implement the rule to fit its national situation.

During the interviews at the IACtHR, there was an overwhelming apprehension that it would be taking on too much if it started considering corporate violations of human rights. The worry was that the Court would become a victim of its own success, like the ECtHR to which the respondents referred. Indeed, all of the respondents across both Courts referenced the backlog at the ECtHR as substantiating the argument against using human rights Courts to consider corporate violations of human rights; as one respondent remarked, "so that we don't fall into the problems that the European system is facing, that is an overburdening of cases" (IAJ3). Thus, for these reasons the judges may be conditioning themselves to refrain from exercising their legal imaginations not because they do not consider it important or worthwhile but rather because they do not think they have the practical capacity to respond.

The interviews suggested that there is no conceptual barrier to applying human rights law to corporate violations, but there are real practical limitations. Respondents at the ECtHR elucidated the point that the burden of pending cases has now become an oppressive force. The financial limitations at the IACtHR are a source of political pressure that means that the judges have very little breathing room. All of the respondents rejected the idea that these burdens may affect their judicial decision-making regarding either the admissibility of cases (e.g. considerations to widening interpretation to include ESC rights), or regarding more dynamic interpretations of the horizontal effect to consider corporate accountability. However, many respondents noted that they are under pressure either to deal with the growing pending cases or be wary of their financial limitations. An issue that came up in both Courts regarding the potential of using human rights law for corporate accountability was the question of jurisdiction. The next section is dedicated to the respondents' views on the issue of jurisdiction.

VI. Jurisdiction: Geographies of (Ir)responsibility

When discussing corporate accountability with the respondents, the issue of jurisdiction arose continuously. The jurisdiction of the ECtHR can be framed

under two categories: first, the state-centred approach, which fixes its jurisdiction to claims against member states and not against individuals (see also Chapters 2, 3 & 4); and second, territoriality, which limits the Court's jurisdiction to claims falling within the geographical *territory* of the member states (e.g. *Bankovic and Others v Belgium and Others*, 2001). The focus of this section is on issues of territoriality since the state-centred approach has been discussed throughout the chapter (see Section 6.1.). The question of jurisdiction at the IACtHR focused more on the internal dynamics of the OAS and the missing ratifications of the ACHR that weaken the authority of the Court (Sub-Section 6.2).

6.1. The ECtHR and Extraterritoriality

Many respondents at the ECtHR understood corporate violations of human rights as relating to issues of extraterritoriality. Corporate violations were assumed to be problems located outside of Europe, in developing countries. For example, in one interview the respondent's view was that,

> A lot of companies are said to violate human rights outside our territory and well that is a thing where we are not competent to rule. We cannot rule on human rights violations outside the territory of the Council of Europe, except where a government has effective control. So don't ask our Court to rule is my first reaction, for example on the positive obligation for a state to implement legislation for instance to an oil company which is based in their country to respect human rights somewhere in Africa; for me that goes much too far, as far as I'm concerned (ECtJ6).

In this comment, the respondent is disassociating the responsibility of European states from the potential violations of human rights by corporations in developing countries.[282] What is noteworthy is that this disassociation is done without any consideration of the contradiction this leads to, including for example the frequent state interventions to ensure trade and investment ventures by corporate nationals abroad. The interviews revealed that the majority of respondents at the ECtHR did not feel that corporations domiciled in

[282] A few legal scholars have skilfully addressed the issue of home-state responsibility for corporations violating rights abroad (de Schutter, 2005a; de Schutter, 2006; Mantouvalou, 2005; McCorquodale and Simons, 2007; Miller, 2010).

their jurisdiction, but violating human rights abroad, concerned their Court. These respondents believed that Europe is less burdened with corporate violations of human rights than developing nations, and therefore it followed for the respondents that the issue was not one that concerned them.

Extraterritoriality is a sensitive issue at the ECtHR. Perhaps its most controversial judgement regarding extraterritoriality was the heavily criticised *Bankovic and Others v Belgium and Others* (2001).[283] Part of the controversy and significance of *Bankovic* for the purposes here lies in the fact that whilst the Court claimed the universality of human rights moving beyond territorial limits, it simultaneously imposed a territorial obstacle.[284] The interpretation of territoriality in *Bankovic* has had repercussions in the past few years, especially regarding European military force during the war in Iraq (e.g. *Al Skeini v UK*, 2011)[285] and has raised questions about the responsibility of states for private military companies in similar situations. According to one respondent, "Al-Skeini will give us [the Court]

[283] For a critique coming from the Bench see former Judge Loukis Loucaides (2007, also Chapter 5). The *Bankovic* case dealt with the death of 16 civilians from the Former Republic of Yugoslavia after NATO bombed a radio station during the war in Kosovo. Six family members of the deceased brought a claim against the seventeen member states, which were also members of NATO. The Court declared this case inadmissible *ratione personae* since the Former Republic of Yugoslavia was not a member state itself at the time of the bombing. Moreover, it ruled that the jurisdictional competence of a state (and *a fortiori* the Court) was "primarily territorial" (§59). In an uncompromising criticism of the *Bankovic* case, Roxstrom *et al.* (2005) assert this Decision is an example of the continuation of European human rights law that demarcates 'insiders' and 'outsiders'. They insist by limiting Convention rights to the territorial boundaries of 'Europe' the Court reconstructed the Convention itself and misconstrued its own case law. Roxtrom *et al.* highlight the contradiction in Western human rights law and Courts that contend the universality of human rights but then implement a limited and parcelled human rights protection depending on "membership in a particular class of persons" (2005: 62).

[284] Bluntly stated by Roxstrom et al. "Bankovic sends a very disturbing message: human rights are universal, but only when powerful Western states determine that they are universal" (2005:64). What is fundamental in this case, and for the discussion here, is that Bankovic highlighted a human rights double standard at the European Court. One set of rights applies at home, but different standards are acceptable abroad. There is an evident strain between the idea of the universality of human rights and the practice of a limited scope of human rights bound by political (and flexible) demarcations of territory. The issue is confusing and confused. This issue raises important points relating to transnational corporations, including its very definition: a corporation headquartered in one country, operating wholly or partially owned subsidiaries in one or more other countries. This creates uncertainty about which laws apply, in which situations, and to what extent; and it becomes an issue of extraterritoriality.

[285] *Al Skeini and Others v UK* (2011) is a landmark case regarding the killing of Iraqi civilians by British soldiers in Iraq. It is a judgement that upholds the universal application of human rights. The ECtHR found that the UK's human rights obligations apply to its acts in Iraq, and that the UK had violated the European Convention on Human Rights by failing to investigate the circumstances of the killings. The Court took this case as an opportunity to redress the jurisdiction of the Convention under Article 1 (re: *Bankovic v Belgium and Others*, 1998).

the opportunity to *fix* the jurisprudence" (ECtJ2, emphasis added). Ineta Ziemele, judge at the ECtHR, has put forth the argument that a jurisdictional nexus can be established where state agents are in control of individuals in other states (2009: 21). She suggests that there is a way to bring the actions of PMCs within the scope of the ECHR by combining two principles: the principle that the state must ensure effective deterrence (see *A v UK* 1998)[286] – meaning taking the necessary measures to ensure the protection of human rights within the jurisdiction of member states – and the principle that member states should not support abroad what they do not support at home. Similar issues have arisen at the ECtHR regarding the obligations for the protection of human rights from comparable processes of privatisation from other state functions, e.g. private prisons, discussed above in Section 3.2. (see Ziemele, 2009).[287]

The precise connection between the states' responsibility regarding territoriality was coined in *Bankovic and Others v Belgium and Others* as "effective control",[288] which was deduced and reinterpreted from previous case law.[289] The applicants

[286] The applicant was a young boy beaten by a stick by his stepfather. The stepfather was acquitted before a jury after claiming the defence of reasonable punishment. The ECtHR held that the applicant's right to Article 3 ECHR was violated by his stepfather's abuse, which constituted "inhuman or degrading punishment", and that then applicable UK domestic law failed to provide adequate protection. In other words, the ECtHR reasoned that the state failed to protect "children and other vulnerable individuals" (§22), despite its positive obligation in the form of effective deterrence, from such forms of ill treatment.

[287] In her article on the human rights violations by private entities, Ineta Ziemele (2009), judge at the ECtHR has noted that the UN Human Rights Committee (HRC) has defined the obligation of the state regarding the actions and omissions of private military companies (PMCs). Ziemele points out that the HRC has resolved that the actions of the military, whether privately contracted or in public service, are within the state's jurisdiction and therefore subject to its obligations under the ICCPR.

[288] *Supra* ftnt 260

[289] Breaking from *Bankovic v Belgium* (2001), the ECtHR has shifted its consideration of 'effective control' from a spatial interpretation (i.e. the member state's control territory) to a personal interpretation (i.e. the exercise of control of the person in question) (e.g. *Öcalan v Turkey*, 2005 §91; *Issa and Others v Turkey*, 2004: §68; *Al-Saadoon and Mufdhi v UK*, 2009: §§86-89; *Medvedyev and Others. France*, 2010: §67). In *Bankovic* the ECtHR had held that,

(…) [T]he exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the *effective control of the relevant territory and its inhabitants* abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, *exercises all or some of the public powers normally to be exercised by that Government* (§71).

The ECtHR attempted to further remedy the definition of jurisdiction set out in *Bankovic* in its Grand Chamber judgement *Al Skeini v UK* (2009) when it stated,

It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the

in *Bankovic and Others v Belgium and Others* argued that the extent to which the state exercised some form of extraterritorial control should define the extent of its obligation to guarantee Convention rights (Miller, 2010). This line of argument was rejected by the Grand Chamber, which insisted that state jurisdiction was primarily *territorial* – a judgement that has since caused polemic within the ECtHR and within legal and academic circles.[290] The significance of *Bankovic* for cases involving corporations is that it forced the Court to scrutinise its position on extraterritorial jurisdiction and gave rise to a series of cases that have sought to clarify its position. For example, in the judgement *Issa v Turkey* (2004), where the Court summarised its understanding of the notion of jurisdiction. It declared that,

> [A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. (…) Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (*Issa v Turkey*, 2004: §§68, 71).

The Court's position on jurisdiction outlined in *Issa v Turkey* is a watershed for cases involving private parties. The implications of the Court's position on cases involving private parties is neatly summarised by Ziemele (2009).

Ziemele draws attention to the fact that the Court did not directly address the question of its jurisdiction over human rights violations allegedly committed by legal persons abroad and the imputability of their acts to the States Parties to the Convention (2009: 21). However, she convincingly argues, the judgment in the

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situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (§137).

[290] The applicants argued against the territorial definition of jurisdiction by invoking previous case law, namely *Soering v UK* (1989) and *Loizidou v Turkey* (Preliminary Objections, 1995) where the Court had accepted that the jurisdiction of the ECHR was not strictly territorial. In *Bankovic v Belgium* (2001) the applicants argued that under certain circumstances the signatories of the ECHR have the obligation to respect human rights even outside their own territory.

Issa v Turkey (2004)[291] provides some insight into which principles the Court will look at in dealing with the questions of jurisdiction and imputability. The Court has accepted a principle of state responsibility in cases where state agents are in control of individuals in a state not party to the ECHR, i.e. extraterritoriality. Ziemele argues that if the principle of effective deterrence "announced by the Court in the *A v UK*[292] case is kept in mind and is combined with the principle that the member states should not support abroad something that they do not support at home" (*ibid*), then there is a way to bring the actions of corporations (she refers specifically to PMCs) within the scope of the Convention. As one respondent put it, "the responsibility of states stemming from the violation of human rights occurring in a third state by a TNC [would be something entirely new]" (ECtJ4). But, the Court's extension of the scope of the application into the private sphere, detailed in Chapter 5, together with the recent case law that has clarified its position on jurisdiction and extraterritoriality, reveal a way for corporations to be brought under the scrutiny of the Court.

The notion of jurisdiction continues to inspire controversy within the Court. The kind of forward thinking and optimism about corporate violations in Ziemele's (2009) discussion did not surface in many of the interviews. During one interview, the difficulty of bringing corporations under the scope of the Convention even with the clarification in *Issa v Turkey* (2004) was pointed to in the following comment,

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[291] The applicants, a group of Iraqis for their deceased loved ones, complained of unlawful arrest, detention, torture and killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in 1991. The ECtHR had to decide on the question of jurisdiction within the meaning of Article 1 ECHR since it was inextricably linked to the facts underlying the applicants' allegations even though the issue of jurisdiction was not raised by the state. The Court relied on the case law to ascertain the concept of jurisdiction noting that it must be considered to reflect its meaning in public international law, which designates the state's jurisdictional competence as primarily territorial but not necessarily restricted to the national territory (§68, also referencing *Loizidou v Turkey*). The Court went on to define that,

> [A] State may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State. (…) Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate not its own territory (§71).

[292] *Supra* ftnt 223 and 285.

> The fact that transnational corporations are everywhere means that we need to consider where the violation occurred – in France, in Spain, in Portugal, it doesn't matter. Where there is a violation, the state must act (…). [But] if it is off the European territory, we are not competent. Our problem is to know, even outside of the European territory, if there is some kind of jurisdiction. You must always find the precise connection, umm, the very specific connection to say that outside of the geographical territory of Europe the Convention still applies [ECtJ1].

That is not to say that the connection cannot be made, but does emphasise the difficulties in establishing the jurisdictional nexus. In a few interviews, the respondents claimed that the most egregious violations committed by corporations occurred abroad, outside of Europe. This position is expressed in the following quote, "[It's all about] not saying 'hey something [or] some injustice is done in Africa. Court, do something about it'" [ECtJ6]. Consequently, according to this respondent, since the ECtHR is a *regional* Court it ought to delimit its activity to Europe and not concern itself with human rights outside of a certain geographic limitation. According to this logic, the ECtHR should refrain from extending Convention rights outside of Europe. However, in a globalised world, delimiting the jurisdiction of the ECtHR to 'Europe' is not enough to respond to the present day circumstances of violations of human rights. And, the ECtHR's case law has made reference to this point, emphasising that the Court not only has jurisdiction over member states' activity *geographically*, but in some cases also in the place where the violation has occurred, or in other words *territorially* (see *Al-Skeini v UK*, 2011; *Issa v Turkey*, 2004).

The apprehension related to the practicability of establishing effective control of a corporation acting outside of Europe by a member state was signalled by the assertion that,

> (…) A lot of companies are said to (…) violate human rights outside our territory and well that is a thing where we are not competent to rule on human rights violations outside the territory of the Council of Europe except where a government has effective control. So don't ask our Court to rule [on European corporations acting abroad], is my first reaction [ECtJ6].

In this case, the judge's initial reaction is to effectively suppress the consideration of a connection between the state and the corporation because of the prevalent view of the two as independent rather than "functionally interdependent" (Laslett, 2011).

Questions of jurisdiction, particularly regarding extraterritoriality, pose theoretical as well as practical dilemmas for some judges who considered it in relation to issues of corporate responsibility for violations of human rights. Two of these respondents' views are illustrated by the following quotes,

> [Extra-territoriality] is a big issue and a difficult legal problem and it won't go away. (…) On the contrary, I think it will be more and more pressing and we will have to find some solutions. And the worst option is to do nothing because then you will undermine the system of protection of human rights because these corporations or these organisations will be untouchable and the people whose rights – allegedly whose rights – have been violated by these organisations have nowhere to go and this of course is not an acceptable development [ECtJ3].

> [Extraterritoriality and companies moving production abroad] is a big problem – Absolutely! And that might be one of the reasons why we should establish an international body that would have a global jurisdiction because (…) this problem of big corporations moving their production sites – one thing is labour but also the environment! [ECtJ5].

The call to establish an international body was raised in several interviews and will be discussed in the next section. What is important to be mindful of with these comments is that there is a clear acknowledgement of a gap in international human rights law where corporations effectively evade responsibility by consciously seeking out the space between national and international laws, and home-state/host-state jurisdictions.

There are other structural obstacles that make it difficult to attribute corporate responsibility for violations of human rights to the state, even where jurisdiction may be recognised. These structural obstacles were described during one interview as "[the link between a corporation and a state] is not always easy to

establish" [ECtJ8]. In the example of the violations of human rights committed by *Total* (a French petroleum company) in Burma, another respondent observed,

> It is quite difficult [for us judges]. (…) If we have a French company abroad, it's not the French who are [responsible] or who have to ensure the French companies respect human rights. I don't know how. I mean the French government could set up guidelines but the French company can do what it wants in Burma or whatever. It would have to abide to that law and I don't see how the French could intervene [ECtJ9].

Here, the respondent is pointing out the effective dissolution of the state's responsibility for the violations of human rights committed by legal entities abroad. There is a defeatism that points to one of the major weaknesses of non-binding mechanisms in the respondent's acceptance that even though the state may 'set up guidelines', they are unenforceable.

A perspective that was generally shared amongst the respondents was that, "the problem posed by transnational corporations is probably much more serious in other countries outside of Europe, for example in Africa or South America" [ECtJ4]. Violations of human rights by corporations are thus, according to some respondents, problems that happen far away, to other people, other citizens. It is not, according to some interviews, a 'European' problem; and for some respondents it is therefore not a consideration for the ECtHR.

> [The European Court does not] have the same problems as with big companies that expulse the population – entire villages which happened for example with the Ogoni in Nigeria which was dealt with by the African Commission of Human Rights. Those kinds of cases don't arise here; at least not to my knowledge, or at least not in my Section, or in the Grand Chambers, which I have participated in [ECtJ4].

> If positive obligations [means] for a state to implement legislation for instance [on]to an oil company which is based in their country to respect human rights somewhere in Africa – for me that goes much too far, as far as I'm concerned [ECtJ6].

These reflections are examples of the continued demarcation of 'insiders' and 'outsiders' that has been a critique of European human rights law (Roxtrom *et al*., 2005) and concretised in the *Bankovic* case. In an uncompromising criticism of

Bankovic, Roxstrom *et al.* (2005) insisted that by limiting Convention rights to the territorial boundaries of 'Europe' the Court reconstructed the Convention itself and misconstrued its own case law. Roxtrom *et al.* highlight the contradiction in Western human rights law and Courts that contend the universality of human rights but then implement a limited and parcelled human rights protection depending on "membership in a particular class of persons" (2005: 62). In this way, they point out a major contradiction inherent in the hegemonic conceptualisation of human rights law.

6.2. Jurisdiction at the IACtHR

At the IACtHR, the respondents expressed the problem of jurisdiction as relating more to the internal dynamics of the OAS. The main problem according to the respondents was that in the current situation several states still have not accepted the jurisdiction of the Court.[293] Respondents commented that corporate violations of human rights are often connected to corporations domiciled outside of their jurisdiction, and notably in the United States and Europe. Respondents noted that the domiciliation of corporations was a real problem for attributing responsibility. Some concluded that corporations domiciled in states that do not accept the jurisdiction of the Court cannot be considered even when attempting to use the horizontal effect. The discussion on extraterritoriality at the IACtHR is addressed before moving on to the lack of jurisdiction of the IACtHR in some OAS Member States.

Issues of extraterritoriality were considered in two ways at the IACtHR. First, was the situation where a corporation is headquartered in an OAS member state and is violating human rights abroad; and second, where a corporation is headquartered in a non-OAS state with subsidiaries in OAS countries violating human rights. In the latter, when asked about extraterritoriality, respondents made it clear the issue had never been raised at the Court to their knowledge. Respondents were not very forthcoming on the issue of extraterritoriality and did

[293] States that have not ratified the ACHR: United States, Canada, Trinidad and Tobago, St Kitts and Nevis, St Lucia, Antigua and Bermuda, Bahamas, Belize, Guyana, St Vincent and Grenadines.

not expand on the matter. In response to the former, a common approach taken by the respondents was that the responsibility for a violation of human rights occurring in a state that has accepted the jurisdiction of the Court falls on the host state, and neither on the corporation nor its country of origin, which is contrary to a growing tendency in the ECtHR (see Section 6.1.; also Ziemele, 2009).

Although questions of extraterritoriality have not arisen in the IACtHR's case law, there have been examples at the Commission. The existence of cases involving extraterritoriality at the Commission is in part because of the ambiguity of the American Declaration's Article II, which has no express jurisdictional scope (*Bankovic v Belgium*, 2001: §78). This lack of an express jurisdictional scope is relevant since most of the examples from the Inter-American system, involving the extraterritorial application of its human rights instruments concern the United States, which has not ratified the ACHR and therefore is not under the jurisdiction of the Court. However, the Commission considers the United States subject to the American Declaration (Cernes, 2006: 2). Moreover, in the *Coard Report* (1999)[294], the Inter-American Commission specifically commented on extraterritoriality pointing out:

> The Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – "without distinction as to race, nationality, creed or sex". Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry

[294] The *Coard et al. v United States* involved 17 Grenadian claimants involved in the overthrow of the government. The IACommHR has stated that
The determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control (*Detainees at Guatanomo Bay v United States*, 2002: ftnt 7; also see *Coard Report*, §37)

> turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control (1999: §37).

When asked about the possibilities of extraterritorial jurisdiction over OAS members, one respondent commented, "we have no jurisdiction. We have absolutely [none] (…). This Court can do nothing" [IAJ1]. The judges commented that they are bound to the Convention, which they consider does not allow them to consider extraterritoriality. When asked about the *Coard Report* respondents were simply unfamiliar with it.

The respondents at the IACtHR did not have much to comment on issues of jurisdiction, including the state-centred approach, simply stating that their jurisdiction is restricted to the ACHR and any desire to extend that jurisdiction is left to the political will of states.

> The problem we have, concretely, in the American Court is that the American Convention is only for violations against people, human beings, and judicial action against the state. That is the consideration of the violation of the corporation is something that should be dealt with under national legislation or jurisdiction, or between states. (…) Right now, [the state-centred approach] is a disadvantage because there are no jurisdictional possibilities to expedite the corporation, however, if it is done at another level, for example claiming a penal or civil wrong, I'm sure that it is much easier (IAJ3).

Although according to one respondent, these jurisdictional issues could be negotiated if the Court worked under the Common Law system, which gives more interpretational-power to the judge.

> We apply the American Convention and that's it. That's our jurisdiction. And unless the state parties of the OAS amend the Convention we're stuck with that; but if we were a Common Law Court that would be a different matter (IAJ1).

Even so, for the time being the IACtHR has no jurisdiction, which leaves the responsibility to the Commission, which has jurisdiction over all OAS states. The Commission has a quasi-judicial status with a more political role within the OAS. It delivers Reports that face major problems with enforcement (e.g. the *Dann*

case).[295] The tension between the Court and the Commission, mentioned in sub-section 3.1, means communication between the two bodies remains aloof.

There is a jurisdictional obstacle for the IACtHR, which means that despite the mechanism of due diligence, states that have not ratified the Convention evade responsibility. In other words, for those states that have not ratified the Convention, including the USA, there can be neither application of the horizontal effect nor any possibility of raising questions of due diligence. As one respondent commented, "this [jurisdiction and extraterritoriality] will be for states [to decide] – (…) maybe then they will go to the OAS and amend the Convention. Until then, our hands are tied" (IAJ1).

VII. Alternatives

The potential for developments in human rights law that would allow for these Courts to examine matters related to corporate violations was supported during several interviews. One respondent's comments are particularly encouraging:

> (…) I think that there is a case to be argued, because if you look [at the background], and if you can see that the corporation does not comply with these [human rights] standards there could be behind it serious violations of human rights, like forced labour or environmental problems and so on. And when [extraterritorial considerations of human rights abuses] started there was a lot of scepticism in legal circles, and people thought 'oh well this will never work'; but it's been quite effective in the Telecom industry for instance (…). And why shouldn't it also be possible with human rights? Why not? Yeah, I think it's possible, but nothing you can bank on today. But in the future I don't see why [human rights law] couldn't develop in this way (ECtJ3).

Although it was not the majority view, there were a handful of respondents who pointed to an unmistakable potential within human rights law to evolve towards this end. Thus, small number of judges highlighted the dynamic potential of

[295] The *Dann* case refers to two Shoshane sisters who filed a complaint against the Untied States under the American Declaration alleging that the U.S. government had illegally extinguished their land rights. Although the Commission's Report decided in favour of the Dann sisters, the United States effectively ignored the Commission's recommendations.

human rights law; and, in this way also drew attention to an otherwise underexplored capacity for human rights law to respond to some of the most egregious violations.

A handful of participants across both Courts were favourable to, and even enthusiastic in some cases, about the potential of developing the horizontal effect as a mechanism to engage state responsibility for corporate violations of human rights. Reflecting on the possibilities, these respondents explained their position in the following quotes,

> [The horizontal effect] applies in the Inter-American system (…) and (…) it has effects vis-à-vis third parties regarding the application of the American Convention in the sense that although the state answers for the wrongs in cases of omissions for example, the state is under the obligation to investigate the facts and to sanction the responsible persons. (…) This is tertiarisation with third parties doing something, and absolutely this can come before the Court (IAJ2).

> (…) The European Court could work with [a] kind of [corporate accountability] initiative in an indirect way, [the state would always be a responsible party]; first the state, then eventually, maybe others (ECtJ1).

> Those positive obligations [related to corporations] of the state are not so developed. The state must provide a framework, and a regulatory framework must probably put a lot of emphasis on supervising (…). The starting point is that you have to identify the right infringed by this corporation. By definition, this is a horizontal violation; then you must find what kind of positive obligation could be attributed to the state – to intervene or to protect to prevent such a situation. Because again one could say if the state incorporates a company, it allows this company to develop certain types of activities then it also should control or supervise them [ECtJ8].

> There is probably a development [in positive obligations] where we see clearer, and more examples, where the state has not directly interfered but has also not protected. (…) And in that respect I think that corporate liability will be the underlying factor, which is triggering the state responsibility if they haven't lived up to the norms. [ECtJ5].

These comments reveal that, for these judges, the flexibility of positive obligations displays this mechanism as the most viable for the Court to bring

issues of corporate violations under the scope of the Convention. Despite the potential to use existing mechanisms in this way, the respondents were mostly against the idea of using human rights law, specifically, in ways to develop corporate accountability. These respondents argued that human rights Courts are not the appropriate *fora* to tackle the problem of corporate violations of human rights. In light of the global nature of corporate activities, the respondents explained that the IACtHR's limited jurisdiction precluded it as an effective instrument. According to the all but one respondent at the IACtHR, the most appropriate forum for corporate accountability remained national law. The justification of using domestic Courts was that over the past decade and a half national legal systems have developed a kind of (limited) universal jurisdiction in the fields of criminal and humanitarian law (see de Schutter, 2006a; McCorquodale and Simons, 2007; also Conclusion Chapter).

Discussing issues of extraterritoriality and the impact of the *transnationality* of corporations, one judge commented that "[The problem] is so obvious and so important. So, the need for an international body is really there!" [ECtJ5]. Indeed, many respondents in both Courts suggested that given their Court's respective challenges (e.g. financial problems, backlog, etc.) that a different international forum dedicated to dealing with corporate violations of human rights would be more appropriate and more effective than using already-existing Courts. Many respondents were favourable to the development of a special mechanism specifically to deal with corporate violations of human rights. This position was summed up by one of the IACtHR judges who was "(…) very much in favour of creating a special mechanism to punish [corporations] for all the wrongs they've done. And they have collaborated in some of the most serious violations!" (IAJ2). This was a popular recommendation reiterated in several interviews:

> Of course, I think [there should be an international forum] and there should be international instruments for [addressing corporate violations of human rights]; but they shouldn't be using human rights instruments for that purpose. They should be amenable according to other instruments, which should relate this kind of problem to human rights obligations. (…) I am very much in favour of creating a special mechanism to punish [corporations] for all the wrongs they've done. And they have collaborated in some of the

> most serious violations. (…) There should be a special forum for them to avoid evading. They should be answerable to a different kind of forum (IAJ2).

> Possibly, there should be another mechanism of protection other than just the responsibility of the state. We have for example the ICJ to responsibilise human beings for criminal wrongs. Why not have, tomorrow, another mechanism to responsibilise corporations? And probably one day we will come to that (IAJ3).

> (…) Why not [reform the ECHR to include legal persons as responsibility parties]? I haven't thought of that I must confess. Right now, if someone said let's put that reform in place right now, I'd say first we have to deal with what we have on our plates. But, ok if you start from a clean slate, why not? It could be something to consider. It's not completely insane at least, I would say (ECtJ3).

> (…) The more I think of it – and this discussion is very interesting – I think that it would be more realistic to establish a body outside the European Court and to establish an international body to which persons can bring complaints against corporations, hmmm, (…) I see the need for it. But I think it should be another body than this one. (…) And I think in order not to destroy this system [in Europe], we need to leave the Court to do what it has done and instead establish a new body for corporation accountability. (…) There might be situations where corporations are so powerful within the state that you might need a body that is outside and more independent (ECtJ5).

> For the moment [the IACtHR] does not have the jurisdiction [to consider corporate violations at home nor abroad] and if it happens, one day, probably it will be a different Court and stipulating other things [IAJ4].

Using other types of law rather than human rights law (e.g. civil or criminal) and other legal forums (i.e. not human rights Courts) to deal with corporate accountability was another recurring theme during the interviews at both Courts. According to most of the respondents, human rights law and the existing conventions are not able to deal with these issues because they were not written with them in mind. In the words of one respondent,

> The problem is that all these instruments of human rights were adopted – they were drafted and adopted – and they did not have all these problems in mind. And [corporations] take advantage of that (…). [Because of this, corporations] can always

> argue that they are not amenable and that they are not the addressees of human rights norms (…) [T]he problem is the gap [in human rights law]" (IAJ2).

> (…) [The Court] believes domestic Courts have even more powerful weapons to undermine human rights violations. (…) They have powerful instruments in certain states to liquidate a company that has committed serious criminal offences. In France, for instance, the heaviest penalty a corporation or company can carry is liquidation (ECtJ2).

In other words, the position of many of those respondents was that their Courts were *forum non conveniens* for corporate accountability and so a new forum for corporate accountability would be more appropriate.

Moreover, despite infrequent domestic remedies offering some solutions for corporate transgressions, it is important to keep in mind the position articulated during one interview that,

> (…) [F]rom a philosophical point of view for international Courts to find a violation carries a different stigma for the company concerned and from this perspective it might be interesting in the future to entrust international Courts with the function of, hmmm, with the task of highlighting violations of private entities [ECtJ2].

When asked about an eventual reform of the conventions to deal more clearly with violations of human rights by corporations, there was not much optimism from either Court. There was a tendency to absolve the Courts of any role in moving the law forward. The general view was that the obligation to *do* something about human rights violations by corporations was that of the state. This point was made on several occasions with similar remarks to one respondent who asserted that, "[Corporate responsibility] will be an issue for states. Perhaps (…) states will [become informed] and go to the OAS and amend the Convention, but until then, our hands are tied" (IAJ1). It is true that only states can sign treaties and ratify conventions, but this comment obviates the flexibility of the application of the law in the Courts inherent to judicial interpretative powers, a point made in other interviews.

Indeed, the interpretative power of judges was a subject that led to some discussion on the potential for exploring the open-texture of the law, alluded to by some respondents. The recommendation from respondents who were open and willing to consider corporate accountability for human rights violations was that judges should become more creative in their interpretations, without touching the law itself. One such recommendation came from a respondent from the IACtHR with the conviction that,

> (…) [C]hanging or revising the text of the Convention will not do anything or make things better, on the contrary it will make things worse. I would leave it the way it is but we have to see how it can be interpreted and that [the IACtHR] takes on more and becomes more creative, more imaginative (IAJ4).

Thus, although it is unrealistic to believe that the OAS will amend the ACHR to address corporate violations of human rights, the judges remain in a position to interpret the Convention in light of present day circumstances. The question becomes whether the judges are willing to consider corporate violations of human rights within the scope of the ACHR.

This section has examined the recommendations from judges at the ECtHR and the IACtHR regarding the potential of bringing corporate violations of human rights under the scope of human rights law. Although the majority of respondents were reluctant to consider this potential role for human rights law as a viable possibility, there were nonetheless a few respondents who were favourable to it, and whose constructive suggestions are worthy of further attention. This finding indicates that the certainty with which the Ruggie Process disregarded the role of human rights law with regards to corporate accountability debates does not have the substantive justification that was asserted (see Chapter 2). In other words, the international community need not necessarily preclude bringing corporations under the scope of human rights law *per se*.

Conclusion

This chapter has analysed the opinions and positions of respondents from the ECtHR and the IACtHR. There were some important differences across the Courts. The most salient of these included: the judges' general interest and awareness and human rights violations by corporations; their opinions on corporations as rights-holders; and, the willingness to think creatively about ways to bring corporations under the scope of human rights law. Whilst the majority of respondents from the ECtHR did not express an interest in corporate accountability, this was not the case at the IACtHR. All of the judges interviewed at the IACtHR acknowledge a general lack of attention in law given to corporate violations of human rights, and some even specifically referred to "a gap" in human rights law. The lack of awareness about corporate violations of human rights from human rights judges is symptomatic of the concerted efforts at the international level to disassociate corporate responsibility from human rights.

The major legislative difference between the Conventions is the status of legal persons. The inclusion of legal persons in the ECHR and the subsequent interpretation of that extended rights to by the ECtHR (see Chapter 5), has established corporations as rights-holders in Europe. The *human* rights of corporations has entered the legal commonsense understanding of human rights, illustrated in the opinions of the respondents at the ECtHR. Obversely, the explicit rejection of legal persons in the ACHR has meant that the respondents' notions of human rights have remained focused on physical persons, i.e. shareholders. However, the architecture of the corporation, i.e. separation between corporation and shareholders discussed at Chapter 3, has become commonsense and goes unchallenged at both Courts. To this effect, the interviews at the IACtHR are instructive. They reveal the dominant view at the IACtHR that although the corporation as such is not protected by the Convention, the shareholders are and ought to be; thus, bringing to light a business-friendly human rights system in the IACtHR despite its Convention.

From the major themes explored throughout this chapter, there are two points that can be generalised across the Courts. Firstly, there was a generalised emphasis on the state-centred approach in human rights law that served to

explain the lack of corporate accountability for violations of human rights. The state-centred approach does not preclude the possibility of bringing issues of corporate accountability under the scrutiny of human rights Courts, but rather highlights the need to enforce state responsibility for corporate violations. In other words, if the state-centred approach is accepted, responsibility for the harms done by a corporation becomes imputable to the state through positive obligations and due diligence, detailed in Chapter 6.

Secondly, most, if not all respondents were keen on the necessity of having some kind of mechanism for corporate accountability. However, the respondents generally suggested that this mechanism come in the form of some new tribunal or supervisory mechanism. The reason being both due to the already-existing pressures on human rights judges and their Courts (e.g. financial, back-log, etc.); and, as was pointed out, the lack of political will to formally introduce legal mechanisms for corporate accountability under human rights law. Because of the lack of political will, the respondents often claimed that their 'hands were tied', and that it was up to the politicians to make the necessary reforms. So, although a sizeable minority acknowledged a real need to address corporate violations of human rights – some even claiming they would be willing to interpret the law in ways to do so – they continually pointed to what they identified as the main obstacle: the lack of political will and political support in this domain. In other words, many deflected their role to that of the responsibility of the political sphere for new policies and especially new mechanisms for corporate accountability for human rights violations.

Despite often deflecting responsibility onto the political sphere, it became clear through the interviews that the immediate possibility for considering corporate violations of human rights within human rights law also depends on the willingness and creativity of the judicial protagonists in attributing responsibility to states for their actions or omissions (i.e. the horizontal effect), as they have done in other examples (see Chapter 5). In light of their unique position, judges have an understanding of the law that makes their perspectives worth incorporating into policy discussions and proposals. Furthermore, the interviews

demonstrated a belief from some respondents that there is a role for the judge to monitor state-corporate complicity where violations of human rights are concerned. The unique position of human rights judges, their understanding of the law, and their role in interpreting the law make them ideally placed to evaluate human rights law regarding corporations. It would be of interest to consult them or include them in discussions on *how* to improve human rights protection against non-state actors.

The interviews revealed that what is hindering corporate accountability using human rights law is the *practice* of a human rights law in the Courts. Respondents that exhibited an inclination to imagine possibilities for developing human rights law to address issues of corporate accountability did so through the tradition of the state-centred approach. Whether intentionally or not the state-centred approach forces scrutiny of the state-endorsed legal architecture of corporations. In human rights Courts not only are the judges rarely in contact with corporate violations of human rights, but also there are few judges who even consider the issue, which has several consequences. On one hand, it means that there is an entire gambit of human rights violations that do not concern human rights judges, and as has been pointed out in this chapter, is not addressed by human rights law. This lacuna reinforces and is reinforced by a hegemonic conception of human rights, the role of which this thesis has attempted to question in Chapters 2 and 4.

On the other hand, the practice of law generally, and human rights law in particular, under neoliberalism has provided a framework for capitalist transnational elites to use popular demands for CSR to exercise hegemony (see Chapters 2 and 3). In this way, there has been a relatively successful effort by transnational elites to remove the discussion of how to address corporate violations of human rights from the institution of human rights by concentrating on a framework that emphasises consensus from all stakeholders and declines formal, regulatory structures (e.g. the UN *Global Compact*; the Ruggie Process addressed in Chapter 2). However, the interviews reveal an emergent position that emphasises the open-texture of human rights law, which indicates that the

idea of human rights endures as a space for the conceptualisation of counter-hegemonic responses and even as a potential space for action.

CONCLUSION

The philosophers have only interpreted the world in various ways;
the point, however, is to change it.

-Karl Marx, 1845

Introduction

This thesis has explored the gap in international human rights law regarding corporate accountability by examining the otherwise unexplored viewpoints of human rights judges at the ECtHR and IACtHR. It has scrutinised the extent to which human rights law can be used to challenge corporate power. The empirical research, discussed in Chapters 6 and 7, has demonstrated that human rights judges can provide valuable insight into the potential for international human rights law to address corporate violations. The critique of human rights law in this thesis raises questions about whether it is useful for counter-hegemonic struggles to focus on human rights Courts.

This final chapter will begin, in Section I, by evaluating the potential for human rights as an emancipatory discourse with value for counter-hegemonic struggles against corporate violations. Section II will draw out the evidence supporting the argument that despite being a hegemonic instrument, human rights Courts can be a focus for counter-hegemonic struggles. It will highlight the empirical research findings by emphasising the differences between the Courts and the possibilities this offers for thinking about alternative formulations of human rights law. The Chapter concludes with some final thoughts on the Ruggie Process (see Introduction and Chapter 2). It will also point to some relevant and under-developed areas of research on corporate accountability and human rights law that will surely gain momentum in the coming years. In this way, it will also address the limitations of the research.

Section I: Problematizing Human Rights

Chapter 2 argued that the move away from problematizing to institutionalising rights in international public law has meant that human rights law has been considered to provide the solution to human rights problems (Evans, 2005a). This move has resulted in the hegemony of an international human rights law that frames the continued violations of human rights as a problem arising only from the non-fulfilment of obligations and related issues of implementation. It obfuscates reflection on the systemic causes of violations linked to the neoliberal capitalist social order within which the dominant human rights regime exists (see Chapter 2). There are regional differences between the Conventions and the Courts, however in both fundamental to the notion of human rights is private property. Chapter 3 detailed how the capitalist notion of private property has developed the corporation as a vehicle for capitalist accumulation. The dominance of the corporate form in business has anchored the central role of the modern corporation in the social relations of production. The research findings reveal that the corporate personhood has been entrenched in the minds of many human rights judges and is thus illustrative of law's ability to induce submission to a dominant worldview (see Chapter 7). In other words, the research findings are indicative of law's hegemonic force. As such, it has been in the thesis that international human rights law has entrenched the corporate form in the "legal sense" understanding of human rights.

Chapters 4 and 5 pointed out the differences in the human rights systems of the Americas and of Europe, specifically in the status of non-state entities as legal persons. However, given the legal structure of the corporation, discussed in Chapter 3, the importance of these differences must be qualified. What is significant is that despite their seemingly pivotal differences, in one way or another corporations are protected either directly (e.g. corporate persons as rights-holders at the ECtHR) or indirectly (e.g. with the protection of shareholders at the IACtHR). Thus, whereas in the IACtHR corporate persons are excluded from the Convention at Article 1.2. ACHR and at the ECtHR legal persons are rights-holders by virtue of P1-1 ECHR, the outcome is comparable (see Chapter 5). In other words, as argued in Chapters 3 and 5, even though the legal person is not protected at the IACtHR, the legal concept of corporate personhood means that shareholders can still use

the Court to protect the corporation. Ultimately, the significance of the differences in how the Conventions consider legal persons is that it unmasks an elemental problem with the corporate form itself; a problem that cannot be reduced to questions of inclusion or exclusion of non-state entities as legal persons in human rights conventions. The problem of inclusion of corporations is thus much greater than the formulation of P1-1 ECHR, Article 1.2. ACHR or the procedural application of Article 34 ECHR. It requires rethinking about an international human rights law that is entrenched in a capitalist framework. Simultaneously, the problem reveals the need to challenge the corporate form, as a site of irresponsibility through the separation of managers and shareholders (see Chapter 3), with the ultimate aim of dismantling the modern corporation altogether.

There has been a critical failure to address corporate accountability in any meaningful way at the international level. This failure is illustrated by the nonfulfillment of ESC rights at the international level (see Evans and Hancock, 1998); the pre-eminence of 'consensus-building' during the UN's Ruggie Process (see Chapter 2); the "de-radicalisation" of CSR (Shamir, 2004a); the importance placed upon voluntary codes of conduct and other non-intrusive CSR schemes rather than formally binding mechanisms for corporate responsibility (e.g. Khoury and Whyte, *forthcoming*). The lack of binding norms remains symptomatic of states' role in buttressing neoliberal capitalism and reflects the dominance of the hegemonic international human rights law discourse, which has acted as a barrier to investigating the *causes* for human rights violations (Evans, 2005b: 53). The result of these failures of international law is that human rights effectively act as a business-friendly paradigm. The UN embraced Ruggie's *Guiding Principles* (2011), which was not surprising when viewed in light of the international community's repeated rejections on imposing legal obligations on corporations for the respect and guarantee of human rights (see UN, 2005).[296] The UN's support of Ruggie's approach is indicative of this business-friendly human rights paradigm (see Introduction and Chapter 2) since it reinforced

[296] Ruggie promoted the distinction between 'responsibility' and 'duty', emphasising that "respecting rights is not an obligation current international human rights law generally imposes on directly on companies" (Ruggie, 2011: 130).

voluntarism for the human rights responsibilities of corporations and incorporated the business community into the policy discussions.

Despite these bleak prospects, the business-friendly paradigm of international human rights law has also been a rallying point for some important resistances[297] (e.g. *Indignados* and Occupy Wall Street;[298] protests against the WTO in Seattle, USA in 1999;[299] protests against the Free Trade Area of the Americas in Québec City, Canada in 2001;[300] protests against the G8 in Genoa, Italy in 2001[301]). These campaigns have succeeded in raising awareness about the nefarious effects of neoliberal globalisation and neoliberalism more generally, as well as raising questions about whether the conception of 'rights' embraced by the majority of the world is in fact the same as that expressed in international law (Evans, 2005: 52).

Section II. Alternative Uses of Law

[297] These counter-hegemonic struggles are demonstrations of global dissent that have been mischaracterised by a myth of protester violence and have been met with police brutality in many cases (Boski, 2008: 268).
[298] *Supra* ftnt 3
[299] Supra ftnt 2
[300] In Québec City, demonstrations were held against the FTAA, a neoliberal hemispheric trade initiative, similar to NAFTA but acting to ensure free trade across the Americas; in other words, to create a hemispheric free trade bloc. Interestingly for this thesis, the FTAA is organised under the auspices of the OAS, and launched by the USA in 1994. In the wake of the Battle for Seattle, the summit was pre-empted by the Canadian government with a massive police and security detail. It became famous for its violence and the defensive perimeter wall that exacerbated tensions and grievances regarding the undemocratic process of the summit's activities. The protests degenerated and violence ensued, but the government together with the media ensured the public received the message of "a problem of the degeneracy of the protesters" (Sheptycki, 2005: 341). The protester's anti-globalization message was largely ignored and the heavy-handed police operation was hardly criticized in the mainstream media (ibid).
[301] The demonstrations in Genoa, Italy were held against the G8, the exclusive forum for the world's wealthiest governments to discuss global issues, namely economic and trade matters although it does not exclude politics. The G8 is criticised for representing the interests of an elite group of industrialised nations to the detriment of the rest. The protests in Genoa degenerated into extreme violent clashes between protesters and police. The summit became famous for a violent campaign of police brutality, the murder of Italian protester Carlo Guiliani who was shot dead by police, verbal and physical abuse and torture that was later discovered to have been covered-up by the police. Since the shocking events of the summit in Genoa, the G8 has chosen remote and relatively inaccessible locations for its meetings. This has brought to the fore issues of anti-democratic practice and the domination of urban space by governments and related elite groups (Boski, 2008: 268).

The empirical research for this thesis has also focussed on the potential for the ECtHR and the IACtHR to use existing mechanisms of human rights law in cases involving corporate violations of human rights through a detailed case law analysis and semi-structured interviews (see Chapter 1). The analysis of the case law (Chapters 5 and 6) and the interviews (Chapter 7) has argued that human rights law can be used to *challenge* the harmful effects of corporations, although it is unlikely that it is able to *change* it fundamentally. Human rights law, so far, has been unable to challenge the corporate veil in any meaningful way. In cases where the corporate veil is identified it has been in order to pierce the corporate veil to uphold the rights of shareholders (e.g. *Cantos v Argentina*, 2001; see Chapter 5).

Chapter 6 explored the ECtHR's and the IACtHR's case law to scrutinise the potential of applying existing mechanisms in cases of corporate violations of human rights, developing the concepts of the horizontal effect and due diligence. The complicity between states and corporations provide the basis for exploiting the potential of linking responsibility from the corporation to the state, and where applicable to the home state and head office. The case law data explicated examples where the Courts have used these mechanisms to establish state responsibility for corporate harms, e.g. *Guerra v Italy* (1998), *López-Ostra v Spain* (1994), *Comunidad Mayagna (Sumo) Awas Tingni v Nicaragua* (2005), *Kichwa Peoples of the Sarayaku* (2004), *Mayas Indigenous Community of the Toledo District v Belize* (2004), *Third Report on the Human Rights Situation in Colombia 1999* (see Appendix 2). The analysis illustrated the role of judicial interpretation in creating possibilities to extend state responsibility through positive obligations for corporate violations of human rights (see the discussion on the dynamic approach at Chapter 6). The use of human rights Courts by the victims of violations by corporations substantiates the claim that human rights law can be used counter-hegemonically despite the fact that it is a hegemonic instrument (see Santos, 2002b). The law is not impervious and so there is a potential to challenge the interpretation of human rights law *through* the Courts.

Chapter 7 explored the perspectives of the respondents on the plausibility of using human rights law to address corporate violations of human rights. The findings revealed that the judges did not approach the discussion in the same way depending on the Court. The judges' comments and the case law showed that there is a difference between the two Courts in their approaches to non-state actors. The IACtHR judges appeared more willing to imagine different ways of using the law to respond to corporate violations of human rights and were more utopian in their view of the transformative potential of law.

The interviews revealed that a sizeable minority of respondents, mostly from the IACtHR, disapproved of the possibility for corporations to act as applicants in human rights Courts and saw a role for judges to reinforce the doctrine of positive obligations to address corporate harms. Two respondents declared the role of the judge as a guarantor of human rights law even where this means sometimes *making* the law – and indeed, some judges conceded that this inevitably requires them to act as moral agents as well as judicial ones (see Chapter 1). In this perspective, respondents described their role as ensuring that the law reflects and responds to present day circumstances in a democratic society. Thus, despite similar outcomes in the case law, attributable in large part to the hegemony of the corporate form (see Chapter 3), the differences between the Courts open up spaces for different readings of human rights law, which indicates that the law *is* dynamic. In other words, the differences demonstrate that there is potential to use human rights law in alternative ways, such as triggering positive obligations or to hear cases with non-state actors as violators (see Chapter 6).

Several respondents were mindful of the contradictions in human rights law regarding the status and treatment of corporations, but attributed these to the lack of political will to develop more robust mechanisms for corporate accountability. There are concrete examples of other types of law having been developed to broaden their application where states – and in some cases judges, e.g. universal jurisdiction claimed by former Spanish Judge Baltasar Garzón – have willed it, for example extraterritorial jurisdiction for sex tourism. In many

destination countries,[302] perpetrators may easily evade criminal prosecution or responsibility (de Schutter, 2006a; McCorquodale and Simons, 2007). Extraterritorial jurisdiction included in the legislation of over thirty countries provides a mechanism through which home governments can hold perpetrators accountable for their crimes (Svensson, 2007: 642). This legislation provides a country with the jurisdiction to prosecute its nationals for criminal conduct committed beyond its borders (see Beaulieu, 2008; Svensson, 2007). That said, it is important to remain wary of global laws that leave room for paternalist and "West knows best" attitudes and approaches to international law. Nonetheless, the adoption of this legislation does raise questions about the contradiction between the Westphalian notion of the isolated, territorial-sovereignty of the state and the overlap of jurisdictional claims created by globalisation (e.g. international trade and finance, communications and media, and the network society in general, etc.). The legislation on sex tourism illustrates that international law is always changing and thus *a fortiori* there is potential for change in human rights law for corporate accountability.

It became clear through the interviews that a sizeable minority of respondents were willing to explore new ways of interpreting the law in a dynamic way so that it may respond to present day circumstances. In support of the dynamic interpretation of human rights conventions, Dean Spielmann (2012) has grounded his position in the Preamble of the ECHR asserting that,

> The Preamble to the Convention states that it was adopted with a view, in particular, to the *further realisation of human rights and fundamental freedoms*. It is thus clear that the substantive content of the rights and freedoms enumerated by the Convention is not cast in stone and that it must evolve in line with progress in the legal, social and scientific fields. An evolutive interpretation of the Convention allows its norms to be adapted to the new challenges created by the complex development of European societies (Spielmann, 2012: 18)

This position reflects that of several of the respondents who supported a proactive role for the judge through the dynamic approach but rooted in their

[302] A 'destination country' refers to a country where the sex tourist travels to and where the act physically occurs.

respective conventions (see Chapter 7). It therefore suggests the possibility of using the existing framework to bring legal persons within the scope of the Convention in some cases. This possibility has elsewhere been clearly invoked by Ineta Ziemele, judge at the ECtHR, who has written that,

> It can be said that the existing legal framework contains most if not all the necessary elements to hold such legal entities as private military or security contractors accountable for human rights violations. The question lies more with the courage to use them to ensure respect for human rights (Zeimele, 2009: 25).

Ziemele's point of view appears to support responses frome those respondents who commented that it is not human rights *per se* but the *practice* of the law that is one factor hindering developments in corporate accountability (see Chapter 7). It has been argued that the notion of human rights hence remains an important tool (see Chapter 2), but so too can human rights Courts since they are *fora* that depend on legitimacy and are subject to public scrutiny. In this way, existing mechanisms may be developed through the Courts in ways that could be used in counter-hegemonic struggles.

The majority of respondents supported the establishment of an alternative mechanism specifically geared towards addressing corporate violations of human rights. Suggestions of what this alternative mechanism could be included for example an international tribunal outside of human rights Courts to deal with corporate violations of human rights. The advantage of a single forum is that it avoids the undesirable prospect of contradictory decisions. Some scholars argue that it may result in a more uniform, international case law that would avoid different standards of human rights globally (Tévar, 2012: 401). Moreover, a single international tribunal to address corporate violations of human rights could maintain the primary responsibility of the state with a complementary responsibility of the corporation. This two-pronged approach to responsibility challenges the hypothesis of the retreat of the state (Strange, 1996)[303] and

[303] Strange's claim is that the technological changes are driving market structures and limiting the influence and role of states over the outcomes affecting people's lives. She posits, "Impersonal forces of world markets, integrated over the post-war period more by private enterprise in finance, industry and trade than by the cooperative decisions of governments, are now more

maintains the power and responsibility of the nation-state in a global society (Tombs and Whyte, 2003c: 11-13).[304] This finding points to the importance of continuing the research into including the perspectives and imagination of judges for a specialised Court to deal with corporate violations of human rights.

The IACtHR has developed its case law, discussed in Chapter 6, to respond to violations of human rights by paramilitary groups through the concept of horizontality and due diligence (e.g. *Velásquez Rodríguez v Honduras*, 1988; *Godínez Cruz v Honduras*, 1989). David Weissbrodt, author of the UN Norms (see Introduction and Chapter 2), points out "in observing that the ACHR sets out positive obligations to prevent and remedy human rights violations, the Court suggested state responsibility extends to omissions by non-state actors" (1998: 184). Indigenous peoples have begun drawing on these developments for analogous cases involving corporate violations and thus using the IACtHR to try to respond to state-corporate harms. Examples of these uses of human rights Courts include the U'Wa Peoples struggle against Oxy Petroleum in Colombia (see *Third Report on the Human Rights Situation in Colombia*, 1999; see Chapter 6). This may not lead to any significant systemic changes, but it may open up possibilities for different areas of struggle to use these Courts, and human rights law more generally, in counter-hegemonic ways.

The uncertainty surrounding the future of the human rights-corporate accountability debate means that there is room to manoeuver and to explore the open-texture of the law. This thesis has demonstrated one aspect of the open-endedness of human rights law in its exploration and analysis of the existing mechanisms employed at the regional human rights Courts. These mechanisms, it

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powerful than the states to whom ultimate political authority over society and economy is supposed to belong" (1996: 4). Strange argues that authority has been displaced from the state to non-state actors, such as TNCs. In other words, she claims power is shifting from political authorities to markets. In a *Review* of Strange's *Retreat of the State* (1996) Beth A. Simmons comments, "(…) few have argued as vehemently as Strange that the growing authority of [non-state actors] have contributed to the retreat, if not the obliteration of the state as the central site of political influence and authority" (1998: 135).

[304] It is convincingly argued by Tombs and Whyte (2003c: 11-13) that the state is not impotent in the face of corporations and has a plethora of forms of regulation (social, economic, political, etc.). The state structures the conditions of existence of markets and their key actors. It has the capacity to intervene in the market and therefore has an important role in asserting human rights above the interests of corporations.

has been argued, demonstrate the feasibility and the practicability of using human rights law in creative ways. The analysis of existing mechanisms demonstrates a compatibility with the traditional notion in international law of the primacy of state responsibility and the complementary responsibility corporations for violations.[305] It has been argued throughout the thesis that one of the key problems in human rights law is that it accepts and reinforces the corporate veil as part of a general buttressing of neoliberal capitalism. In light of this, it is not enough to rely on simply research to continue to explore the emancipatory potential of law, although this is an essential part of the struggle. In the (near) future, we may need to consider how to break down the corporate veil in a more fundamental way before we can truly undertake changes to human rights law – or at least we will need to deal with the corporate veil and human rights law simultaneously.

Conclusion: Looking Forward

The discussions on corporate accountability at the international level, e.g. at the UN, have stagnated, focussing on ameliorating CSR and extending voluntarism generally rather than developing legally binding norms. Bittle and Snider argue that,

> Mandatory and enforced human rights, backed by criminal law – measures suggested in the [UN] *Norms* that Ruggie (and the transnational corporate lobby!) vigorously resisted – are important even though we know that many states will be unwilling or unable to enforce them (Ross, 2000; Rothe and Mullins, 2011). Such laws empower NGOs and other oppositional forces to call recalcitrant states and [T]NCs to account. (…) Such counter-hegemonic tactics may end the cycle of well-meaning but doomed initiatives that rest on the empirically fallacious belief that corporations will voluntarily abandon their power and wealth-generating practices to become humane and socially responsible (2012: 190).

[305] The workings of this complementary responsibility were discussed in Chapter 5 and in particular in discussions on the IACtHR's implementation of *due diligence* and the ECtHR's notion of the *duty to prevent harm*. Moreover, the interviews revealed that the majority of respondents believed that international human rights judges have a role in actively moving the law forward, with a handful specifically addressing the possibility of the judge using the dynamic approach to address corporate violations of human rights through the interpretation of existing laws in order to reflect the current situation and protect human rights.

Scholars from law (e.g. Blitt, 2012), the social sciences (e.g. Bittle and Snider, 2012; Khoury and Whyte, *forthcoming*), as well as actors within civil society (e.g. HRW, 26 June 2011) continue to critique the UN *Guiding Principles* for their lack of effective legal remedies. Thus, although the issue of corporate responsibility has gained purchase in the international community and at the level of international politics, effective change has not yet been reached. Looking forward, the question may become how the struggle for corporate accountability might be engendered in human rights Courts. The struggle to respond to corporate violations of human rights in meaningful ways may force us to reconsider state-market relations, the structure of the corporation, and even the structure of international law as it has been hitherto construed.

Continuing the research in this field presents opportunities to investigate other, otherwise under-explored areas. A few areas that will certainly gain momentum in the coming years and that will most certainly have an impact on socio-legal human rights research involve considerations of feminist and Indigenous perspectives on the corporate accountability debate. These research spheres will be crucial in future discussions of corporate accountability and human rights, for one because they are two of the most vulnerable populations and they are populations that are actively challenging corporate power internationally. How would feminist critiques of human rights bear on this discussion in the context of human rights Courts?[306] How might Indigenous critiques and struggles apply to the debate?

[306] Feminists have investigated the oppression of women from various perspectives including Marxist feminists (e.g. Shulamith Firestone, Alison Jaggar), post-modern feminists (e.g. Judith Butler), liberal feminists (e.g. Betty Freidan), the 'ethics of care' doctrine (e.g. Carol Gilligan; applied to law by Leslie Bender), postcolonial feminists (e.g. Chandra Mohanty), and radical feminists (e.g. Catharine Mackinnon, Andrea Dworkin). Feminist legal theory has been successful in applying feminist theory to analyse and deconstruct law by scrutinising the use and distribution of power (e.g. Bender, 1988, 1992; Mackinnon, 1987; Dworkin, 1991). It has addressed a number of specific issues that concern women directly, including the patriarchal architecture of laws that affect women's everyday lives, including job discrimination and family leave practices, and rape. However, some authors assert that there has been a relative "neglect of the gender components of business and human rights" (Abbott, 2012). If this view is accepted, then it can be posited that the impact of feminist theory on corporate accountability is a relatively unexplored analytical framework. Although there have been efforts to apply feminist theory to corporate law (Cohen, 1994; Lahey and Salter, 1985; Testy, 2004), feminist theory has had little direct relationship with the modern corporation and TNCs (Testy, 2004). One of the key analytical

In the case of Indigenous perspectives, struggles from Indigenous peoples against the power of corporations have centred predominantly on challenges to the appropriation and exploitation of Indigenous lands in resource-wealthy areas. Indigenous struggles have taken the forms of grassroots resistances and demonstrations (e.g. U'wa non-violently occupying Oxy drilling sites) to armed struggle (e.g. the Zapatistas in Chiapas, Mexico) to formal legal complaints at the IACommHR and IACtHR (e.g. *Kichwa Peoples v Ecuador*), discussed in Chapters 5 and 6. Indigenous peoples' resistances to corporate power has not been adequately addressed here, but it is a line of research that offers a fresh perspective into using law creatively, or imagining new ways to address old issues through international law.

One example might be to explore the contradiction in law between rejecting the notion of collective rights espoused by Indigenous populations whilst simultaneously protecting shareholders. It is paradoxical because shares are aggregate or collective capital (see Chapter 3) that is protected by law and thus translates into a kind of collective right for shareholders. The corporation thus uses a combination of its privileges as a non-state legal entity to protect itself but in the process it invokes a collective concept of rights that is contrary to the neoliberal capitalist emphasis on individuality. In other words, there is a fundamental contradiction since in human rights law there is a categorical rejection of collective rights but in fact through the corporate entity a collective notion of rights is otherwise invoked through shareholding.

Another idea might be to consider ways to incorporate environmental protections in international law in analogous ways to that of the Bolivian Constitution that granted rights to the Pachamama or Mother Earth. This research might include empirical investigations into what this means for the populations most affected by this type of law. There are interesting and inspiring

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tools in feminist theory is the deconstruction of dichotomies (e.g. public/private, personal/political, reason/emotion, etc.), which are prevalent features of hegemonic international human rights law, thus considering the corporate accountability debate with a gendered lens might prove fruitful to stimulate new perspectives on the discussion.

resistances and redefinitions of the limits of international human rights law originating within some Indigenous communities in Latin America. Addressing struggles for counter-hegemonic globalisation, Santos and Rodriguez-Garavito (2005) focus on the struggle to reform the international human rights regime in a cosmopolitan, and bottom-up fashion. They point to Indigenous movements that have challenged liberal and individualist constructions of rights by demanding the incorporation of alternative models based on collective entitlements and the inclusion of nature as a subject of rights (*ibid*, 2005: 21-22). The demand for these solidarity or collective rights necessarily objects to the separation and scaling of 'generation rights'.[307] It also opens a space to challenge or reconceptualise the approach to the guarantee and protection of human rights centred on the state. Since the very concept of state is constructed through a Western lens, a cosmopolitan approach to human rights must decide whether to reject human rights entirely or reconcile their potential for counter-hegemonic struggles by reinventing them in ways that reflect the individuals and communities struggling within them.

[307] *Supra* ftnt 66.

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---------- Economic and Social Council (2003), "*Commentary* on the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*" Dist. General E/CN.4/Sub.2/2003/38

APPENDIX 1. Description of the Judges

In order to guarantee anonymity and confidentiality, the description of the respondents is limited to a first table that includes the date and place of the interview by Court. A second table presents some statistical information regarding the gender of the respondents, their academic or pedagogic affiliations, and the number of years of experience of the respondents. As a general reminder, all of the judges sitting on the Inter-American Court at the time of the interviews were from Latin American and Caribbean countries. None were of the same nationality. They have all published widely on human rights and have all taught or teach at the university level. The respondents from the European Court were from both Western and Eastern European countries. As per the rules and regulations of the Court, none were of the same nationality. Some of the respondents had a pedagogical background and continue to lecture and publish widely on issues of human rights.

Table 1

1.1. Inter-American Court of Human Rights Respondents

Code	Date	Place
IAJ1	23/11/2010	Judge's Office San José, Costa Rica
IAJ2	07/04/2010	The Hague, Netherlands
IAJ3	22/11/2010	Judge's Office San José, Costa Rica
IAJ4	24/11/2010	Judge's Office San José, Costa Rica
IAJ5	25/11/2010	Judge's Office San José, Costa Rica
IAJ6	25/11/2010	Judge's Office San José, Costa Rica

1.2. European Court of Human Rights Respondents

Code	Date	Place
ECtJ1	22/02/2010	Judge's Office Strasbourg, France
ECtJ2	05/03/2010	Judge's Office Strasbourg, France
ECtJ3	05/03/2010	Judge's Office Strasbourg, France
ECtJ4	23/04/2010	Judge's Office Strasbourg, France
ECtJ5	06/09/2010	Judge's Office Strasbourg, France
ECtJ6	25/02/2010	Judge's Office Strasbourg, France
ECtJ7	25/02/2010	Judge's Office Strasbourg, France
ECtJ8	24/02/2010	Judge's Office Strasbourg, France
ECtJ9	04/03/2010	ECtHR Cafeteria Strasbourg, France

Table 2

Sex	Academic Affiliation	Years as a Human Rights Judge	Terms Served
Male……12	Professor/	Less than 5 years……2	1 term……8
Female……3	Lecturer……11	More than 5 years……13	2 terms……7

APPENDIX 2: Tables of Case Law

1.1. European Court of Human Rights

#	Case Name	Respondent State	Year	Convention Articles	Case Reference	Brief Summary and Relevance for Corporate Accountability
1	**A.**	UK	1998	1, 3, 8 , 14	[Judgement of 23 September 1998] (App. No. 225599/94) ECHR 1998-VI	In September 1998, the European Court of Human Rights unanimously found that the beating of a young English boy by his stepfather constituted "inhuman or degrading punishment", in breach of the European Human Rights Convention, and that current UK domestic law failed to provide adequate protection. Although the Court found a violation, states are normally left a certain margin of appreciation as to the legilsation to enact. In *A.* the Court restricted itself to finding that "the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3" (§24). **SIGNIFICANCE: The ECtHR held that the beating of the applicant by his stepfather constituted "inhuman or degrading punishment", in breach of Article 3 ECHR and that the UK domestic law at that time failed to provide adequate protection. The state failed to protect the applicant despite its positive obligation to protect, in this case children, in the form of effective deterrence, from such forms of ill treatment.**
2	**Agosi**	UK	1986	6, P1-1	[Judgement of 24 October 1986] App. no. 9118/80 Series A no. 108 ECHR	In 1980, AGOSI, a company incorporated in the UK, filed a complaint under the Convention claiming violations of the right to a fair trial (article 6) and the right to property (P1-1). The applicant company had issued a check to purchase South African gold coins (Krugerrands), however the check was dishonoured and the English bank alerted the authorities. Two individuals from the company, X and Y, were arrested and convicted of attempting to smuggle the coins into the UK contrary to the relevant customs and excise legislation. AGOSI requested that the Commissioners of Customs and Excise return the coins on the basis that the company was their rightful owner and had been the innocent victim of fraud. The Krugerrands were seized by customs and, after judicial proceedings, declared forfeit. The Court found a violation of the Convention considering that the forfeiture of the coins was a clear interference with the applicant company's enjoyment of possessions.The company was held responsible for the acts of the individuals (see also Air Canada). **SIGNIFICANCE: AGOSI demonstrates how corporations began using the ECHR against the exercise of the regulatory authority of the state; and importantly, it marks an acceleration of the Court's acceptance of corporations as victims of human rights violations.**
3	**Agrotexim Hellas S.A. and Others**	Greece	1995	6, 13, P1-1	[Judgement of 26 Sept. 1995] App. no. 14807/89 Series A 330-A ECHR	ECtHR rejects applicant shareholders status as victims and dismisses the case for lack of jurisdiction. The shareholders argued the 'corporate veil' ought be lifted or pierced to allow them to claim the bankrupt company's rights. **SIGNIFICANCE: This case demonstrates the separation of rights of companies from their shareholders (see §66). The Court upholds the corporate veil.**

4	**Air Canada**	United Kingdom	1995	6, P1-1	[Judgement of 5 May 1995] App. No. 18465/91 20 E.H.R.R. 150	Between 1983-1987 a number of incidents gave rise to concern over the adequacy of the company's safety procedures at Heathrow Airport, London. In 1987, a container holding over 300kg of cannabis was found in the carrying load of an Air Canada plane carrying both cargo and passengers. The plane was seized pursuant to the powers of forfeiture under the Customs and Excise Management Act 1979. and only returned after Air Canada paid a fine. The company was not given any explanation until the ECHR's hearing. Similarly to in AGOSI, the Court decided the government acted rightly within its capacity and margin of appreciation in deeming the company was responsible for the crime committed by a third party. **SIGNIFICANCE: The Court attributed responsibility of the illegal act to the company for an offence committed by a third party because of the general interest (a kind of reverse horizontal effect). The judgement was highly criticised and included several dissenting opinions opining that a law which made no distinction at all between the innocent and the guily could not be upheld as being in the general iterest within the meaning of P1-1(2).**
5	**Airey**	Ireland	1979	6, 8	[Judgement of 9 October 1979] App. No. 6289/73 ECHR 3	Mrs Airey sought judicial separation from her physically abusive husband but lacked the financial means, in the absence of legal aid, to retain a solicitor. The European Court of Human Rights held this was a violation of her right to access a court for determination of her civil rights and obligations (Article 6). Teh Court further determined that Art. 8 was violated. Citing international law and the Convention's intention they said that remedies must be effective not illusory.The Court did not address the claim of discrimination which raised the question as to whether denial of civil rughts due to poverty amounts to discrimination. **SIGNIFICANCE: Citing international law and the Convention's intention, they said that remedies must be effective not illusory.They noted that many civil and political rights had social and economic implications involving positive obligations. The right to respect for family life could entail positive obligations for the effective access to protective mechanisms. This case has been frequently cited as a precedent for demonstrating there are economic and social rights dimensions within civil and political rights and that States may have positive obligations with respect to civil and political rights.**
6	**Al-Jedda**	UK	2011	5	[Judgement 7 July 2011] (App. No. 27021/08) ECHR 1092	The case concerned the internment of an Iraqi civilian for more than three years (2004-2007) in a detention centre in Basrah, Iraq, run by British forces during the "War on Terror". At issue was the jurisdiction of the UK and the attribution of responsibility (either to the UN or the UK). **SIGNIFICANCE: the ECtHR reversed its position from *Bankovic and Others v. Belgium and Others* (2001). The GC held that the UN's Security Council Resolution did not displace the Government's obligations to protect the right to liberty under Article 5 ECHR and thus the UK was responsible for the violation. The case reinforced the ECHR's *Al-Skeini* (2010) judgement that established that a Member State has jurisdiction, which is *not* limited geographically.**

7	**Al-Saadoon & Mufdhi**	United Kingdom	2010	3, 6, 13, 34	[Judgement 2 March 2010] App. No. 61498/08	Following the invasion of Iraq the applicants were arrested and detained in a British detention suspected of orchestrating violence against the coalition forces. The Royal Military Police concluded they had been involved in the deaths of two British soldiers. In 2004, the Iraqi National Assembly reintroduced the death penalty in respect of certain violent crimes, including murder and war crimes. In 2005, the British authorities referred the case to the Iraqi criminal courts. In 2006, the applicants appeared before the Basra Criminal Court on charges of murder and war crimes. That court authorised their continued detention by the British Army in Basra. Subsequently, it decided the allegations constituted war crimes and fell within the jurisdiction of the Iraqi High Tribunal. The case was transferred to the IHT in 2007 which formally requested the British forces to transfer the applicants into its custody; repeated requests were made. They began judicial review proceeedings in the UK, which found since the applicants were held in a British military detention facility, they were within the jurisdiction of the UK as provided by Article 1 (obligation to respect human rights) of the ECHR. Nonetheless, the court held under public international law the UK was obliged to surrender the applicants unless there was clear evidence that the receiving State intended to subject them to treatment so harsh as to constitute a crime against humanity. It found no substantial grounds for believing there to be a real risk that, on being transferred, a trial against the applicants would be flagrantly unfair or that they would face torture and/or inhuman and degrading treatment. While, on the other hand there was a real risk that the death penalty would be applied if the applicants were surrendered to the Iraqi authorities, the death penalty in itself was not prohibited by international law. **SIGNIFICANCE: The UK argued the applicants were not held in Iraq, and so the UK had a legal obligation under international law to transfer them to Iraqi authorities, otherwise be forced to violate its obligations towards Iraq. The ECtHR recalled the Convention must be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties, thus using an external international document to interpret the Convention (re: possibilities of Norms).**
8	**Al-Skeini and Others**	UK	2010; 2011	1, 2	[Judgement of 9 June 2010] (GC) App. no. 55721/07 ECHR; (GC) [Judgement of 7 July 2011] App. No. 55721/07 E.Ct.H.R.	Al-Skeini concerned the killing of six Iraqi civilians by British soldiers in southern Iraq, including the brutal death of Baha Mousa during his detention at a UK army base. **SIGNIFICANCE: This case concerns the question of jurisdiction and the obligations of Member States. The GC held that the UK had a duty to conduct an effective investigation into the deaths of all civilians killed by British soldiers, on and off UK military bases. It based its decision on the fact that the UK had assumed responsibility for security in Southern Iraq and was exercising "effective control and authority" over Iraqi civilians. This case reversed the *Bankovic* (2001) decision. It established and defined the ECHR's enforceability where a Member State has jurisdiction, which is not limited geographically.**

9	**Anheuser Busch**	Portugal	2001	P1-1	[Judgement of 11 January 2007] App. No. 73049/01 [GC], ECHR 2007	Lodged by an American company who alleged a violation of the right to peaceful enjoyment of its possessions (P1-1) as a result of being deprived the right to use a trademark (Paris Convention 1883 Protection of industrial property - para. 28). The point in issue was to ascertain precisely when the right to protection of the trademark became a 'possession' within the meaning of that provision (§81). They referenced their rights under 4 different conventions all dealing with commercial and intellectual property rights law. **SIGNIFICANCE: Grand Chamber decides intellectual property falls under the protection of P1-1. This was a watershed for corporate claims of violations against their intellectual property (e.g. copyright, trademark, etc.). It also signifies the acceptance of aspects of purely corporate law into the interpretation of human rights law.**
10	**Austin and Others**	UK	2012	5(1)	(GC) [Judgement 15 March 2012] App. Nos. 39692/09 and 41008/09 Eur. Ct. H.R.	This case dealt with the police containment or 'kettling' with a police cordon during a protest. The Court held that the police had imposed the cordon to isolate and contain a large crowd in dangerous and volatile conditions. It held this had been the least intrusive and most effective means to protect the public from violence. Although the police tried to start dispersing the crowd throughout the afternoon, they had been unable to do so as the danger had persisted. The ECtHR held that kettling did not amount to deprivation of liberty. **SIGNIFICANCE: Judges Tulkens, Spielmann and Garlicki produced a Joint Dissenting Opinion noting that kettling can be a deprivation of liberty. The dissenting judges highlighted the wording of certain statements made by the majority that "appear dangerous (…) in that it leaves the way open for carte blanche and sends out a bad message to police authorities" (§7).**
11	**Bankovic and Others**	Belgium and Others	2001	2, 10, 13	(Judgement of 12 December 2001) App. No. 52207/99 Eur. Ct. H.R.	The case concerned the bombing by NATO of the Radio Televizije Srbije (RTS) headquarters in Belgrade as part of NATO's campaign of air strikes against the Federal Republic of Yugoslavia during the Kosovo conflict. On 23 April 1999, one of the RTS buildings at Takovska Street was hit by a missile launched from a NATO aircraft. Sixteen people were killed and another 16 were seriously injured.Noting that the impugned act was performed, or had effects, outside the territory of the respondent States, i.e. a question of extra-territoriality, the Court considered that the essential question to be examined was whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States. In one of its most controversial judgements to date, the ECtHR held that the jurisdiction of the ECHR is limited geographically. **SIGNIFICANC: The ECtHR limited the application of the Convention to the territory of Member States. Furthermore, it rejected the applicant's suggestion that there was a positive obligation emanating from Article 1 ECHR that could be applied. The case raised concerns over the issue of jurisdiction and invoked serious debates on the application of the ECHR as well as on the role of human rights obligations more generally.**

12	**Belgian Linguistics**	Belgium	1968	8, 14, P1-2	[Judgement (merits) 23 July 1968] Series A, No.6 (1979-80) 1 EHRR 252	French-speaking residents of certain Flemish-speaking areas of Belgium lodged a complaint against the state obligation for children in those areas to attend school in Dutch. Dutch-speaking children in a particular French-speaking area were allowed to be educated in Dutch-speaking schools in a bilingual district outside the neighbourhood, however French-speaking children in an equivalent Flemish area could not attend the French-speaking schools in the same bilingual district but were compelled to attend their local Dutch-language schools. The Court decided in favour of the applicants insofar as the legislation prevented certain children, solely on the basis of the residence of their parents, from having access to the French language schools existing in the six communes on the periphery of Brussels invested with the special bilingual status. **SIGNIFICANCE: This case was one of the first in which the Court clearly outlined its position on positive obligations. It determined the scope of the obligations of the state in securing the protection against discrimination at all levels. It noted the travaux préparatoires' emphasis on the negative formulation agreed upon by states, but it creatively negotiated the Convention insisting it could not be concluded from the travaux préparatoires that the State has no positive obligation to ensure respect for such a right (as is protected by P1-2). The interpretation was "As a 'right' does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State." In this way, it circumvented the political disinclination to the right of education and enforced the doctrine of positive obligations by way of another Article which they considered took precedence.**
13	**Bosphorus Hava Yollari Turízm Ve Tícaret Anoním Şirketi (“Bosphorus Airways“)**	Ireland	2005	1, P1-1	[Judgement (merits) 30 June 2006] App. No. 45036/98 42 EHRR 1	In May 1993 an aircraft leased by Bosphorus Airways from Yugoslav Airlines ("JAT") was seized by the Irish authorities. It had been in Ireland for maintenance by TEAM Aer Lingus, an aircraft maintenance company owned by the Irish State, and it was seized under EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). Bosphorus Airways' challenge to the retention of the aircraft was initially successful in the High Court, which held in June 1994 that Regulation 990/93 was not applicable to the aircraft. However, on appeal, the Supreme Court referred a question under Article 177 of the EEC Treaty to the European Court of Justice (ECJ) on whether the aircraft was covered by Regulation 990/93. By that time, Bosphorus Airways' lease on the aircraft had already expired. Since the sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro) had also been relaxed by that date, the Irish authorities returned the aircraft directly to JAT. Bosphorus Airways consequently lost approximately three years of its four-year lease of the aircraft, which was the only one ever seized under the relevant EC and UN regulations. Bosphorus Airways complained that the manner in which Ireland implemented the sanctions regime to impound its aircraft was a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of P1-1. **SIGNIFICANCE: Pivotal case that considered a decision taken by the EU under the Convention. In 2010, Protocol 14 was ratified by all Member states and the EU officially became a High Contracting Party to the Convention and thus also falls under the jurisdiction of the Court. Responsibility of contracting states to uphold Convention continues even after assuming international obligations subsequent to the ECHR.**

14	**British-American Tobacco Company Ltd**	Netherlands	1995	6, P1-1	[Judgement 20 November 1996] App. No. 19589/92 Series A no. 331	The applicant was a limited liability company from the UK. It filed a patent application under the Paris Convention (1883) in the Netherlands claiming priority on the basis of a patent held in the UK. The Court decided there was no violation under Art 6 (did not exhaust national remedies) and did not consider it under P1-1. **SIGNIFICANCE: This case is a continuance of the case law decided in Anheuser-Busch related to intellectual property under P1-1. The Court admitted that property does not only apply to material things, but also includes immaterial possessions.**
15	**Capital Bank AD**	Bulgaria	2006	6, 13, P1-1	[Judgement 24 November 2005] App. no. 49429/99 44 EHRR 48	The applicant was Capital Bank AD, a company in liquidation. The application was introduced on its behalf by chairman and vice-chairman of its former board of directors. The application form was also signed by its three shareholders. The applicant bank was set up and acquired a banking licence in 1993. In November 1997 its licence was revoked by the Bulgarian National Bank (BNB) which considered it insolvent. The BNB nominated special administrators to represent the bank until liquidators were appointed. Following a petition lodged by the BNB, the applicant bank was declared insolvent in January 1998 by the Sofia City Court, and put into liquidation. In the City Court's view, under the Banks Act 1997, once the BNB had found a bank insolvent, it could not revisit the issue and was bound to order its winding-up. Subsequently the court appointed liquidators to represent the bank; they did not appeal. In April 2005 the proceedings to wind up the applicant bank were concluded and it was struck off the register of companies. The applicant bank alleged the courts deciding on the wind-up petition against it had not examined in substance whether it had in fact been insolvent; that the proceedings in which this issue had been decided had not been adversarial; and that the BNB's decision to revoke its licence had not been made in accordance with the law. **SIGNIFICANCE: On considering its admissibility, the ECtHR commented that striking the application out of the list would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality. In a unanimous decision, the Court gave reason to the applicant. This case highlights the status of the legal person at the ECtHR.**
16	**Chahal**	UK	1996	3	[Judgement of 15 November 1996] (App. No. 22414/93) 23 EHRR 413	In this Case, the ECtHR established that deportation in the circumstances of the case is a breach o Article 3 ECHR (against torture and inhuman or degrading treatment). **SIGNIFICANCE: This case demonstrates the potential for human rights courts to be used by individuals in order to call into question the actions of the executive and legislative powers.**

17	**Commingersol S.A.**	Portugal	2000	6(1)	[Judgement 6 April 2000] (App. No. 35382/97) 2000-IV Eur. Ct. H.R. 355	The applicant company is a public company. It had in its possession eight bills of exchange that it had received from the A. Lda company. As the bills were not honoured when due, the applicant company issued enforcement proceedings against A. After several years of domestic proceedings the applicant company complained of the length of the civil proceedings in question. It alleged a violation of Article 6(1) ECHR. **SIGNIFICANCE: In its judgement the Court held that a company has a right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6(1) ECHR. Thus, the ECtHR assimilated the corporation to a human being in giving it moral damages. Moreover, in their Concurring Opinion for the Comingersoll judgement, Judges Rozakis, Bratzas, Caflisch and Vajic described the corporation as "an independent living organism".**
18	**Costello-Roberts**	United Kingdom	1993	3, 8, 13	[Judgement of 25 March 1993] App. No. 13134/87 Series A no. 247-C	The applicant's child went to a private boarding school in the UK. Unbeknown to her, the school practiced corporal punishment, although she had not either made known her disapproval of the practice. Her son received a punishment, after which she wrote to demand that the school refrain from the use of corporal punishment on her son. The school replied that perhaps the boy should go to another school since Mrs Costello-Roberts did not agree with their methods of discipline. The boy's attitude changed, and it was argued in Strasbourg that this was the result of the punishment received at the school. **SIGNIFICANCE: Although the Court voted that there was no violation of the Convention, it did confirm "the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals" (§27). The Court reiterated that there are fields within the private sphere wherein the state must exercise some regulation or measure of control to ensure the Convention is upheld. This is an example of positive obligations and although not referred to, Drittwirkung.**

19	**Credit and Industrial Bank**	Czech Republic	2003	6, P1-1	[Judgement 21 October 2003] App. No. 29010/95 93 DR 137 26 EHRR 88	The applicant company had been placed in compulsory administration during seven months on the grounds that its financial situation and liquidity remained unsatisfactory despite measures which had been taken to resolve the situation. It complained that it had had no remedy concerning this decision or concerning subsequent administrative and judicial decisions. The Court cited Agrotexim and Others v. Greece where the Court held that shareholders in the company could not be regarded as entitled to apply to the Convention institutions to complain of an interference with the company's property under P1- 1. The Court observed that the disregarding of a company's legal personality would be justified only in exceptional circumstances, in particular where it was clearly established that it was impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators. Although the subject company was in the process of liquidation, it had not ceased to exist as a legal person at the time the shareholders lodged their application with the Commission and was at that time represented by its two liquidators, who had legal capacity to defend its rights and therefore to apply to the Convention institutions, if they considered it appropriate. The Court differentiated this case from Agrotexim since the essence of the complaint is the denial of effective access to court to oppose or appeal against the appointment of a compulsory administrator, to hold that the administrator alone was authorised to represent the bank in lodging an application with the Convention institutions would be to render the right of individual petition conferred by Article 34 theoretical and illusory. The Court found that having there were exceptional circumstances which entitled Mr Moravec, former President of the bank's Board of Directors and its majority shareholder, to lodge a valid application on the bank's behalf. **SIGNIFICANCE: The Court pierced the corporate veil to allow the shareholder to lodge a complaint on behalf of the company.**

20	**Cyprus**	Turkey	2001	2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 17, 18, 41, P1-1, P1-2	[Judgement of 10 May 2001] App. No. 25781/94 (GC) ECHR 2001-IV	The case relates to the situation that has existed in northern Cyprus since the conduct of military operations there by Turkey in 1974 and the continuing division of the territory of Cyprus. In connection with that situation, Cyprus maintained that Turkey had continued to violate the Convention in northern Cyprus after the adoption of two earlier reports by the European Commission of Human Rights, which were drawn up following previous applications brought by Cyprus against Turkey (1976). In the Convention proceedings, Cyprus contended that Turkey was accountable under the Convention for the violations alleged notwithstanding the proclamation of the "Turkish Republic of Northern Cyprus" in 1983 and the subsequent enactment of the "TRNC Constitution" in 1985. Cyprus maintained that the "TRNC" was an illegal entity from the standpoint of international law and pointed to the international community's condemnation of the establishment of the "TRNC". Turkey, on the other hand, maintained that the "TRNC" was a democratic and constitutional state, which was politically independent of all other sovereign states, including Turkey. For that reason, Turkey stressed that the allegations made by Cyprus were imputable exclusively to the "TRNC" and that Turkey could not be held accountable under the Convention for the acts or omissions on which those allegations were based. **SIGNIFICANCE: The Court held "[…] the acquiescence or connivance of the authorities of a Contracting state in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that state's responsibility under the Convention"(§81).**
21	**Demir and Baykara**	Turkey	2008	11, 14	[Judgement of 11 December 2008] (App. No. 34503/97) ECHR 1345	This landmark case dealt with the right to engage in collective bargaining and take collective action. During domestic proceedings, the Turkish courts went back and forth on the right for collective action from the trade unions. The domestic courts claimed that the right to form a union existed but not that unions did not have the right to engage in collective agreements. **SIGNIFICANCE: The ECtHR used the dynamic approach to establish its decision that there is an inherent right to collective bargaining in Article 11 (freedom of association). By do doing, the ECtHR introduced an ESC right into the ECHR.**
22	**E. and Others**	UK	2002	3, 8, 13	[Judgement of 26 November 2002] (App. No. 33218/96)	The case involved a family with four siblings. The father had passed away and the mother cohabited with another man. On several occasions, the sisters alleged that their step-father was abusive. The man was eventually arrested and charged. The sisters later filed for compensation. The applicants alleged that the local authority failed to protect them from abuse by their stepfather and that they had no remedy. **SIGNIFICANCE: the ECtHR reinforced its position on the positive obligations of states and the duty to prevent.**

23	**Fedeyeva**	Russia	2005	2, 3, 8	[Judgement 9 June 2005] App. No. 55723/00 (Ser. C) 2005-IV	The applicant lives in the city of Cherepovets, a major steel-producing centre in the Russian Federation. In order to delimit areas where pollution caused by steel production may be excessive, the authorities have established so-called 'sanitary security zones'. The applicant lives in a council flat within one of these zones. In 2000, the authorities confirmed that the concentration of certain hazardous substances in the atmosphere within the zone largely exceeded the 'maximum permitted limit' the ('MPL') established by Russian legislation. In 1995 the applicant, together with other residents of her apartment block, brought an action to the Cherepovets Town Court, seeking resettlement outside the zone. The Town Court found that, in principle, the applicant had the right to be resettled, but, in practice, the local authorities were only obliged to put her on a 'priority waiting list'. On 31 August 1999, the Town Court dismissed the applicant's further action against the municipality and confirmed that she had been put on a 'general waiting list'. **SIGNIFICANCE: In its judgment of 9 June 2005, the Court found that there had been a violation of Article 8 of the Convention in respect of the failure of the respondent state to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and private life. The Court found that although the state did not control or operate the Severstal plant, a state's responsibility in environmental cases may arise from a failure to regulate private industry.**
24	**Federchenko and Lozenko**	Ukraine	2012	2, 14	[20 Sept. 2012] (App. No. 387/03) ECHR 1721	The applicants alleged that in 2001 a policman had threatened and hit Mr Fedorchenko and then set his house on fire, during which five relatives died. The applicants complained that the State authorities had failed to conduct a thorough and effective investigation into the circumstances of their deaths and of the policeman's involvement. They further alleged that the crime had had racist motives. **SIGNIFICANCE: the Court held that States have a duty to conduct an independent and effective investigation into all deaths, and in particular deaths associated with State agents. The Court also considered the application of article 14 in circumstances where a violent crime may have been motivated by racial or ethnic hatred or prejudice. The Court indicated that in such circumstances, the State has an obligation to investigate the role played by such motivations, and that failure to do so would be "to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights" (§65).**
25	**Garaudy**	France	2003	6, 9, 10	[Decision 24 June 2006] App. No. 65831/01, ECHR 2003-IX (extracts)	The applicant wrote a book to which he was accused of denying crimes against humanity, publishing racially defamatory statements and inciting to racial or religious hatred or violence; he was taken to Court. He alleged violations of his rights as protected under the Convention. The Court declared his case inadmissible. **SIGNIFICANCE: The ECtHR prohibits the abuse of Convention rights not only by the state but also by private groups or persons.**
26	**Gaskin**	UK	1989	8	[7 July 1989] App. No. 10454/83 Eur.Ct.H.R. 12 EHRR 36	The Court found a violation of Article 8 because there was an absence of an independent authority to decide upon the access to records relating to the individual's personal and family life in cases where a contributor to the records cannot be found or refuses consent without justification. **SIGNIFICANCE: the Court affirms that the fulfilment of the positive obligations by the state may require changes in administrative practice.**

27	**Guerra and Others**	Italy	1998	2, 8, 10	[Judgement 19 February 1998] App. No. 14967/89 1998-I, no. 64	The applicants all live in a town approximately 1 kilometre away of the Enichem agriculture company's chemical factory. In 1988 the factory, which produced fertilisers was classified as `high risk'. The applicants said that in the course of its production cycle the factory released large quantities of inflammable gas. Accidents due to the malfunctioning had already occurred in the past, the most serious one on 26 September 1976 when the scrubbing tower for the ammonia synthesis gases exploded, allowing several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, to escape. One hundred and fifty people were admitted to hospital with acute arsenic poisoning. In a report, a committee of technical experts established that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia. It was noted in the report that the factory had refused to allow the committee to carry out an inspection and that the results of a study by the factory itself showed that the emission treatment equipment was inadequate and the environmental-impact assessment incomplete. In 1994, the factory permanently stopped producing fertiliser. **SIGNIFICANCE: The applicants complained not of an act by the State but of its failure to act. This is a case that highlights positive obligations since guaranteeing (particular) rights does not merely compel States to abstain from interference: in addition to that primarily negative undertaking, there might be positive obligations inherent in effective respect for private or family life.**
28	**Ireland**	UK	1978	3, 5	[Judgement of 18 January 1978] (App. No 5310/71) (Ser. A) No 35	The IRA engaged in several terrorist acts in the U.K., after which several members were arrested and detained in the U.K. The detained individuals were tortured, including wall-standing, hooding and deprivation of sleep and food. The applicant government (Ireland) claimed that the extrajudicial detention infringed Article 5 (right to liberty) and that the interrogation practices were torture, resulting in the violation of Article 3 ECHR. The Court held that the interrogation techniques were within inhumane treatment and thus that there was violation of Article 3, although it did not hold that these acts were "torture" as such. **SIGNIFICANCE: The Court reaffirmed that the limitations on a Member State's discretion (Article 15 ECHR) emphasising that there no derogation whatsoever is permitted from the proscription against torture (Article 3). Thus, the Court in a way defined the limits of the margin of appreciation and the discretion of the state.**

29	**Immobiliare Saffi**	Italy	1999	6, P1-1	[Judgement 7 July 1999] App. No. 22774/93 (GC) Reports 1999-V (2000) 30 EHRR 756	I.B., a construction company, was the owner of an apartment in Livorno, which it had let to L.B. and to whom it informed that the lease would not be renewed and the tenant needed to leave the premises at the end of the lease. The tenant refused. I.B. contacted the bailiff to retake possession but the tenant did not budge. Immobiliare Saffi became the owner of the apartment in 1988 following a corporate merger with, inter alia, I.B. It pursued the enforcement proceedings. The applicant company attempted to force the tenant's expulsion through legal means. In 1996, it informed the implicated court that the apartment had been repossessed following the death of the tenant. The applicant company submitted that its apartment had been expropriated de facto, since, even if it would theoretically have been possible for it to sell the apartment, it could not have done so at market value. The ECtHR decided in favour of the applicant. **SIGNIFICANCE:The Court had distinguished between deprivation of property and control of of property and judged that there was no deprivation in this case. The question on whether a commercial company may allege that it has sustained non-pecuniary damage through anxiety was already raised, but not answered. Despite this, the Court expressly recognized a company's right under Article 41 ECHR to financial compensation for non-pecuniary damage it sustained as a result of a violation, in this case of the reasonable time requirement of Article 6 § 1 ECHR. Since then legal persons have also been granted financial compensation for non-pecuniary damage that resulted from violations of, for instance, the right to freedom of religion and the prohibition of discrimination (e.g. Religionsgemeinschaft der Zeugen Jehovas v. Austria, 1998).**
30	**Issa and Others**	Turkey	2004	1, 2, 3, 5, 8, 13, 14, 18	[Judgement of 16 November 2004] (App. No. 31821/96) ECHR 2004	This case involved questions of jurisdiction. Based on the evidence it received, the Court did not consider that the standard of proof had been established regarding whether the Turkish armed forces had conducted operations in the area in question.The Court found the that the claimants had failed to present sufficient verifiable evidence that Turkey exercised 'effective control' over the relevant region in northern Iraq. **SIGNIFICANCE: Nonetheless, the ECtHR attempted to clarify its position vis-à-vis *Bankovic* (2001), stating that "[A] state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State" (*Issa and Others v Turkey*, 2004: §71).**

31	**J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd.**	United Kingdom	2007	41 (under reserve), P1-1	[Judgement 30 August 2007] App. No. 44302/02	The applicant company alleged a violation of P1-1. The owners of the property adjacent to the contested land, occupied the land under a grazing agreement until December 31, 1983. They were instructed to vacate the land but they did not do so. In January 1984 the applicants refused a request for a further grazing agreement because they anticipated seeking planning permission for the development of all or part of the land and considered that continued grazing might damage the prospects of obtaining such permission. From September 1984 onwards until 1999 the neighbours continued to use the land for farming without the applicants' permission. In 1997, they registered cautions at the Land Registry against the applicant companies' title on the ground that the land title had been obtained by adverse possession (under Limitation Act 1980 which provides a person in possession of land for more than 12 years can claim its property). The applicant companies sought the cancellation of the cautions before the High Court and issued further proceedings seeking possession of the disputed land. No violation. **SIGNIFICANCE: The ECtHR gave effect to Convention rights between private parties, through the legitimacy of state legislation. In other words, where a violation of the Convention (public international law) was committed in the realm of private law, Convention guarantees were upheld.**
32	**Lithgow and Others**	United Kingdom	1986	6, 13, 14, 18, P1-1	[Judgement 8 July 1986] App. nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 (GC) 8 EHRR	When certain aerospace companies were nationalised under the Aircraft and Shipbuilding Industries Act 1977 complaints concerning terms and related matters arose, specifically on the amount paid for the expropriation. No violation. **SIGNIFICANCE: The Court recognised Contracting States are entitled to control the use of property in accordance with the general interest. It also recognised the state must compensate non-nationals as well as nationals.**
33	**Loizidou**	Turkey	1995		[Preliminary Objections 23 March 1995] (App. No. 15318/89) (Ser. A) No. 310, 20 EHRR 99	This is a landmark case regarding the rights of refugees wishing to return to their former homes and properties The applicant had been forced out of her home during Turkey's invasion of Cyprus in 1974 along with around 200,000 other Greek-Cypriots. The Court studied the question of jurisdiction and effective control and found a violation of the ECHR. **SIGNIFICANCE: Effective control was explained by the ECtHR as incurring the obligation to secure the rights and freedoms set out in the Convention; an obligation deriving from the fact of such control "whether it be exercised directly, through its armed forces, or through a subordinate local administration" (*Loizidou v. Turkey*, 1995: §62).**

34	**López Ostra**	Spain	1994	3, 8	[Judgement 9 December 1994] App. No. 16798/90 A 303 C	On May 14, 1990, Gregoria López Ostra filed a report before the ECommHR claiming the State's failure to take any measures against the smell, noise and contaminating smokes originated in a solid and liquid waste treatment plant located a few meters away from her home violated her rights. In December 1993 the ECommHR referred the case to the ECtHR. It considered neither the claimant's moving out nor the closing down of the waste treatment plant changed the fact that the claimant and her family had lived for years a few meters away from a source of smell and smokes and thus the State was responsible since serious pollution can impact an individual's well-being and prevent him/ her from enjoying his or her home in such a way that his or her private and family life is damaged. The Court further stated the State had failed to find an adequate balance between its interest to promote the city's economic development and the claimant's effective enjoyment of her rights. **SIGNIFICANCE: This case is very significant because it shows the interdependence between civil and political rights on the one hand, and economic, social and cultural rights on the other hand. In many cases, protecting civil rights, such as the right to private and family life, and to respect for the home, involves also protecting economic, social and cultural rights, such as the right to a healthy environment and the right to health. The European Court ruled that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely." The case reveals a successful strategy to claim economic, social and cultural rights through civil and political rights where the regional human rights system does not provide an effective protection of economic, social and cultural rights.**
35	**Marckx**	Belgium	1979	8, 14, P1-1	[Judgement of 13 June 1979] App. No. 6833/74 Series A, No. 31, (1970-1980) 2 E.H.R.R. 330.	This case referred to the legal status of children born out of wedlock. It held that "the object of Article [8] is 'essentially' that of protecting the individual against arbitrary interference by the public authorities". The judgement continues by recognising that "nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life". **SIGNFICANCE: The Court recognises the positive obligations of the state in the private sphere. This clearly emphasises the responsibility of the State to initiate and enforce legislation that will ensure the safeguard of ECHR rights, without which the State is in violation of the Convention. Peaceful enjoyment of possessions include the right of property.**
36	**M.C.**	Bulgaria	2003	3, 8, 13	[Judgement 4 December 2003] App. No. 39272/98 40 H.E.R.R. 20	The applicant alleged that she had been raped by two men in 1995, when she was 14 years old. The ensuing investigation came to the conclusion that there was insufficient proof of the applicant having been compelled to have sex The Court considered various international and comparative law cases and practice (e.g. ICTY). **SIGNIFICANCE:This is another example of the doctrine of positive obligations. Moreover, the Court herein confirmed the doctrine of effective deterrence at the European Court.**

37	**Medvedyev and Others**	France	2010	5(1)	GC] [29 March 2010] (App. No. 3394/03) ECHR 2010	This case dealt with the extra-territorial application of the ECHR. The applicants were crew members on a Cambodian ship intercepted by the French Navy near Cape Verde The applicants were brought to France where they were convicted of drug smuggling. The applicants challenged the legality of their detention at sea. **SIGNIFICANCE: The Court found that there had been a violation and deprivation of liberty because once the French militarydetained the crew and took control of the ship it had "effective control".**
38	**National Union of Belgian Police**	Belgium	1975	11, 14	[Judgement 27 October 1975] App. No. 4464/70 1 EHRR 578	Complaint about regulations on trade union consultation - difference in treatment introduced by Belgian legislation between different categories of unions. **SIGNIFICANCE: One of the first cases in which the Court considered a legal person under the Convention.**
39	**Niemietz**	Germany	1992	8, P1-1	[Judgement of 16 December 1992] (App. No. 13710/88) 251 Eur. Ct. H.R. (Ser. A) (1992)	The German authorities searched the law office premises of the applican, a judge, to find the identity of someone who had written an insulting letter under a false name, which was a criminal offense in Germany. The authorities proceeded to seize documents in the applicant's office in order to pursue the investigation, against his wishes. The applicant filed for a violation of Article 8 and P1-1 ECHR. **SIGNIFICANCE: The Court held that private life could include activities of a professional or business nature. More specifically, it stated that the term 'home' referred to in Article 8 could apply in the context of business, thus supporting the application of Article 8 to corporations.**
40	**Norwood**	UK	2004	10, 14	[Dec. Admissibility 16 November 2004] App. No. 23131/03 ECHR 2004-XI	The applicant, a member of the BNP (a neo-nazi organisation, had displayed a poster outside his window with a poster of the Twin Towers on fire and the words "Islam out of Britain - Protect the British People". After a member of the public complained, the police removed the poster. The applicant was charged and convicted with displaying hostility towards a racial or religious group. The applicant complained that his freedom of expression was violated and that he was the victim of discrimination. The Court considered the case inadmissible ratione materiae since it was incompatible with purpose of the Convention. **SIGNIFICANCE: Prohibiting the abuse of Convention rights not only by the state but also by private groups or persons at Article 17 ECHR (also Article 29 ACHR).**
41	**OAO Neftyaaya Kompaniya Yukos**	Russia	2009	1, 6, 7, 13, 14, 18, P1-1	[Dec. Admissibility 29 January 2009] App. no. 14902/04 E.C.H.R.	Although formally the applicant is the company, it is a claim made on behalf of the 'stakeholders' (creditors and shareholders). The company claims that the Russian government crippled it by concocting a huge tax liability that led to its bankruptcy forcing its sale to a state-owned individual. The executives claim the action was politically motivated and breached ECHR law. The executives filed the multi-million euro claim in the name of all the stakeholders, alleging the denial of the protection of the rule of law. **SIGNIFICANCE: This case demonstrates the growth of the nexus of human rights law with commercial, company and trade law.**

42	**Öcalan**	Turkey	2003	2, 3, 5, 6, 14, 34	[Judgement 15 May 2005] App. no. 46221/99 E.C.H.R. 2005-IV	The applicant filed a complaint regarding the actions of Turkey taken outside the territorial jurisdiction of the state. Turkish agents physically abducted Abdullah Öcalan, leader of the Workers' Party of Kurdistan (PKK), at Nairobi Airport and quickly flew him to Turkey, bound and hooded. The arrest by Turkish agents was made and the applicant was detained on a Turkish plane in the international zone of a Kenyan airport following the interception of the applicant by Kenyan officials. A Turkish court later found him guilty of murder as the leader of the PKK's insurgency and sentenced him to death. The applicant claimed the abduction itself was illegal because it amounted to a deprivation of his liberty without due process of law. **SIGNIFICANCE: Clarified ECHR's extraterritorial human rights protections with regard to the arrest and detention of individuals.**
43	**Öneryildiz**	Turkey	2004	2, 6, 13, P1-1	[Judgement 30 November 2004] App. No. 48939/99 E.C.H.R. 2004-XII	The applicant lived in a slum quarter of Istanbul surrounding a rubbish tip which exploded because of the decomposition of the refuge and killed 9 of his relatives. A report showed that the authorities failed to take any measures at the tip in question to prevent an explosion of methane. The Court decided the Turkish authorities had known or ought to have known that there was a real risk to persons living near the rubbish tip so they had had an obligation to take operational measures to protect individuals living near the rubbish tip. Their failure to do so breached article 2. Furthermore, there was a positive obligation on the State under P1-1 to take practical steps to avoid the destruction of the dwelling. **SIGNIFICANCE: Court indirectly refers to concept of due diligence. Failure of authorities to prevent methane explosion from a rubbish dump next to an illegal squatter encampment breached articles.**
44	**Opuz**	Turkey	2009	2, 3, 6, 13, 14	[Judgement 9 June 2009] (App. No. 33401/02) E.Ct.H.R. [not yet received]	The ECtHR raised the due diligence standard in the landmark case Opuz v Turkey (2009) which dealt with the responsibility of the state to protect women from domestic violence. The ECtHR held, for the first time, that gender-based violence is a form of discrimination under the ECHR.the ECtHR framed a crucial question for the case as being "whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against [Ms Opuz's husband] despite the withdrawal of complaints by the victims" (Opuz v Turkey, 2009: §139). The Court went on to observe that the state should have provided "protective measures in the form of effective deterrence" (ibid: §177). **SIGNIFICANCE: In light of the events related to the Opuz case, the ECtHR held that the national authorities did not display due diligence and therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 ECHR.**

45	**Osman**	United Kingdom	1998	2, 6, 8, 13	[Judgement 28 October 1998] App. No. 23452/94 Reports of Judgements and decisions, EHRR 1998-VIII	Mrs. Osman's husband was killed by her son's former teacher. Her son was seriously wounded in the same incident. The case concerned the alleged failure of the authorities to protect the right to life of the first applicant' husband and of the second applicant from the threat posed by an individual, and the lawfulness of restrictions on the applicants' right to access to a court to sue the authorities for damage caused by the said failure. he Court noted that it was not disputed that Article 2 may in welldefined circumstances imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. As to the scope of that obligation the Court considered that, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, any such obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. **SIGNIFICANCE: Again indirectly noting the doctrine of due diligence, the Court emphasised "Having regard to the nature of the right protected by Article 2 … it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge" (§116).**
46	**Osmanoğlu**	Turkey	2008	2, 3, 5, 8, 13, 14	[Judgement of 24 Jan. 2008] (App. No. 48804/99) ECHR	The case involved the torture, disappearance and murder of the appliant's son. Based on the evidence the Court concluded that the state had failed to take the necessary measures to investigate and that the authorities had failed to take reasonable measures, available to them under Turkish criminal law, to prevent a real and immediate risk to the life of the applicant's son. The distress placed upon the applicant constituted inhuman treatment. **SIGNIFICANCE: the Court ruled that the nature of the states' positive obligations regarding the right to life (Article 2) depends on the level of risk. This case reinforced the ECtHR's case law on the duty to prevent.**

47	**Pafitis & Others**	Greece	1998	6	[Judgement 26 February 1998] App. No. 20323/92 ECHR-I 27 EHRR 566	In light of irregularities at the Central Bank of Greece, the Governor of the Bank appointed an administrator in 1984. This administrator decided to issue new shares to increase the capital of the Bank, informing existing shareholders they could option purchase of these new shares until 1986. The applicants were not amongst the shareholders that did so. After a series of problems related to the allocation of the majority of the new shares to one shareholder, the administrator was removed and replaced by another. This new administrator who held elections for the Board of Directors in 1987. The same year, the Greek government enacted a number of laws the effect of which was retrospectively to validate certain decisions relating to the BCG, including all those mentioned above. the general meeting of shareholders decided to increase the BCG's share capital to almost double what it was then (second increase). The BCG's share capital was subsequently increased another four times, each time by sizeable proportions of the former figure. These were challenged at court by the applicant shareholders. The court proceedings incurred an enormous delay and the applicants filed a claim at the ECtHR for violation of Article 6. **SIGNIFICANCE: The Court established the right to seek a review of the lawfulness of a general meeting resolution and related measures affecting applicants' shares falls within the ambit of Article 6. In other words, shareholder complaints in which their property rights or direct shareholder rights have been allegedly affected satisfy the 'victim' requirement because these rights pertain to the applicant person directly.**
48	**Pine Valley Developments Ltd**	Ireland	1991	13, 14, P1-1	[Judgement 29 November 1991] App. No. 12742/87 14 Eur.Ct. H.R. Rep. 319 (1992)	The applicants complained the State's failure to validate retrospectively the outline planning permission or to provide compensation or other remedy for the reduction in the value of their property constituted a violation of P1-1. They also complained of discrimination in the enjoyment of their property rights contrary to Article 14. Finally they claimed that they did not have an effective remedy under Irish law in respect of these complaints as required by Article 13. Prior to the Supreme Court's decision that their outline planning permission was a nullity, the applicants had, in the Court's view, at least a legitimate expectation of being able to carry out the proposed development and this was to be regarded as a component part of the property. **SIGNIFICANCE: Legal persons are entitled to the peaceful enjoyment of their possessions. The element of state 'control of use of property' under ther terms of P1-1 must be proportional to the aims.**

49	**Plattform Ärzte für das Leben**	Austria	1988	9, 10, 11, 13	[Judgement of 21 June 1988] (App. No. 10126/82) (1988) 13 E.H.R.R. 204.	An anti-abortion NGO "Ärzte für das Leben" (Physicians for Life) organised a religious service and a march to the surgery of a doctor who carried out abortions. Counter-demonstrators disrupted the march. At the end of the ceremony, special riot-control units - which had until then been standing by - formed a cordon between the opposing groups. The association lodged a disciplinary complaint against the police for failing to protect the demonstration, which was refused, and later a constitutional complaint which was denied on grounds of lack of jurisdiction. A second demonstration against abortion was held by "Ärzte für das Leben" in 1982. Demonstrators opposing the march gathered outside the cathedral. Policemen formed a cordon around the "Ärzte für das Leben" demonstrators to protect them from direct attack, and later cleared the square to prevent the religious ceremony being disrupted. In view of the Constitutional Court's decision the "Ärzte für das Leben" considered that a second appeal would have served no purpose. **SIGNIFICANCE:The ECtHR emphasised positive obligations to ensure respect of human rights even in relations between individuals in the private sphere extending this from Article 8 to include Article 11. Although the ECtHR did not find a violation of the rights claimed, it emphasised genuine, effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11.**
50	**Preussische Treuhand GmbH & Co. KG a.A.**	Poland	2008	P1-1	[Dec. Admissibility 7 October 2008] App. No. 47550/06 ECHR-IV	A company set up to represent German individuals expelled by Poland after 1945. They claimed to be excluded from the social system. They allege Poland annexed their property without compensation and actied contrary to international law. **SIGNIFICANCE: The Court decides the case is admissible, although the applicant company cannot itself claim to be a victim of the violations alleged. The individual members of that company can assert victim status. It further notes that the company is acting in a representative capacity on their behalf in the Convention proceedings (para. 47).**

51	**Rantsev**	Cyprus and Russia	2010	2, 4, 5	[Judgement of 7 January 2010] (App. No. 25965/04) ECHR	The case Rantsev v Cyprus and Russia deals with the death a Russian immigrant to Cyprus who worked as an 'artiste' in a cabaret. Ms Rantsev started work in March 2001 only to abandon her place of work and lodging three days later leaving a note that she was going back to Russia. The manager took her to the police station to have her declared an illegal immigrant, although the charges were not held. She died due to a fall from a building in unclear circumstances. A separate autopsy carried out in Russia concluded Ms Rantseva had died in strange and unclear circumstances requiring additional investigation; this was forwarded to the Cypriot authorities in the form of a request for mutual legal assistance under treaties in which Cyprus and Russia were parties. There are several published reports referring to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus, and the role of the cabaret industry and 'artiste' visas in facilitating trafficking in Cyprus. **SIGNIFICANCEN: The ECtHR reiterated that as well as deciding on the particular case before it, its judgments served to elucidate, safeguard, and develop the rules instituted by the Convention. It also emphasised its scarce case law on the question of the interpretation and application of Article 4 to trafficking in human beings. It concluded that, in light of the above and the serious nature of the allegations of trafficking in the case, respect for human rights in general required it to continue its examination of the case, notwithstanding the unilateral declaration of the Cypriot Government in which it took responsibility. The Court did not accept the Russian Government's submission that they had no jurisdiction over, and hence no responsibility for, the events to which the application pertained as it found that if trafficking occurred it had started in Russia and that a complaint existed against Russia's failure to investigate properly the events, which occurred on Russian territory.**
52	**Saadi**	Italy	2008	3	(GC) [Judgement 28 February 2008] (App. No. 37201/06) ECHR 179	In this case, under the auspices of national security and international terrorism, the UK and Italy called into question the appropriateness of the ECtHR's existing jurisprudence on the principle of "non-refoulement" (Article 3 ECHR). **SIGNIFICANCE: The ECtHR unanimously reasserted its existing jurisprudence and noted that involvement in terrorism did not affect an individual's absolute rights under Article 3. This case indicates what was referred to by one respondent as a 'new' role for human rights judges to counter illegal or increasingly undemocratic counter-terrorism legislation from the executive.**
53	**Scordini**	Italy	2006	6(1), P1-1	(GC) [Judgement of 29 March 2006] App. no. 36813/97 ECHR 2006-V.	Relying on Article 6 § 1 of the Convention (right to a fair trial within a reasonable time), the applicants complained of the length and the unfairness of the compensation proceedings following the expropriation of their land. They also complained, under Article 1 of Protocol No. 1 (protection of property), of an infringement of their right to peaceful enjoyment of their possessions on account of the time taken to pay them the expropriation compensation and the effect of the entry into force during the proceedings of domestic law. **SIGNIFICANCE: The Court should intervene only where the domestic authorities fail in the task of implementing and enforcing the rights and freedoms of the Convention. When the ECtHR finds a state guilty of violating a human right, it is the state that is responsible for deciding how to remedy the breach.**

54	***Société Colas Est and others***	France	2002	8	[Judgement of 16 April 2002] (App. No. 37971/97) 2002-III Eur. Ct. H.R.	The applicants submitted that the searches and seizures, which had been conducted by the investigating officers without any supervision or restriction, amounted to trespass against their "home". **SIGNIFICANCE: the ECtHR, relying on its own case law, extended the scope of rights to corporations for rights heretofore reserved for physical individual applicants.**
55	**Soering**	UK	1989	3, 6, 13	[Judgement 19 January 1989] App. No. 14038/88 11 Eur. Ct. H.R. (ser. A)	The case concerns the imminent extradition of the applicant from the United Kingdom to the United States of America, where he fears that he will be sentenced to death on a charge of capital murder and subject to the "death row phenomenon". **SIGNIFICANCE: The Court holds that the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights (§140**).
35	**Spörrong and Lönnroth**	Sweden	1982	P1-1	[Judgement 23 Septemer 1982] App. No. 7151/75; 7152/75 5 EHRR 85	The two applications related to the effects of long-term expropriation permits and prohibitions on construction on the Estate of the late Mr. Spörrong and on Mrs. Lönnroth, in their capacity as property owners. The ECtHR has recognised that the right to property is not absolute and that states can in certain legitimate cases limit the right to property. As such, the right to property is regarded as a more flexible right than other human rights. **SIGNIFICANCE: The Court held that it should intervene only where the domestic authorities fail in the task of implementing and enforcing the rights and freedoms of the Convention. When the ECtHR finds a state guilty of violating a human right, it is the state that is responsible for deciding how to remedy the breach.**
56	**Steel and Morris**	UK	2005	6, 10	[Judgement 15 February 2005] (App. No. 68416/01) ECHR-IV	In the case, referred to as the "McLibel case", the ECtHR unanimously voted that the the unavailability of legal aid for defamation meant that the applicants had been denied their rights to a fair trial under Art 6 and the proceedings and their outcome infringed Article 10 ECHR in the libel case opposing the McDonald's Corporation against Helen Steel and David Morris, who had distributed leaflets as part of an anti-McDonald's campaign. **SIGNIFICANCE: the domestic proceedings eading up to this case demonstrates that corporations have the same rights as human beings. The ECtHR judgement balanced the power of the corporation with the lack of resources of the applicants during the domestic proceedings and pointed to the responsibility of the state to level the playing field by providing legal aid.**
57	**Stran Greek refineries & Stratis Andreadi**	Greece	1994	6, P1-1	[Judgement 12 September 1994] App. No. 13427/87 ECHR 319	Company acquired land under military junta. Expropriation under the new democracy. The democratic legislature claimed it was under a duty to eradicate from public life the residual traces of measures taken by the military regime (para.45). The legislature did not respect the balance between the right to property and the public interest (para.74). **SIGNIFICANCE: The Court stated that the rights guaranteed by Article 6 are applicable to all decisions where rights and obligations are at stake: "Article 6(1) applies irrespective of the status of the parties, of the nature of the legislation which governs the matter in which the dispute is to be determined and of the character of the authority which has jurisdiction in the matter; it is enough that the outcome of the proceedings should be decisive for private rights and obligations."**

58	**Sunday Times**	UK	1979	10	[Judgement 26 April 1979] App. No. 6538/74 Series A, no. 30 2 EHRR 245	Distillers marketed a drug, a sedative given to pregnant women. It was discovered that it led to deformities in the fetus, and was subsequently taken off the market. There was a suit against Distillers and they were in the midst of settling. The Sunday Times then decided to publish information on Distiller's actions prior to the public discovery of how harmful the drug was, and in that article, promised another article the next week detailing facts, which would strongly indicate Distiller's negligence. Distiller sought and was granted an injunction against publishing of the article. The Times appealed and won. After a series of appeals, the injunction against publication held. Sunday Times applied the ECtHR for violations of the right to expression. **SIGNIFICANCE: The first case in front of the ECtHR where the applicant was a corporation.**
59	**Swedish Engine Drivers' Union**	Sweden	1976	11, 13, 14	[Judgement 6 February 1976] App. No. 5614/72	The applicant union, an independent trade union, complained that the Swedish National Collective Bargaining Office concluded collective agreements on terms of employment and conditions of work only with the three principal federations of Swedish State employees. It considered this policy led to stagnation and a drop in its own membership. **SIGNIFICANCE: one of the first cases brought before the Court where the applicant was a legal person.**
60	**Tyrer**	UK	1978	1, 3	[Judgement of 25 April 1978] (App. No. 5856/72) Eur. Ct. H.R., (Ser. B) No. 24; [Judgement of 25 April 1978] (App. no. 5856/72) (Ser. A), No. 26, 2 EHRR 1	A school boy in the Isle of Man was sentenced by the juvenile court to "birching" for assaulting another student (supposedly for reporting that they had taken beer into the school, for which he had been caned by the school). The birching took place in the presence of the boy's father and a doctor. The ECtHR held that the judicial birching was 'degrading punishment' contrary to article 3 of the Convention. **SIGNIFICANCE: The Court accepted the Commission's emphasis that the Convention is a "living instrument" (§31), which must be interpreted with consideration of "present day circumstances".**
61	**Vgt Verein gegen Tierfabriken**	Switzerland	2001	10	[Judgement 28 June 2001] App. No. 24699/94 ECHR 2001-VI	The case originates in an application against Switzerland because of the refusal in 1994 by the AG für das Werbefernsehen (Commercial Television Company, now Publisuisse) to broadcast a commercial concerning animal welfare at the request of the Verein gegen Tierfabriken (Association against industrial animal production - VGT). The television commercial was to be considered as a response to the advertisements of the meat industry, and ended with the words "eat less meat, for the sake of your health, the animals and the environment". The Commercial Television Company refused to broadcast the commercial, however, because it considered it to be a message with a clear political character, and Swiss broadcasting law prohibits political advertisements on radio and television. The ECtHR developed am approach with regard to the right of access to broadcast 'non-commercial" television commercials. The judgement can be interpreted as affording arguments for a 'right to an antenna', ie a right of access to a particular media controlled by a third person. **SIGNIFICANCE: The European Court has stated that the Convention applies between individuals in some situations, although it is explicitly reluctant to elaborate a set of principles for its applicability in the private sphere.**

62	**Von Hannover**	Germany	2004	8	[Judgement 24 June 2004] (App. No. 59320/00) ECHR 2003-VI	The judges referred to the case concerning the protection of the private life of Princess Caroline of Monaco from the publication of photos taken of her during her daily life by the paparazzi and not during official public events. The ECtHR decided that everyone, including celebrities, had a "legitimate expectation" that his or her private life would be protected. They ruled that there had been a violation of Article 8. **SIGNIFICANCE: Despite the margin of appreciation the Court considered that the German courts had not struck a fair balance between the competing interests of the protection of private life and her role as a public figure.**
63	**Woś**	Poland	2005	6	[Dec. 1 March 2005] App. No. 22860/02, ECHR 2005-IV	The applicant had been subjected to forced labour during the Second World War on the territory of occupied Poland. Between February 1941 and January 1945 he was forced to work on German farms and defences, most of which time he was under the age of 16. In 1993 he applied to the Polish-German Reconciliation Foundation for compensation from funds contributed by the Government of the Federal Republic of Germany under an agreement with Poland in 1991. He was paid a certain amount for the period of forced labour, but for the months after his 16th birthday the compensation was reduced according to the eligibility rules which required that claimants should establish that they had been "deported" by the German authorities during the time in question. The applicant appealed but was unsuccessful. The domestic courts found that the Foundation was not a public authority and that, as entitlement to receive a benefit from the Foundation did not fall within the scope of civil law, claims concerning entitlement could not be raised before a civil court. **SIGNIFICANCE: The Court considered that if a state chooses a form of delegation in which some of its powers are exercised by another body that cannot be decisive for the question of state responsibility ratione personae. In the Court's view, the exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law. The Convention does not exclude the transfer of competences under an international agreement to a body operating under private law provided that Convention rights continue to be secured. The responsibility of the respondent State thus continues even after such a transfer (§72 emphasis added).**
64	**X and Y**	Netherlands	1985	6, 8	[Judgement (merits) of 26 March 1985] App. No. 8978/80 Ser. A No. 91	Mr X applied on behalf of himself and his 18 year-old daughter Miss Y, who had disabilities; the case was referred to the Court which found that the impossibility of instituting criminal proceedings against the perpetrator of sexual assault on a minor with a mental disability breached Miss Y's article 8 rights. **SIGNIFICANCE: Establishes the doctrine of positive obligations and hints at Drittwirkung.**

65	**Young, James and Webster**	United Kingdom	1981	11	[Judgement of 13 August 1981] App. No. 7601/76, 7806/77 Eur. Ct. H.R. Series A no.44	The applicant employees Young, James and Webster were employed by British Rail. During the time of their employment British legislation changed to allow for the termination of unionized employees who were not Members of the union in any British workplace where the union and employer negotiated a "Closed Shop" collective agreement. Employment with British Rail required that employees be unionized by one of either, National Union of Railwaymen ("NUR"), the Transport Salaried Staffs' Association ("TSSA") or the Associated Society of Locomotive Engineers and Firemen ("ASLEF"). The applicants, for a variety of reasons did not wish to become Members of one of the unions. They subsequently failed to satisfy this condition, and the change in legislation gave the union the power to have them terminated from their jobs. **SIGNIFICANCE: The responsibility of the state was engaged by the violation of a right by a private actor towards another private actor because legislation was lacking to prevent the violation. The Court held "[…] if a violation of one of [the] rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the state for that violation is engaged" (§29). In other words, the Court acknowledged that certain articles of the European Convention could apply to purely individual or 'private' relations.**

1.2. European Commission on Human Rights

#	Case Name	Respondent State	Year	Convention Articles	Case Reference	Brief Summary and Relevance for Corporate Accountability
1	**Agrotexim Hellas S.A. and Other**	Greece	1994	6, 13, P1-1	[Dec. Admissibility] (App no 14807/89) 72 DR 148 (ECommHR).	A Greek company had its land expropriated for the "city's social, cultural and commercial needs" (§13). The company had filed for bankruptcy and was being liquidated. The government alleged that the company no longer existed and therefore could not access the Court as a petitioner. In view of this, the shareholders demanded their right to step in as applicants. The Commission initially granted the shareholders their request, but the Court reversed the decision (1995). **SIGNIFICANCE: The Commission pierced the corporate veil to identify the shareholder's as the company which allowed them to make the claim for the violations of their human rights and not that of the company's. The Commission pierced the corporate veil in favour of the shareholders.**
2	**B. Company and others**	Netherlands	1993	8, P1-1	[Dec.] (App. No. 20062/92) Eur. Comm. H.R.	The applicants were eight Dutch private companies with limited liability.On 30 January 1987 the applicant companies requested the Minister of Economic Affairs to be exempted from their obligation to publish their balance sheets and profit and loss accounts. The applicant companies argued that their clients could by means of these published figures find out the profits made by them with reasonable exactitude. In these circumstances the margin of contract negotiations will diminish. The applicant companies feared that as a result thereof the continuation of their activities would be endangered, possibly leading to a liquidation of one or more of the companies.Their request was rejected. The applicant companies invoked Articles 8 ECHR and P1-1 to file an objection, which was rejected by the Minister. The companies applied to the Commission. **SIGNIFICANCE: The Commission noted the question in this context regarding whether legal persons such as the present applicants can be regarded as capable of having a private life within the meaning of Art. 8 ECHR, it did not find it necessary to determine this issue. Despite the Commission finding no violation of P1-1, the ECommHR "identified" shareholders' rights when the shareholder is the *direct* victim of a violation his/her rights.**

3	**Bramelid & Malmström**	Sweden	1982	6, P1-1	[Dec. Admissibility 12 October 1982] (App nos 8588/79, 8589/79) E.Comm.H.R. 29 DR 64	The case concerned two private individuals who owned shares in a large well-known department store in Stockholm, Sweden. In 1977 a new Company Act was passed, which had the effect that any company which owned more than 90% of the shares and voting rights in another company was entitled to compel the remaining minority of shareholders to sell their shares to it, at the same price as would have been paid if it had purchased the shares through a public offer, or otherwise at a price fixed by arbitrators. The minority shareholders complained to the Commission about the application of the new law to them. They argued that they had had to surrender their shares to the majority shareholders at less than market value. (The price had been fixed by arbitrators). However, it observed that although there was no express reference to 'expropriation in Article 1, the travaux prépartoires confirm this is what was meant by the Contracting Parties. Given the nature of the complaint it decided against the application of this Article because it concerned relations between private individuals. **SIGNIFICANCE: The Commission decided shares are 'possessions' under the meaning of property of P1-1 since they have a clear economic value. The Commission did however note that in all the Member states the legislation governing private law relations between individuals includes rules which determine the effects of these legal relations with respect to property and, in some cases, compel a person to surrender a possession to another; therefore, this type of rule, which they noted is essential in a liberal democracy, cannot in principle be contrary to P1-1. This case is significant because it makes clear that P1-1 is capable of applying to legislation which affects legal relations between private individuals.**
4	**Gundmudsson**	Iceland	1959	14, P1-1	(App. No. 511/59) Yearbook III (1960) Eur.Comm.H.R., 394	The ECommHR declared inadmissible the petition of an Icelandic citizen and of an Icelandic company who alleged that a certain Icelandic Tax Law and the decision of the Supreme Court of Iceland applying it were in violation of P1-1, as well as the general principles of international law related to property to which the provision refers. **SIGNIFICANCE: In the Gudmundsson case the second applicant, the company in which the first applicant had a majority shareholding, was, it seems, also a legal person without its right to be a party to the proceedings before the Commission having been challenged.**
5	**Lenzing AG**	UK	1998	6, P1-1	[Dec. Admissibility 9 September 1998] App. No. 38817/97 E. Comm. H.R.	The applicant company's patent was revoked for not being sufficiently inventive. The company sought judicial review from the European Patent Organisation; this was dismissed along with the request for ectification of the register, together with the pending patent proceedings. The United Kingdom alleged it had already signed the EPO and therefore had to honour its engagment. The Commission considered the case inadmissible. **SIGNIFICANCE: The Commission observed if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty. However, the transfer of powers to an international organisation is compatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection. (This becomes relevant with IGOs such as NATO particularly in cases like Bankovic.)**

6	**Retimag S.A.**	Federal Republic of Germany	1961	P1-1	(App. No. 712/60) Eur.Comm.H.R. 4 Yearbook of the European Convention on Human Rights, 384	Retimag was a joint stock company registered under Swiss law in 1955. It owned property in Germany which included the local offices of the Communist Party in Mannheim and a printing press and publishing firm which worked partly for their account; also property in Munich allegedly intended to house the offices of a Communist newspaper. In October 1959, the penal chamber of the Federal Court of Justice at Karlsruhe ordered the confiscation of these two properties without compensation, on the ground that Retimag was a cover to conceal an organisation whose objects were to presereve the property of the outlawed Communist Party and to continue communist subversive activities. The company lodged an application with the ECommHR claiming that this decision violated P1-1 on the ground that it was made in circumstances not provided for by law and contraty to the general principles of international law. The Commission declared the application inadmissible. **SIGNIFICANCE: Tthe objection that the company did not have the right of petition under Article 25 ECHR was not raised. Thus *a fortiori* through its silence the Commission included corporations as rights-holders.**
7	**Smith Kline and French Lab**	Netherlands	1990	P1-1	[Dec. Admissibility 4 October 1990] App. No. 12633/87 E. Comm. H.R. 67 DR 70	The ECHR's first intellectual property decision, in which it stated that under Dutch law the holder of a patent is referred to as the owner of the patent and patents are considered subject to the provisions of the Patent Act, to be personal property which is transferable and assignable. **SIGNIFICANCE: This case opens the watershed for intellectual property establishing that 'possessions' under the meaning of P1-1 includes patents.**
8	**Tyrer**	UK	1976	3	Comm. Report 14/12/76, Eur. Comm. H.R.	A school boy in the Isle of Man was sentenced by the juvenile court to "birching" for assaulting another student (supposedly for reporting that they had taken beer into the school, for which he had been caned by the school). The birching took place in the presence of the boy's father and a doctor.. **SIGNIFICANCE: The Commissione emphasised that the Convention is a "living instrument" that must evolve to reflect "present day circumstances".**

2.1. Inter-American Court of Human Rights

#	Case Name	Respondent State	Year	Convention Articles	Case Reference	Brief Summary and Relevance for Corporate Accountability
1	**19 Tradesmen or Merchants**	Colombia	2004	1, 4, 5, 7, 8, 25	[Dec. Admissibility] (App no 14807/89) 72 DR 148[Judgement: Merits, Reparations and Cost 3 July 2004] Inter-Am. Ct HR (Ser. C) No. 10 (ECommHR).	In 1987, 19 tradesmen were allegedly detained, disappeared and, subsequently executed in the municipality of Puerto Boyacá, in the Magdalena Medio region. These acts were allegedly planned jointly by the paramilitary group operating in the zone and by members of the Army's Fifth Brigade. The Commission had considered violations of Articles 4, 7 on the victims, and Article 5 as regards the next of kin of the victims; and that Articles 8, 25 and 1 were violated with regard to both the alleged victims and their next of kin. **SIGNIFICANCE: Regarding due diligence, the Court estbalished an investigation must fulfil certain criteria in order to meet the requirements of the obligation to investigate. The obligation requires that the investigation be effective, genuine, immediate, impartial, serious, and assumed by the State as its own legal duty.**
2	**Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of**	Peru	2009	1(1), 21, 25	[Judgement of 1 July 2009] Inter-Am. Ct. H.R. (Ser. C) No. 198.	In this case, Peru challenged the jurisdiction of the IACtHR with regards to ESC rights for the first time in its history. Peru claimed that the Court lacked competence in matters concerning the alleged violation to the right to social security, since it is neither in the Convention, nor is it one of the two justiciable rights of PSS. **SIGNIFICANCE:** The Court asserted its competence but did so by relying solely on the Convention. It completely ignored the PSS, thus furthermarginalising the PSS.
3	**Báldeon Gárcia**	Peru	2006	5, 8, 25	[Judgement: Merits, Rreparations and Costs 6 April 2006] Inter-Am. Ct HR (Ser. C) No. 147	Mr Báldeon Gárcia was a farmer living with his family in the Department of Ayacucho in Peru. The 25 of September 1990, during a counterinsurgency military operation in that same departmentmilitary personelle arrived in the community of the applicant and detained 3 people, one of which was the mr Báldeon Gárcia. The victim was taken to the Church of Pacchahuallhua, where allegedly he was physically mistreated and tortured and consequently it is alleged died. **SIGNIFICANCE: Court establishes the need to investigate and state is held responsible if that is not done. For the IACHR, "if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights… This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible."**
4	**Bámaca Velásquez**	Guatemala	2000	1, 4, 5, 7, 8, 25	(Merits) [25 Nov. 2000] Inter-Am. C.H.R. (Ser. C), No. 70	This case concerns the torture, murder and disappearance of Efraín Bámaca Velásquez, a Mayan comandante of the Guatemalan National Revolutionary Unity (URNG), by the Guatemalan military during the civil war. **SIGNIFICANCE:the Court declared that Guatemala failed to comply with its obligation to prevent Bámaca's torture and sanction those involved as required under several articles of the Inter-American Convention to Prevent and Punish Torture. The Court ordered an investigation to determine which persons were responsible for the human rights violations mentioned in the ruling, impose sanctions, and publicly announce the results of this investigation. This landmark case expanded the scope of reparations for cases of forced disappearance in the inter-American system.**

5	**Baena Ricardo and others (270 Workers)**	Panama	2001	1, 2, 8, 9, 10, 15, 16 25, 30, 50	[Judgement 2 February 2001] Inter-Am. Ct. HR Ser. C, No. 72	Comité Panameño por los Derechos Humanos denounced the State of Panama before the Inter-American Commission on Human Rights (IACHR) for having arbitrarily laid off 270 public officials and union leaders who had taken part in several rallies against the administration's policies to defend their labor rights. The lay-offs had followed an accusation made by the Government against the same individuals based on their participation in the demonstrations and on their alleged collaboration with a military uprising. Upon laying off the employees, a law passed after the facts had occurred was invoked, under which any actions started by the workers to challenge their dismissal had to be lodged with courts dealing with administrative matters –instead of labor courts, as required by the applicable law. None of the actions filed with the Supreme Court of Panama were upheld. As the action filed with the IACHR failed, the IACHR submitted the case to the IACtHR. The Court also stated that minimum due process guarantees set forth in article 8.2 must be observed in the course of an administrative procedure, as well as in any other procedure leading to a decision that may affect the rights of persons. Consequently, the Court decided the State had to reassign the workers to their previous positions and pay them the missed salaries. **SIGNIFICANCE: This case is a valuable precedent, because it is the first time that the Inter-American Court has heard violations of labor rights. The case shows that due judicial protection, as well as unrestricted respect for due legal process guarantees at the domestic level, constitute an essential source of protection ensuring the effectiveness of the right to work (ESC right).**

6	**Blake**	Guatemala	1996	4, 7, 8, 11, 13, 22, 25, 50, 51	[Preliminary Objections 2 July 1996] Inter-Am. Ct. H.R. (ser. C) No. 36	In March 1985, two U.S. citizens were assassinated in Guatemala at the hands of the Civilian Defense Patrols. The two victims were a journalist and photographer taking a trip to a small village; the purpose of the trip was to obtain information to write an article about one of the sectors of the Guatemalan guerrillas. That day they were intercepted by the Civilian Self-Defense Patrol of El Llano, a paramilitary organization formed by peasants and indigenous members that carried out patrol work, defence and control of guerrilla movement. Years later it was determined that members of this patrol moved the Americans to an unpopulated place to assassinate them and incinerate their bodies to avoid their discovery.The Guatemalan government, hardened by the various penalties that it had received in the case of the disappearances of political activists by members of its secret police, came up with a strategy to evade its responsibility. According to the Guatemalan government, the IACHR lacked the authority to assess the responsibility for the disappearance of the American citizens because the facts on which the demand was based constituted an "a common criminal act, underwhich are classified homicide and murder, and not a case of the violation of human rights, as are the right to freedom and life." But the IACHR decided the paramilitaries acted as agents of state since they received arms, financing, training and sometimes direct orders from the Guatemalan military. **SIGNIFICANCE: The IACtHR inaugurated a new era in its case law in which the study of the nature of the violated norm became the central argument for the purposes of affirming the Drittwirkung of the rights listed in the Convention. Separate Opinion of Judge A.A. Cançado Trindade, §26, and §27-30 discussing questions of erga omnes application of human rights. Trinidade issued a vote based on the Blake v. Guatemala case that would become the basis for achieving the applicability of fundamental rights in private relations. He argued it was necessary to demystify the existence of eternal and unchanging truths, as these were in reality products of their time, that is, legal solutions formulated in a certain stage in the evolution of law, in agreement with the prevailing ideas of the age. One of these was that international treaties are norms that limit only the actions of states. He argued the treaties on human rights establish objective obligations and represent standards of behaviour aimed at the creation of an international public order. In his opinion, the absolute nature of the autonomy of will cannot be invoked against the existence jus cogens norms such as the fundamental rights listed in the ACHR. These are erga omnes obligations of protection and, as a result, are the minimum expression of all legal relations of the national ordinances, including those that occur between non-state actors.**
7	**Caballero Delgado and Sanata Case**	Colombia	1994	1(1), 2(1), 4(1), 5, 7, 8(1), 25	Preliminary Objections, Inter-Am. Ct.H.R. (Ser. C), No. 17 (1994).	This case concerned the 1989 disappearances of Isidro Caballero Delgado and Maria del Carmen Santana. Both were prominent members of trade unions and the leftist movement M-19. There relatives searched for them but no judicial remedy proved to be effective. The government challenged the Commission's rejection to initiate proceedings for a "friendly settlement". The Commission had justified this rejection by emphasising the nature of the case, stating that disappearances, by their very nature, cannot be subject to friendly settlements. **SIGNIFICANCE: Following a challenge to the IACommHR's discretionary power by the government of Colombia, the IACtHR ruled that the IACommHR must ask the parties if they have an interest in pursuing a friendly settlement. As a consequence of Caballero Delgado and Santana, the discretion to use friendly settlement procedures is now in the hands of the parties.**

9	**Cantoral Benavides**	Peru	2001	1(1), 2,5, 7, 8, 25	[3 Dec. 2001] Inter-Am. C.H.R., (ser. C), No. 88, reparations	Luis Alberto Cantoral-Benavides was arbitrarily detained and tortured by agents of the National Anti-Terrorism Bureau (hereinafter "DINCOTE") of the Peruvian National Police. He was later tried in a Military Tribunal for the crime of Treason. The Supreme Council of Military Justice acquitted him and signed for his release however due to a mistake in the execution of the judgement his twin brother was released instead.The applicant was later released but retried in a civil court for the crime of terrorism. **SIGNIFICANCE: Peru complied fully with the judgement.**
10	**Cantos**	Argentina	2002	1, 8, 25, 28	[Judgemen: Merits, Reparations and Cost 28 November 2002] Inter-Am. Ct. H.R. (Ser. C) No. 96; Judgement 7 Sept. 2001] Inter. Am. Ct. H. R. (Ser. C) No. 97	Cantos was the owner of an important business group in the province of Santiago del Estero in Argentina. In 1972, the Revenue Department of the Province searched the administrative offices of his buisnesses based on a purported violation of the Stamp Act. In these searches, all the accounting documentation, company books and records, vouchers and receipts attesting to payments made by those companies to third parties and suppliers, as well as numerous shares and securities were seized, without being inventoried.The firms began to incur financial losses as a result of the searches and seizures, as they were unable to operate without their business records and papers and had no way of mounting a defense against legal actions brought by third parties demanding payment of bills that had already been settled. To defend his interests, Mr. Cantos began a series of legal actions.Because of the lawsuits he had filed, Mr. Cantos was subjected to “systematic persecution and harassment by State agents.” He was acquitted in every case. Mr Cantos allegedly came to an agreement to pay the filing fees with the Province although the state denies this. **SIGNIFICANCE: Article 1.1. imposes a double obligation upon the state: to respect the rights and freedoms but it also guarantee the free and full exercise of the rights enshrined in the Convention to everyone in its jurisdiction. ACHR only guarantees to human persons. Cantos is business owner and shareholder. ACHR pierces corporate veil to provide rights to shareholders in a way giving effect to legal persons.**

11	**Cesti Hurtado**	Peru	1999	1, 2, 3, 6, 7, 8, 11, 17, 21, 25, 25, 51	[Interpretation of the Judgement 29 September 1999.] Inter-Am.C.H.R., Order of 19 (ser. C) No. 62	In December 1996, the military Courts included Mr. Gustavo Cesti Hurtado, a Peruvian army captain in retirement for the past 13 years, together with other officers, in a complaint presented by the Army High Command for the crime of fraud and others, to the detriment of the Peruvian State-Army, which resulted in a warrant for his arrest and a ban from leaving the country and the freezing of his property. Mr. Cesti, being a civilian, worked solely in private practice although he maintained a working relationship with the army as an insurance agent for the army with an insurance company. Mr. Cesti was arrested in February 1997 and held at the Simón Bolívar barracks; he was denied contact with the outside world and wass prevented from receiving food or medicines from his wife. The military tribunal did not meet minimal requirements of due process. According to the Commission's submission, as a result of the violation of these rights, the applicant was included in an action under the military justice system, in the course of which he was arrested, deprived of his liberty and sentenced, despite the existence of a final decision in a habeas corpus action ordering that the alleged victim should be separated from the proceedings under the military justice system and that his freedom should be respected. The Court states a deprivation of liberty occurs when a government refuses to abide by a court ruling ordering the release of an individual. The Court considered only complaints regarding his personal entity not his business (See also Cantos v Argentina). **SIGNIFICANCE: Redress extends beyond compensation alone. The Court may also order the State to take actions or to desist from particular acts. These developments exalt Inter-American human rights law to supranational stature.Peru released Mr Cesti at a later stage of the proceedings. This is an example of state compliance to a certain extent. The next level of State compliance with Court orders not yet commonly observed in the Inter-American system is due diligence. The Court, in almost every case, orders the State to investigate, prosecute and punish the individuals responsible for the human rights violations. These orders seldom find fulfillment.**
12	**Chaparro-Álvarez and Lapo-Íñiguez**	Ecuador	2007	1(1), 2, 5, 7, 8, 21	[21 Nov. 2007] Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 170	Whether Ecuadorian officials violated the victims' rights protected by Articles 7, 5, 8, and 21, in connection with Articles 1(1) and 2 of the American Convention on Human Rights when they arrested them, detained them on remand, and seized their property. **SIGNIFICANCE: The right to property of investors and company ownersby way of shares was found to be violated by the state by a seizure of property in the context of a criminal investigation of drug trafficking:**
13	**Communidad de Paz de San José de Apartadó**	Colombia	2002	1	[Order of the Court 18 June 2002] Inter-Am. Ct. H.R. (Ser. E) (2002).	The community was attacked by both paramilitary groups and members of the XVII Brigade of the National Army, who targeted members of the Community whom they believe are aiding or participating in the country's internal armed conflict. **SIGNIFICANCE: Cançado Trindade suggested the state's obligation erga omnes to protect all persons subject to its jurisdiction and refernces the recognition of third-party effect (Drittwirkung). The resolution adopted by the Court in Communidad de Paz de San José de Apartadó established the legal development of the erga omnes obligations of protection had to assume a greater importance because of the diversification of the sources of human rights violations. In the opinion of the Court, for the general obligation of respect for fundamental rights listed in Article 1.1 of the Convention to be effective, "it is imposed not only in relation to the power of the state, but also in the relations between private individuals (clandestine groups, paramilitary groups or other groups made up of private individuals)."**

14	**Community Mayagna (Sumo) Awas Tigni**	Nicaragua	2001	1, 2, 21, 25	[Judgement: merits, reparations, costs 31 August 2001] Inter-Am. Ct. H.R. (Ser. C) No. 70; [Judgement of 31 August 2001] Inter. Am. Ct. H. R., Case No. 11.577, Series C, No. 79.; [Judgement of 23 June 2005] Inter. Am. Ct. H. R., Case No. 11.577, Series C, No. 127.	The land the tribe occupies is rich in timber and other natural resources. Since the 1950s, the tribe has requested that Nicaragua demarcate the lands belonging to the country's indigenous populations. Once the lands are defined and registered, the tribes would have title over the property and its natural resources. To date, Nicaragua has failed to demarcate these lands. In 1996, Nicaragua granted a 30-year timber-cutting license to the TNC, Sol de Caribe S.A. (SOLCARSA), permitting the exploitation of nearly 62,000 hectares (nearly 160,000 acres) of tropical forest belonging to the Awas Tingni community. The indigenous tribe was not consulted prior to the negotiation of the timber contract and vehemently opposed the intervention in their land. The Awas Tingni community initiated legal proceedings, first by amparo. The Supreme Court rejected the writ without explanation in 1997. The government proceeded to violate a number of domestic laws in trying to retroactively secure the deed. The Court declared concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled [as Awas Tingni lands].” Ultimately, Nicaragua’s failure to demarcate the communal lands of the Awas Tingni, failure to adopt effective measures securing the rights of the community to its ancestral lands and resources, and failure to engage in any meaningful consultation with the community violated the ACHR. **SIGNIFICANCE: This was a breakthrough case because it was the first time the Court found in favour of an indigenous community. In reaching this conclusion, the Court accepted the Awas Tingni’s identification and elaboration of a land tenure system distinct from formal state law. The Court issued a judgement in favour of the Awas community against the state's concession of natural resources to a corporation. The Court noted that the right to property acknowledged by the ACHR protected the indigenous people's property rights originated in indigenous tradition and, therefore, the State had no right to grant concessions to third parties in their land. Consequently, the Court decided that the State had to adopt the necessary measures to create an effective mechanism for demarcation and titling of the indigenous communities' territory, in accordance with their customary law, values, customs and mores. The Court also decided that, until such mechanism was created, the State had to refrain from any acts that might affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the indigenous community live and carry out their activities.**
15	**Durand and Ugarte**	Peru	2000	1, 2, 4, 7, 8, 25, 27	[Judgment 16 August 2000] Inter-Am. Ct. H.R. (Ser. C) No. 68	Mr Durand and Mr Ugarte were detained without judicial hearing in 1986 under suspicion of having committed terrorist acts. Mr Ugarte was forced to give up his right to a lawyer. The two applicants were transferred to a prison, where later that year a riot broke out and the prisoners took control of the prison. The President declared a state of emergency in the Province; the prison fell under the jurisdiction of the military. The military decided to bulldoze one of the pavilions of the prison, leading to the death and injury of many prisoners. Mr Durand's and Ugarte's bodies were never identified and they did not appear on the list of defunct. Mrs Ugarte demanded the case be reopened. Both were acquitted, but it served to no avail since they had been disappeared. The Court emphasized: "[t]he general duty of Article 2 of the American Convention implies the adoption of measures in two ways. On the one hand, derogation of rules and practices of any kind that imply the violation of guarantees in the Convention. On the other hand, the issuance of rules and the development of practices leading to an effective enforcement of said guarantees." **SIGNIFICANCE: The Court highlights both positive and negative obligations of the state. This also confirmed the judgement of Velasquez-Rodriguez where it the state duty to provide an effective remedy was established.**

16	**Godínez Cruz**	Honduras	1989	1, 4, 5, 7	[Judgement 20 January 1989] Inter-Am. Ct. H.R. (Ser. C) No. 8	The petition filed with the Commission alleged Mr GodÌnez Cruz, a schoolteacher, disappeared in 1982 after leaving his house in the morning while in route to his job. The petition states an eyewitness saw a man in a military uniform and two persons in civilian clothes arrest a person who looked like GodÌnez. They placed him and his motorcycle in a double-cabin vehicle without license plates. According to some neighbors, his house had been under surveillance, presumably by government agents, for some days before his disappearance. This case occurred within the context of the honduran Dirty War that engulfed Central America during the 1980s. A number of individuals considered to be subversive by the regime were the victims of kidnappings and extrajudicial executions. **SIGNIFICANCE: The case follows the same conclusions as Velasquez-Rodgriguez emphasising the positive obligations of the state. Article 1.1. imposes a double obligation upon state: to respect rights & freedoms and to guarantee their free and full exercise to everyone in its jurisdiction.**
17	**Haitian and Haitian-Origin Dominican Persons in the Dominican Republic; (Personas) haitianas y dominicanas de origen haitiano**	Dominican Republic	2000	1, 25	Judgement: merits, reparations, costs 14 September 2000] Inter-Am. Ct. H.R. (Ser. C) No. 44	This case is related to the mass expulsion and deportation of two groups: Haitians with valid working permits and those without; and Dominicans of Haitian origin residing on Dominican territory with documents and undocumented. The Dominican forces allegedly used excessive force to ensure obedience, including sexual abuse of women and the psychological abuse of children. **SIGNFICANCE: Judge Conçado Trinidade directly addresses the responsibility of non-state actors: "It is, moreover, urgent to conceptually develop the law regarding the international responsibility, in a way to also include, at par with the state, the responsibility of non-state actors" (2000: §25).**
18	**Indigenous People of Kankuamo regarding Colombia**	Colombia	2000	1(1), 25(1)	[20 Nov. 2000] Order for Provisional Measures, Inter-Am. Ct. H.R. Series E. no. 1.	The Commission submitted a request to the Court seeking an Order of Provisional Measures against Colombia to protect the lives and the physical and cultural identity of the members of the Kankuamo indigenous people and their special relationship with their ancestral territory. The Kankuamo indigenous people's geographic location exposes its members to constant acts of violence and threats on the part of paramilitary groups operating in the area. Governors and the leaders of indigenous village governments have been the victims of threats, assaults and assassinations. A number of families have had to move to protect their lives; food supplies are being cut off and indigenous youth run the risk of being impressed into the service of these armed groups; several massacres have taken place. **SIGNIFICANCE: the Commission and Court called upon Colombia to fulfill its positive obligations to protect and guarantee the rights of the Kankuamo indigenous people. The IACtHR does not require the existence of a risk of torture or of inhuman, cruel or degrading treatments before granting Provisional Measures, unlike the ECtHR. This flexibility has allowed the IACtHR to grant Provisional Measures, for example in several cases involving Colombia, not only to protect the lives and physical integrity of the populations but also to prevent their forced displacement, or if they had already been displaced, to organise their return whenever possible**

19	**Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights**	Colombia	1989	64(1)	Advisory Opinion OC-10/89 [July 14, 1989] Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989).	Colombia requested an Advisory Opinion on the interpretation of Article 64 ACHR, in relation to the American Declaration of the Rights and Duties of Man. The government wanted clarification on the juridical status of the American Declaration. **SIGNIFICANCE: the Court stated that although the American Declaration is not a treaty it does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above.**
20	**Ituango Massacres**	Colombia	2006	1(1) 4, 5, 6, 7, 11(2) 19, 21, 22(1), 25	[1 July 2006] Inter. Am. Ct. H.R. Series C, No. 148	These massacres occurred in 1996 and 1997 by paramilitary groups in a farming area that was of strategic importance to the guerillas. The perpetrators were the United Self Defense Forces of Colombia (AUC). State troops had been permanently stationed in Ituango since 1996. These massacres consisted of selective extrajudicial executions of civilians with the acquiesance and support of the military. The government did not deny involvement of its own agents in the massacres and partially acknowledged its responsibility. The paramilitaries terrorised the populations in order to force the farmers from the area.

21	**Ivcher-Bronstein**	Peru	2001	1, 8, 13, 20, 21, 25	[Judgement: merits, reparations, costs 6 February 2001] Inter-Am. Ct.H.R (Ser. C) No. 84	Mr. Bronstein, a Peruvian citizen and entrepreneur, was chairman of the board of directors and majority shareholder of "Frecuencia Latina-Canal 2" television. He acquired Peruvian nationality by virtue of a supreme decree, as required under the existing law; under Peruvian law only nationals can a radio or television channel in Peru. In early 1997, Television Channel 2 devoted several programs reports of alleged irregularities within the government. In May 1997, the Armed Forces Joint Command released an Official Communique, which mentioned Baruch Ivcher and underscores the fact that he was a naturalized Peruvian citizen. It accused Ivcher of using the media to wage a campaign to slander the Armed Forces by misrepresenting situations, twisting facts and broadcasting "obviously malicious" commentaries. At the end of May 1997, a Supreme Decree was published, which approved the regulations governing a Nationality Act of cancelled naturalised citizenship "For acts that could be detrimental to the national security and the interests of the State." According to the petitioners, these Regulations Governing the Nationality Law gave the President of the Republic the authority to revoke an individual's nationality, in flagrant violation of Peruvian Constitution. **SIGNIFICANCE: Regarding admissibility ratione personae the Commission had referenced the distinction made in Barcelona Traction concerning legal persons and shareholders. The Ivcher Judgment thus establishes that a shareholder's interest is a compensable property right. Further, in the event of a seizure of property in connection with a questionable criminal proceeding, or a popular occupation with government support or acquiescence, the Court would look to beyond formalities and appearances to the "real situation." If the purported reason for the taking were arguably or obviously pretextual, the Court has shown itself willing to find that there is no legitimate public purpose for a taking. In regard to the potential remedy, two points are significant. First, the Court awarded both compensation and restitution. However, in that case the property had been transferred to another private investor. Suppose a State seized property and then simply kept it. In that event, so long as the Inter-American Court found a proper public purpose for the taking, then despite violations of due process or legal form, restitution might be denied, and the remedy limited to compensation.**

22	**Jiguamiandó and Curbaradó Communities regarding Colombia**	Colombia	2003	1(1)	[6 March 2003] Order for Provisional Measures, Inter-Am. Ct. H.R. Series E, No. 1.	The case concerns death threats, property destruction, looting, illegal detention, harassment, assassinations and disappearances against the members of the Communities. The community has a collective land title legalised by the state in 2001. This Act provides a generic regulatory framework to protect the right to property and the cultural identity of the communities of African descent of the Pacific watershed. For several years, the members of the Communities have been the victims of acts of harassment and violence designed to cause forced displacement from their territory. In February 1997, as part of a military operation against the Colombian Armed Revolutionary Forces (FARC), the Army's Seventeenth Brigade and armed civilians belonging to the United Self Defense Forces of Colombia (AUC), caused the displacement of inhabitants of the Bajo Atrato region to the jungle, where they hid for a year and a half. Since 2001, the company URAPALMA S.A. has initiated cultivation of the oil palm on approximately 1,500 hectares of the collective land of these communities, with the help of "the perimetric and concentric armed protection of the Army's Seventeenth Brigade and armed civilians in their factories and seed banks." The state promised to adopt urgent measures but to no avail.**SIGNIFICANCE:Tthe IACtHR does not require the existence of a risk of torture or of inhuman, cruel or degrading treatments before granting Provisional Measures, unlike the ECtHR. This flexibility has allowed the IACtHR to grant Provisional Measures, for example in several cases involving Colombia, not only to protect the lives and physical integrity of the populations but also to prevent their forced displacement, or if they had already been displaced, to organise their return whenever possible**
23	**Juridical Condition and Rights of the Undocument-ed Migrants,**	Mexico	2003	1(1), 2, 24	[17 September 2003] Inter-Am. Ct. HR Advisory Opinion OC-18 (Ser. A) No. 18	Mexico requested the interpretation of several articles of various international treaties and declarations. **SIGNIFICANCE: the Court enumerated a non-exclusive list of rights to which unauthorised workers should be equally entitled. It reiterated the positive obligations of states to ensure these rights to all people on its territory regardless of citizenship.**

24	**Kichwa Peoples of the Sarayaku community and its members / Matter of the Indigenous Community of the Sarayaku People**	Ecuador	2004	1, 2, 3, 4, 5, 7, 8, 12 ,13, 16, 19, 21, 22, 23, 24, 25, 26, + American Declaration XI, XIII	[Judgment 6 July 2004] Inter-Am. Ct. H. R. Also: [Opinion judge Cançado Trindade 17 June 2005]; [6 July 2004] Inter-Am.Ct.H.R. Provisional Measures (2004); Judgement of 27 June 2012] Fondo y reparaciones (Only in Spanish) Inter-Am. Ct. H. R. Series C No. 245.	The petitioners allege the State is responsible for a series of acts and omissions harming the Kichwa peoples of Sarayaku because it has allowed an oil company to carry out activities on the ancestral lands of the Sarayaku community without its consent, it has persecuted community leaders, and has denied judicial protection and legal due process to the Sarayaku community. In addition, the State has allowed third parties to systematically violate the rights of the Sarayaku community.. Unlike in similar cases, where violations were committed by paramilitaries, this case referred to the violations of human rights by a corporation, Compañía General de Combustible de Argentina. **SIGNIFICANCE: the Court insists that the Member States are to be pressured to heed "the wide reach of the erga omnes obligation of protection (...), characterized by the jus cogens, from which they emanate, as norms of objective character that cover all the receivers of the legal norms, as well as the members of the organs of the state as well as private individuals." Judge Cançado Trindade expands on the Commission's earlier statement noting, "'states have the obligation erga omnes to protect all persons under their jurisdiction; an obligation that involves not only the relationship with the state but also with the actions of third parties'. In [his] point of view, this involves any third party, including individuals that constitute businesses or commercial enterprises" (§14). This is an active recognition of the role of corporations in human rights violation and a reminder of the state's role in reigning in corporate power. It is a clarification loaded with potential for the Court to interpret the Convention and begin the task of developing the law towards more effective human rights protections against corporate violations.**
25	**(Kichwa) Pueblo indígena de Sarayaku**	Ecuador	2005		[17 June 2005], Opinion Judge Cançado Trindade.	It is worth noting, the Court has referred to 'third parties' 'private individuals', 'private persons' or 'private groups', but has yet to refer directly to corporations in its judgements. This omission is, however, mitigated by Judge Cançado Trindade's Concurring Opinion on the Kichwa Peoples of the Sarayaku community and its members / Matter of the Indigenous Community of the Sarayaku People v. Ecuador (2005; hereafter Kichwa Peoples of Sarayaku). Unlike in similar cases, where the violations were committed by paramilitaries, this case referred to the violations of human rights by a corporation. Cançado Trindade reasoned, "'states have the obligation erga omnes to protect all persons under their jurisdiction; an obligation that involves not only the relationship with the state but also with the actions of third parties'. In [his] point of view, this involves any third party, including individuals that constitute businesses or commercial enterprises" (§14, emphasis added, translated from Spanish by the author).
26	**Loayza Tamayo**	Peru	1997	1(1), 5, 7, 8, 25	[17 September 1997] (Merits), Inter-Am. C.H.R., 84, (Ser. c), No. 33	This case involves a professor who was acquitted on charges of treason by a military court and then retried and convicted by a civil court.The applicant claims the conviction was based on unreliable testimony and constitutes double jeopardy, and alleges that she suffered torture and rape by police officials. The Court during this session issued provisional measures that were requested by the Commission. The state has generally complied with the Court's judgement.

27	**Mapiripán Massacre**	Colombia	2005	1, 4, 5, 7, 8, 25	[Judgement: Merits, reparations and costs 15 September 2005] Inter-Am. Ct. H.R. (Ser. C) No. 134	This case relates to the massacre of civilians by the United Self-Defense Forces of Colombia (AUC), an outlawed right-wing Colombian paramilitary group backed by elements of the Colombian government; there have also been allegations that the Chiquita corporation also backed the paramilitaries.In proceedings before the Inter-American Court of Human Rights, the government of Colombia admitted that members of its military forces also played a role in the massacre, through omission. A local judge had implored the police and military to intervene but they stayed away. General Jaime Uscátegui allegedly ordered local troops under his command to stay away from the area in which the murders were taking place until the paramilitaries finished the massacre and left. SIGNIFICANCE: This is a landmark case wherein the Court established the responsibility of the state for the actions of a non-state actor. It denied the government's attempt to dresponsibilise itself under the rules of General International Law. It emphasised important considerations of erga omnes obligations (under Articles 1 and 2) enforcing the positive obligations of states and responsibility for omissions of the state to protect, guarantee and ensure human rights.
28	**Mariela Morales Caro et al. (La Rochela Massacre)**	Columbia	2007	1, 2, 4, 8, 13, 25	[Judgement 11 May 2007] Inter-Am. Ct. H.R. Serie C No. 163	January 1989, 15 judiciary officials were investigating human rights violations including the forced disappearance of 19 merchants (e.g. 19 Tradesmen or Merchants v Colombia). Suddenly, they were approached by several dozen armed men who presented themselves as members of the FARC and proceeded to disarm and hold them for the next two and a half hours. After their hands were tied behind their backs, they were put in two SUV's and driven to a place called La Rochela. There, one after another and in a state of utter defenselessness and vulnerability, they were executed in cold blood. It was later discovered that the murderers belonged to a paramilitary group created under the protection of the framework legalizing the creation of self-defense groups and was sponsored by large landowners, politicians, and ranchers from the area (along with having the active participation and close cooperation of the State security forces and especially the senior military commanders in the area). SIGNIFICANCE: State responsibility for actions of non-state actors: “it is sufficient to prove public officials have provided support or shown tolerance ... their omissions enabled commission of violations, or the state failed to comply with its duties” (§68). The relationship between the state and non-state actors regarding the responsibility of human rights is here made clear. The state, under the Inter-American system fails to fulfil its duty where it has not taken the necessary precautions to protect human rights, including violations between private persons.
29	**Marino López et al.**	Columbia	2007	1, 2, 4, 5, 19, 21, 22, 25	Case 499-04, Report No. 86/06, Inter-Am. Ct. H. R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007)	The applicants alleged the responsibility of the Colombian government in incidents known as “Operation Genesis” that took place between February 24 and 27, 1997, in the municipality of Riosucio, Chocó department, and that resulted in the murder of Mr. Marino López and the forced displacement of the members of 22 communities of African descent living along the banks of the River Cacarica. **SIGNIFICANCE: the Court found a pattern of abuse. The IACtHR concluded that the acts of the Colombian government with paramilitary groups “constitute a crime against humanity, since they are part of a pattern of massive, systematic, and widespread violence and were carried out in the context of the armed conflict” (IACommHR, 2011). Identifying a pattern of human rights violations was an innovative approach to human rights law to address violations by private parties, which, while maintaining the primary responsibility of the state, formally acknowledges and requires remedy for the violations of the non-state entity.**

30	**Maritza Urritia**	Guatemala	2003	1(), 5, 7, 8, 13, 25	[Judgement of 27 November 2003] Inter. Am. Ct. H.R. (Ser. C) No. 103 (2003)	The applicant was kidnapped and tortured by the Guatemalan police. **SIGNIFICANCE: the Court emphasised the existence of positive obligations for third parties stemming from Article 7 ACHR. It stated that Article 7 establishes "obligations of a positive nature that impose specific requirements on both State agents and third parties who act with the tolerance and agreement of the former and who are responsible for carrying out detentions" (§41).**
31	**Mayagna (Sumo) Awas Tingni Community**	Nicaragua	2000; 2001	1, 2, 21, 25	Preliminary objections, [1 February 2000] Inter-Am. Ct. HR (Ser. C) No. 66; [31 August 2001] (Merits, Reparation and Cost) Inter-Am. Ct. HR (Ser. C) No. 70	The government had granted a logging concession to private interests in Mayagna traditional territory without consulting with the people, and despite their complaints and requests to demarcate their land. The Court held that they had a right as indigenous people to their collective land. **SIGNIFICANCE: it was the first such ruling by a court with legally binding authority to rule that a government had violated the rights of indigenous people in their collective land. The IACtHR found that Nicaragua had a positive obligation and an obligation under due diligence to prevent corporate actors engaged in state-corporate enterprises with the state from infringing the land rights of the Awas Tigni.**
32	**Palamara-Iribarne**	Chile	2005	1(1), 2, 13, 21	[Judgement 22 November 2005] Inter-Am.Ct.H.R. (Ser. C) No. 135	Palamara-Iribarne, a retired Chilean Navy officer, was a civil servant hired as contractor by the Chilean Navy in the city of Punta Arenas. In March 1993, he published the book 'Ética y Servicios de Inteligencia' ('Ethics and Intelligence Services'), in which he addressed issues related to military intelligence and the need to bring it into line with certain ethical standards. Because of the controversy generated by the publication of the book, copies of the book were seized, as well as the originals, a diskette containing the full text, and the galleys of the publication, and the complete text of the book in question was erased from Palamara-Iribarne's personal hard disk. In November 2005, the Court established that Chile was guilty of having violated Mr. Palamara's right to the freedom of expression, private property, judicial guarantees, judicial protection, and to personal freedom. It ordered the government to return the materials he used to write the book and the edition that was taken. **SIGNIFICANCE: In this case the Court reiterated its position regarding non-material or moral damages.This decision has infomred debates on investment arbitration regarding moral damages of expropriation of property whether tangible or intangible.**
33	**Pueblo Bello Massacre**	Colombia	2006	1(1), 5, 8, 25	[31 January 2006] (Merits, Reparations and Costs) Inter-Am. Ct. H. R. Series C No. 140, 200	On 14 January 1990, 60 army-backed paramilitaries travelling in two lorries entered the community of Pueblo Bello. The IACtHR established that the paramilitaries belonged to the "Los Tangueros" paramilitary group under the command of Fidel Antonio Castaño Gil, the owner of the Santa Monica Farm. The villagers were terrorised before forty-three people were selected by the paramilitaries and taken to the Santa Monica Farm, in another province, passing unhindered through at least two military checkpoints (Pueblo Massacre, 2002). At the farm, the victims were torture, killed, and disappeared. The disappearances were reportedly carried out in retaliation for the theft of 43 head of cattle belonging to paramilitary leader Fidel Castaño by guerrilla forces.**SIGNIFICANCE: The Court held that the state can be held responsible for the actions of non-state entities with regards to human rights.**

34	**Salvador-Chiriboga**	Ecuador	2008	1(1), 2, 8, 21, 24, 25, 29, 63(1)	[Judgement 6 May 2002] Inter-Am.Ct.H.R.(Ser. C) No. 179	From 1974-1977 the Salvador-Chiriboga siblings inherited a plot of land designated with the number 108 on the location "Batan Merizalde" from their father. In 1991 the Municipal Council of Quito expedited the expropriation of the land. Following that municipal decision, the Salvador-Chiriboga siblings filed several lawsuits and appeals before the state contesting the expropriation and claiming just compensation in accordance with Ecuadorian law and the ACHR. The IACommHR decided that in response to expropriation the Government issued a Ministerial Decree annuling said declaration of public utility in 1997. However, later in the same year the Ministry of Government annulled the aforementioned anulment. The siblings initiated several lawsuits. However, in 1996 a judgement fell in favour of the state, authorizing the immediate possession of the property by the state. **SIGNIFICANCE: The Court defined its definition of the right to property which included intangible property (§55).**
35	**Santo-Domingo Massacre**	Columbia	2003		[6 March 2003] (Admissibility) Case 289/2002, Report No. 25/03, Inter-Am. Ct. H.R. OEA/Ser.L/V/II.118 Doc. 70 rev. 2 (2003).	The case has to do with the dropping of a cluster bomb on the village of Santo Domingo carried out on 13 December 1998 by the Colombian Air Force, killing 17 civilians. After the initial cluster bomb exploded, the military continued bombing civilians who were trying to help the wounded and those trying to escape the village. Following these events, the entire population of Santo Domingo moved away; in 1999 some returned to rebuild their homes. There is proof that this massacre was done at the request of, and with financing from, the US corporation Occidental Petroleum (Beisinghoff, 2009: 165). The Colombian government receives direct funding from Occidental in return for protecting the pipeline. A second company, AirScan, Inc., was also involved in the attack,, working in its capacity as a security contractor and agent of Occidental,it supplied the coordinates for the bombing.
36	**Saramaka People**	Suriname	2007	1(1) 2, 4, 5, 11	[28 November 2007] (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R. (Ser. C) No. 172	The idea of consent refers to a three-pronged test outlined by the Inter-American Court regarding violations of property rights of indigenous peoples that was set out in Saramaka People v Suriname (2007). Diego Alcala (2009) summarises the test: Firstly, the state must ensure the effective participation of the indigenous community regarding any development plan or project. The Court stressed that the state has a duty to consult the indigenous people during the early stages of any proposed plan, respecting their customs and traditions. In certain cases, the state is not only required to consult, but to obtain the “free, prior and informed consent” of the affected group (Saramaka People, 2007: §134). Secondly, the state must guarantee that the community will receive a reasonable benefit from such plan and rejected compensation packages that were similar to those awarded in expropriations cases. The difference is that indigenous people must be compensated not only for the deprivation of land, but also for the loss of regular “use and enjoyment of their traditional lands and of those natural resources necessary for their survival” (ibid: §139). The compensation is not only for the individual, but also for the community’s relationship with the land. The third and final part of the three-pronged test requires the state to issue independent environmental and social impact assessment plans before placing any restriction regarding any proposed restrictions of the Saramaka people’s property rights, particularly regarding proposed development or investment plans in or affecting Saramaka territory.

37	**Sawhoyamaxa**	Paraguay	2006	1, 2, 8, 21, 25	[Judgment 29 March 2006] Inter-Am. Ct. H. R. (Ser. C) No. 146	Similiary to the Yakye Axa Case, the land claimed by the indigenous community corresponded to land that they had traditionally occupied and formed a part of their traditional home, but was now in private control and was being utilized by its owners, who refused to negotiate the sale of the lands, hindering its expropriation by the State. The petitioners argue that more than 11 years have gone by since the procedures were first set in motion to recover part of the ancestral lands of the Sawhoyamaxa Indigenous Community, yet thet initiative was not fruitful, even though Paraguayan legislation recognizes the right of the indigenous peoples to develop their ways of life in their own habitat, and that the State has not protected the lands claimed. In addition, they argue that the members of the Community are living in sub-human conditions; as a result, several people, including minors, have died due to lack of adequate food and lack of medical care. The sale of land was issued to Kansol S.A. y Roswell Company S.A. **SIGNIFICANCE: The Court recognised a recognised the right of restitution belonging to the members of indigenous communities for the loss of traditional lands taken by the State, even where those lands have been transferred to third persons. This case is one of a series of cases the Court and Commission set in motion to condemn the State for violations of human rights of indigenous communities, particularly regarding land concessions to third parties - namely corporations.**
38	**Velásquez Rodríguez**	Honduras	1988	4, 5, 7,	[Judgment 29 July 1988] Inter-Am.Ct.H.R. (Ser. C) No. 4	The Inter-American Commission on Human Rights presented evidence to the IACHR on behalf of the applicant (the victim's father), suggesting the Honduran government conducted, or at least tolerated, a pattern or practice of forced disappearance. Such evidence included testimony from victims of arbitrary detentions during the relevant period, interviews with family members whose relatives were disappeared, and general country reports produced by independent, non-governmental organizations. From this evidence, the IACHR concluded a pattern or practice of forced disappearance existed in Honduras. After concluding a pattern or practice existed and was "supported or tolerated" by the government, the IACHR stated that if the applicant could link the disappearance of a particular individual to that practice, then the "disappearance of [a] particular individual [could] be proved through circumstantial or indirect evidence or by logical inference."). Manfredo Velásquez Rodríguez was disappearanced by the Honduran secret police aided by civilians acting under their orders, the IACtHR stated the breach of the American Convention on Human Rights, "under international law a state is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law (§170)." **SIGNIFICANCE: The value of the IACHR's holding is significant because it lowers the burden of proof for an individual to establish that a forced disappearance occurred. This was a landmark case regarding the responsibility of the state for the actions of third parties (Drittwirkung). It encompasses positive obligations, third-party effect and due diligence and has become the bedrock of the Court's jurisprudence. The Court detailed actions or ommissions "[…] Initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) 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 violation or to respond to it […]" (§172).**

39	**Villagrán Morales et al. (The Street Children Case)**	Guatemala	1999	1, 4, 5, 7, 8, 25	(merits) [19 Nov. 1999] Inter-Am. Ct. H. R. (Ser.C) No. 63	The applicants alleged the kidnapping, torture and death of four minors and the murder of a fifth one in 1990, in the city of Guatemala, by members of the security forces, and the State's failure to provide adequate judicial protection to the victims' families. The Court stated that the right to life comprises not only the right of all persons to not being deprived of life arbitrarily, but also the right to having access to the conditions needed to lead a dignified life.
40	**Yakye Axa indigenous community of the Enxet-Lengua People**	Paraguay	2005	1, 2, 8, 21, 25	[Judgment of June 17, 2005] Inter-Am. Ct. H.R. (Ser. C) No. 125.	The members of the community decided to initiate the process to claim the lands in Loma Verde that they considered as their traditional home, in which were found immovable property of the companies "Florida Agricultural Corporation," "Livestock Capital Group Inc." and "Agricultural Development Inc." These companies expressed that they were not interested in negotiating the sale of the land, requesting the application of expropriation submitted by community be rejected, on the basis that the immovable property was being reasonably utilized. These reasons, in the final instance, justified the state's denial of expropriating the requested lands. The Commission referred it to the IACtHR. The Court considered Paraguay had failed to adopt adequate measures to ensure its domestic law guaranteed the community's effective use and enjoyment of their traditional land, thus threatening the free development and transmission of its culture and traditional practices. The Court also concluded Paraguay had violated the rights to property and court protection, as well as the right to life, since it had prevented the community from access to its traditional means of livelihood. Furthermore, the Court understood that the State had failed to adopt necessary positive measures to ensure the community lived under dignified conditions during the period they had to do without their land. While they stayed on the side of a road across from the land they claimed, the community lacked adequate access to food, health services and education. Sixteen persons died due to the said living conditions. The Court concluded the State had the obligation to adopt positive measures towards a dignified life, particularly when high risk, vulnerable groups were at stake, whose protection became a priority. The Court ordered the State to demarcate the traditional land, to submit it to the community at no cost, and to provide basic goods and services necessary for the community to survive until they recovered their land. **SIGNIFICANCE: Art. 21 right to property of indigenous communities is established although it specifies that the right is not a collective community right but an individual right based on community membership. It reaffirmed its interpretation of right to life (incl. health, education and food standards set forth in the Protocol of San Salvador) although this remains contentious vis-à-vis the political acceptance of the Protocol by the OAS members.**

2.2. Inter-American Commission on Human Rights

#	Case Name	Respondent State	Year	Convention Articles	Case Reference	Brief Summary and Relevance for Corporate Accountability
1	**105 Shareholders of the Bank of Lima**	Peru	1991	8, 21, 24, 25	(22 February 1991) I.A.Comm.H.R. Report no. 10/9110 Annual Report of the Inter-American Commission on Human Rights 1990-1991.	The complaint was filed on behalf of on behalf of 105 named petitioners, all individual shareholders of the Banco de Lima, against the Government of Peru. The case arises out of President Alan Garcia's announced plan to expropriate "all of the shares of the Peruvian Banks remaining in private hands". The Commission concluded that the Convention protects individual rights and/or individual property owners. This case was thus deemed inadmissible on the grounds that the claimants alleged the collective property rights of the Banco de Lima. In other words, the Commission found the claim to collective rights to be outside the jurisdiction of the ACHR because the Inter-American human rights system is based on individual rights.
2	**ABC Color newspaper (Resolution 9250)**	Paraguay	1984	American Declaration: IV, XXVI	Case 9250, Paraguay, May 17, 1984; OAS/Ser. L/V/II.63, doc. 10, 24 September 1984. Original: Spanish	In March 1984, ABC Color's editor was arrested for refusing to reveal the name of the reporter whose article quoted some antigovernment statements made by MOPOCO party leader. A few days later, the Minister of the Interior ordered publication of the daily ABC Color to be suspended for an indefinite period starting that very day. The application was made in the name of the newspaper. **SIGNIFICANCE: The Commission has interpreted the domination 'person' in the American Declaration to apply to all persons, physical and legal. This opened the gates to other corporations demanding protection of human rights under the American Declaration at the Inter-American Commission.**
3	**Bendeck-Cohdinsa (Zacarías E. Bendeck)**	Honduras	1999	8, 21, 25	Informe No. 106/99, Inter-Am. C.H.R., OEA/Ser.L/V/II. 106 Doc. 3 rev. en 311 (1999)	Zacarías E. Bendeck filed a petition against acts involving contracts between the Compañía Hondureña de Inversiones, S.A. [Honduran Investment Company, Inc.] (COHDINSA), a corporation in which he was the majority stockholder, and the Corporación Hondureña de Desarrollo Forestal [Honduran Forestry Development Corporation] (COHDEFOR). In that case the domestic legal remedies of Honduras were presented and exhausted by COHDINSA, which had a different legal status than its stockholders, and not by Mr. Bendeck, a private citizen. Mr. Bendeck was a different taxpayer than COHDINSA and was only responsible for his social security. Furthermore, the contract with COHDEFOR was entered into by the COHDINSA corporation and not by Mr. Bendeck, an individual. In this case the Commission found, based on the precedents, that it lacked competence ratione personae because Mr. Bendeck was not a legitimate party. **SIGNIFICANCE: The Commission concluded it competencia ratione personae to consider the petition, since it was submitted by "a person," Mr. Bendeck, and since "person" refers to "every human being," according to Article 1(2) of the Convention. However, the Commission concludes that Mr. Bendeck's claims to be the presumed victim of the allegations render the petition inadmissible because the remedies provided by domestic law were not exhausted by him, either on his own behalf or as a shareholder, but rather by COHDINSA, a corporate entity.**

4	**Bernard-Merens and Family**	Argentina	1999	8, 35	[27 September 1999] Report No. 103/99	The petitioners claim to have been denied justice in a lengthy legal case concerning the amount of compensation due for the expropriation by the government of the Formosa province of real property owned by the company GINU S.C.A. The petitioners are a family group comprising all the company's shareholders. **SIGNIFICANCE: The Commission denied the admissiblity in compliance with Articles 1(2) and 47(c) of the Convention and Article 31 of its Regulations, on grounds that it lacked active competence ratione personae to hear this petition because the remedies sought under the domestic laws of Argentina were filed and exhausted by the company GINU S.C.A., which is a legal entity different than the petitioners.**
5	**Carvallo-Quintana**	Argentina	2001	1, 8, 21, 25	[14 June 2001] Inter. Am. Comm. H.R. Report no. 67/01 Case 11.859 OEA/Ser./L/V/II.114 Doc. 5 rev. at 86	The petitioners contended the state bears responsibility for a series of illegal and arbitrary acts and omissions in prejudice of Mr. Carvallo Quintana's interests as the majority shareholder of the Regional Bank of North Argentina, S.A. ("BARNA"). They indicate that, prior to what they characterize as the effective confiscation of his property, Mr. Carvallo Quintana owned approximately 30% of the shares of the BARNA in his individual capacity, and 70% through Ganadera El Dorado S.A., another company owned by him. Argentina invoked the reservation it entered upon ratification of the Convention to the effect that claims concerning State economic policy shall not be subject to review by international tribunals. The State contented the action filed was a misplaced effort to litigate the claims of the BARNA, but the Commission maintained the complaint was expressly filed on his behalf as an individual shareholder thus giving him access to the human rights system. **SIGNIFICANCE: Notwithstanding the human individual-centred application of the Convention by the Commission in these cases, they nonetheless demonstrate a business-friendly perspective by upholding the corporate veil and recognising the distinctiveness of the legal personality. In Cavallo Quintana v Argentina the Commission reinforced that shareholders cannot claim to be victims without demonstrating that their rights have been directly affected. It further outlined the existence of the protection of rights of shareholders under the Convention as direct rights granted under domestic law and transposed to the international realm.**
6	**Ituango Massacres**	Colombia	2000		[2 Oct. 2000] Case 12.050, Report No. 57/00, I.A.Comm.H.R., OEA/Ser.L/V/II. 111 Doc. 20 rev. at 198	Refer to IACtHR above

7	**Jehovah Witnesses**	Argentina	1978	1, 5, 7, 21, 25	[18 November 1978] Inter-Am. Comm. H.R. Case No. 2137 OEA/ser. L/V/II.47, doc. 13, rev. 1	Under the military junta in Argentina, the Jehova's Witnesses were illegalised under a law passed by the president. The Commission examined their petition, filed under the American Declaration. The Commission found that the Argentinean state violated several rights under the Declaration, (Art.5) and the right of association (Art. 21), as against the Jehovah Witnesses as a group. The decision makes no reference to individuals, and, only refers to "members of the Jehovah Witnesses group" when discussing the rights to life and personal security as well as to equal opportunity in education. **SIGNIFICANCE: The Commission's interpretation give rise to questions about the notion of personhood under the Declaration and the Convention, since it effectively interpreted the former to include corporate claims for protection. Thus there are two regimes of claims for 'persons' in the Inter-American system: 1) under the Declaration wherein nongovernmental entities (juridical persons) also have protection, and 2) under the Convention, which only provides protection for violations of the rights of human beings.**
8	**Kichwa Peoples of the Sarayaku Community and its Members**	Ecuador	2004		Ecuador [Admissibility 13 October 2004] Case 167/03, Report No. 62/04, I.A.Comm.H.R., OEA/Ser.L/V/II. 122 Doc. 5 rev. 1 (2004).	Refer to IACtHR above
9	**Mary & Carrie Dann**	USA	2002	American Declaration: II, III, VI, XIV, XVIII, XXIII	Case 11.140, Report No. 75/02, Inter-Am. C.omm. H.R., Doc. 5 rev. 1 at 860	According to the petition, their land and the land of the Dann band, is part of the ancestral territory of the Western Shoshone people and the Danns and other members of the Western Shoshone are in current possession and actual use of these lands. The Petitioners also contended that the State has interfered with the Danns' use and occupation of their ancestral lands by purporting to have appropriated the lands as federal property through an unfair procedure before the Indian Claims Commission, by physically removing and threatening to remove the Danns' livestock from the lands, and by permitting or acquiescing in gold prospecting activities within Western Shoshone traditional territory. the Commission concluded that the State has failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands. The complaint challenged US legal doctrine that the federal govenrment can extinguish Native American land titles without due process and compensation. **SIGNIFICANCE: The Commission decided in favour of the petitioners stating the USA had violated their international human rights by not providing due process of law. Indigenous peoples may assert a right to property to protect their traditional lands and resources from exploitation and environmental degradation. The Commission called onthe USA to take the measures aimed at restoring, protecting, and preserving the rights of indigenous peoples to their ancestral territories, on the basis that respect for the collective rights of property and possession of indigenous people to the ancestral lands and territories constitutes an obligation of OAS member states, and that the failure to fulfill this obligation engages the international responsibility of the states.**

10	**Mayagna (Sumo) Awas Tigni Community**	Nicaragua	1998	1, 2, 21, 25	[3 March 1998] Inter-Am. Comm. HR Report 27/98	The land the tribe occupies is rich in timber and other natural resources. Since the 1950s, the tribe has requested that Nicaragua demarcate the lands belonging to the country's indigenous populations. Once the lands are defined and registered, the tribes would have title over the property and its natural resources. To date, Nicaragua has failed to demarcate these lands. In 1996, Nicaragua granted a 30-year timber-cutting license to the TNC, Sol de Caribe S.A. (SOLCARSA), permitting the exploitation of nearly 62,000 hectares (nearly 160,000 acres) of tropical forest belonging to the Awas Tingni community. The indigenous tribe was not consulted prior to the negotiation of the timber contract and vehemently opposed the intervention in their land. The Awas Tingni community initiated legal proceedings, first by amparo. The Supreme Court rejected the writ without explanation in 1997. The government proceeded to violate a number of domestic laws in trying to retroactively secure the deed. **SIGNIFICANCE: Commission specifically targeted the violation of human rights by the company SOLCARSA in the destruction of indigenous lands. Establishes right to property for the indigenous people but NOT as a collective, only individual. This is a landmark case in the Inter-American System because it is the first case brought before the Court concerning the rights of an indigenous population. This case illustrates the fact that states actively participate in constructing the elusive legal character of multinational corporate authority .**
11	**Mayas Indigenous Community of the Toledo District**	Belize	2004	American Declaration: I, II, III, IV, VI, XI, XVIII, XX, XXIII	Case 12.053, Report No. 40/04, Inter-Am. Comm.H.R., OEA/Ser.L/V/II. 122 Doc. 5 rev. 1 at 727	The petitioners claimed the state had violated their rights under the American Declaration in respect of lands traditionally used and occupied by the Maya people, by granting logging and oil concessions in and otherwise failing to adequately protect those lands, failing to recognize and secure the territorial rights of the Maya people in those lands, and failing to afford the Maya people judicial protection of their rights and interests in the lands due to delays in court proceedings instituted by them. According to the Petitioners, the State's contraventions have impacted negatively on the natural environment upon which the Maya people depend for subsistence, have jeopardized the Maya people and their culture, and threaten to cause further damage in the future. **SIGNFICANCE: The Commission notes the horizontal effect / Drittwirkung(see §140). Citing the Mayagna Awas Tigni case (IACtHR, 21 ACHR), the Commission notes In evaluating the Petitioners' complaint, it considered the right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the State, affect the existence, value, use or enjoyment of that property without due consideration of and informed consultations with those having rights in the property.**
12	**MEVOPAL**	Chile	1999	8, 21, 24	[11 March 1999] Inter. Am. Comm. H.R., Report. No. 39/99, Annual Report of the Inter-American Commission on Human Rights 1998	The petitioner alleges that MEVOPAL, S.A., a construction company, entered into three construction contracts with the Provincial Housing Institute in the Province of Buenos Aires. The Province breached these contracts in various respects (land not delivered, constant modification of projects, failure to pay for project certification, etc.). The petitioner also states that this breach of contract caused it to lose its working capital and that it survives only as a juridical person but is not in operation. **SIGNIFICANCE: In the system of individual petitions, the Commission has active competence when "any person or group of persons or any nongovernmental entity legally recognized in one or more member states of the Organization" presents a denunciation or complaint pursuant to Article 44. In this petition, Mevopal, S.A. presented itself to the Commission as a private juridical person, legally established and with legal capacity to act in the State of Argentina. The Commission considers that "private juridical persons" may be assimilated to the notion of "non-governmental entity legally recognized" by the State of Argentina. Consequently, the Commission held itself competent to hear a petition presented by Mevopal, S.A.**

13	**Pueblo Massacre (José del Carmen Álvarez Blanco Et Al.)**	Colombia	2002		[9 October 2002) I.A.Comm.H.R. Report No 41/02, Admissibility, Petition 11.478	Refer to IACtHR above
14	**Report of Citizen Security and Human Rights**	N/A	2009	N/A	[31 Dec. 2009] I.A.Comm.H.R. OEA/Ser.L/V/II. Doc. 57.	The duty to ensure obliges states "to prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation" (Godínez-Cruz v Honduras, 1989: §175; Velásquez-Rodríguez v Honduras, 1988: §166). The IACommHR has also commented on the duty to prevent noting that "the obligation to protect is the duty to prevent third parties from interfering with, hindering or barring access to the resources that are the object of that right" (Report on Citizen Security and Human Rights, 2009: IV§35).
15	**Tabacalera Boquerón S.A.**	Paraguay	1997	8, 10, 16, 21, 24	Petition, Report No. 47/97, Inter-Am. Comm.H.R., OEA/Ser.L/V/II. 95 Doc. 7 rev. at 225	This petition concerned the registered trademarking of a cigarette under the name "Ritz Boquerón". The Ritz Hotel Limited, an English company, registered their brandname "Ritz" for certain hotel goods and merchandise and requested the inclusion of the brandname "RITZ" for articles classified in class 34 (unprocessed or manufactured tobacco, smoking related articles, matches, etc.), and although they sold cigarettes with the "RITZ" brandname as souvenirs, they were never involved in the production of cigarettes since the registration of the brandname on July 27, 1988. The owner of the brandname, Ritz Hotel Limited, sold and transferred said brandname to Souza Cruz S.A, headquartered in Rio de Janeiro, Brazil, for a nominal value of US$ 10.00. The Brazilian company Souza Cruz S.A. registered the brandname in Paraguay on September 24, 1993. The petitioners point out that said registration was invalidated due to serious irregularities. **SIGNIFICANCE: The Commission found it was unable to consider the case because it lacked jurisdiction ratione personae. The Commission did not admit the petition because it was not the shareholders claiming human rights violations but the company itself.**

16	**Third Report on the Human Rights Situation in Colombia 1999 (U'wa Community**	Colombia	1999	1, 21, 25 American Declaration: XXIII	[Third Report on the Human Rights Situation in Colombia 26 February 1999] Chapter X, OEA/Ser.L/V/II. 102, Doc. 9 rev. 1, Original: English	In April 1992, Occidental Petroleum (Oxy) signed a contract with the Colombian government for oil exploration on the U'wa's traditional territory. Three years later the U'wa discovered that they were not consulted prior to occupying their reservation. The U'wa-Occidental fight began in 1995, when the 5,000 member Indian community sued Oxy for not consulting it before obtaining government permission to conduct preliminary tests in the area. The U'Wa threatened to committ mass suicide if the company proceeded with the project. The Ombudsman filed a protection action against the Colombian Ministry of Environment and Sociedad Occidental de Colombia Inc. on behalf of the U'wa People, seeking revocation of an oil development license granted to the said company affecting traditional indigenous land. At the same time, the U'wa people denounced the State of Colombia before the Inter-American Commission of Human Rights (IACHR) alleging the court-ordered consultation had not been adequately conducted and the necessary measures to protect their personal, cultural, economic and environmental integrity had not been taken. The petitioners requested the IACHR to adopt precautionary measures to prevent the oil project from being developed in indigenous land, because the U'wa people consider its whole territory, including the subsoil, to be sacred. **SIGNIFICANCE: The intervention of the IACHR led to the initiation of a friendly settlement process. In the context of this process, the State of Colombia had to design an adequate prior consultation procedure ensuring adequate protection of indigenous interests.**
17	**Yanomami**	Brazil	1985	American Declaration: I, II, III, XI, XII, XVII, XXIII	Case No. 7615, Inter-Am. Comm. H. R. 24 OEA/Ser L/V/II 66 Doc 10 rev 1	The complainants alleged that the degradation arose from the Brazilian government permission to private companies to exploit natural resources on Yanomami lands, and the construction of the Trans-Amazonian highway, the incursion of disease and outsiders into Yanomami territory, and the displacement of Yanomami people (a minority and indigenous group in Brazil). In giving its decision, the Commission stated that the Brazilian government approved development in the Amazonian region caused various life and culture threatening harms to the Yanomami population, including their displacement, the break-up of social organisation, introduction of prostitution and disease and destruction of encampments. **SIGNIFICANCE:This is one of the first reports in which the IACHR outlined the doctrine on the right of indigenous peoples to receive special protection aimed at enabling the preservation of their cultural identity. The IACHR also acknowledged their lack of title over their ancestral land as a key factor behind their situation of vulnerability. This moreover highlighted the relationship between the state and corporations given generous land concessions of indigenous lands for industrial activities.**

3. Other Jurisdictions

#	Case Name	Parties	Year	Case Reference	Brief Summary and Relevance for Corporate Accountability
1	**Advisory Opinion on the Reparations for Injuries Suffered in the Service of the United Nations**	Reparation for injuries suffered in the service of the United Nations - Advisory Opinion	1949	Advisory Opinion of ICJ of 11 April 1949 No. 49/12	The question brought before the ICJ was whether the UN, as an organisation could bring an international claim against a state for responsibility where one of its agents suffered injury in the performance of his duties in view of obtaining reparation to both the UN and to the victim or persons entitled through the victim. **SIGNIFICANCE: This case was crucial in expanding the notion of legal subjectivity in internaitonal law. It estbalished the existence of other types of international legal personality other than statehood.**
2	**Aguinda**	Texaco Inc.	2001	142 F.Supp.2d 534 (S.D.N.Y. 2001)	Aguinda v. Texaco Inc. (2001): A coalition of indigenous tribes and communities sued Chevron Texaco for the ecological damage due to oil exploitation in Ecuador has created on lands used for bathing, drinking, and fishing, including water pollution, soil contamination, deforestation and cultural upheaval. There has also been a reported increase in cancer within the communities. The case started in 1993 in the United States under ATCA, but was dismissed based on ratione loci grounds. It resumed in Ecuador in 2003. The Ecuadorian Courts found in favour of the indigenous tribes and communities in February 2011.
3	**Bano et al.**	Union Carbide Corp.	2001	273 F.3d 120 (2d Cir. 2001)	Bano et al. v. Union Carbide Corp., et al. (2001): On 3 December 1984, a pesticide plant belonging to Union Carbide in Bhopal, India leaked methyl isocynate gas and other chemicals creating a dense toxic cloud over the region and killing thousands of people immediately, but killing thousands more in the aftermath of the disaster. The plant was inadequately maintained by Union Carbide and was additionally poorly monitored by the Indian authorities. A number of factors exacerbated the calamitous effects of the disaster including a lack of information about the identity and toxicity of the gas at the plant, safety measures that malfunctioned and the location of the plant. A complaint was filed under the Alien Torts Claims Act (ATCA) in New York (2d Cir 2001) but was dismissed in 2008 on the basis of a prior settlement of claims in India.
4	**Barcelona Traction, Light & Power Co. Ltd**	Belgium v Spain	1970	Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase, International Court of Justice (ICJ), 5 February 1970	Barcelona Traction was a corporation that controlled light and power utilities in Spain and was incorporated in Toronto, (Canada). In 1948, there was an adjudication in bankruptcy in Spain of Barcelona Traction. Its object was to seek reparation for damage alleged by Belgium to have been sustained by Belgian nationals, shareholders in the company. The Belgian Government, contended that after the First World War Barcelona Traction share capital came to be very largely held by alleged Belgian nationals, but the Spanish Government, maintained that the Belgian nationality of the shareholders was not proven. Belgium's claim is rejected. The Belgian government lacked the standing to exercise diplomatic protection of Belgian shareholders in a Canadian company with respect to measures taken against that company in Spain. The court ruled on the side of the Spanish, holding that only the nationality of the corporation (the Canadians) can sue. **SIGNIFICANCE: This case demonstrates how the concept of diplomatic protection under international law can apply equally to corporations as to individual.**

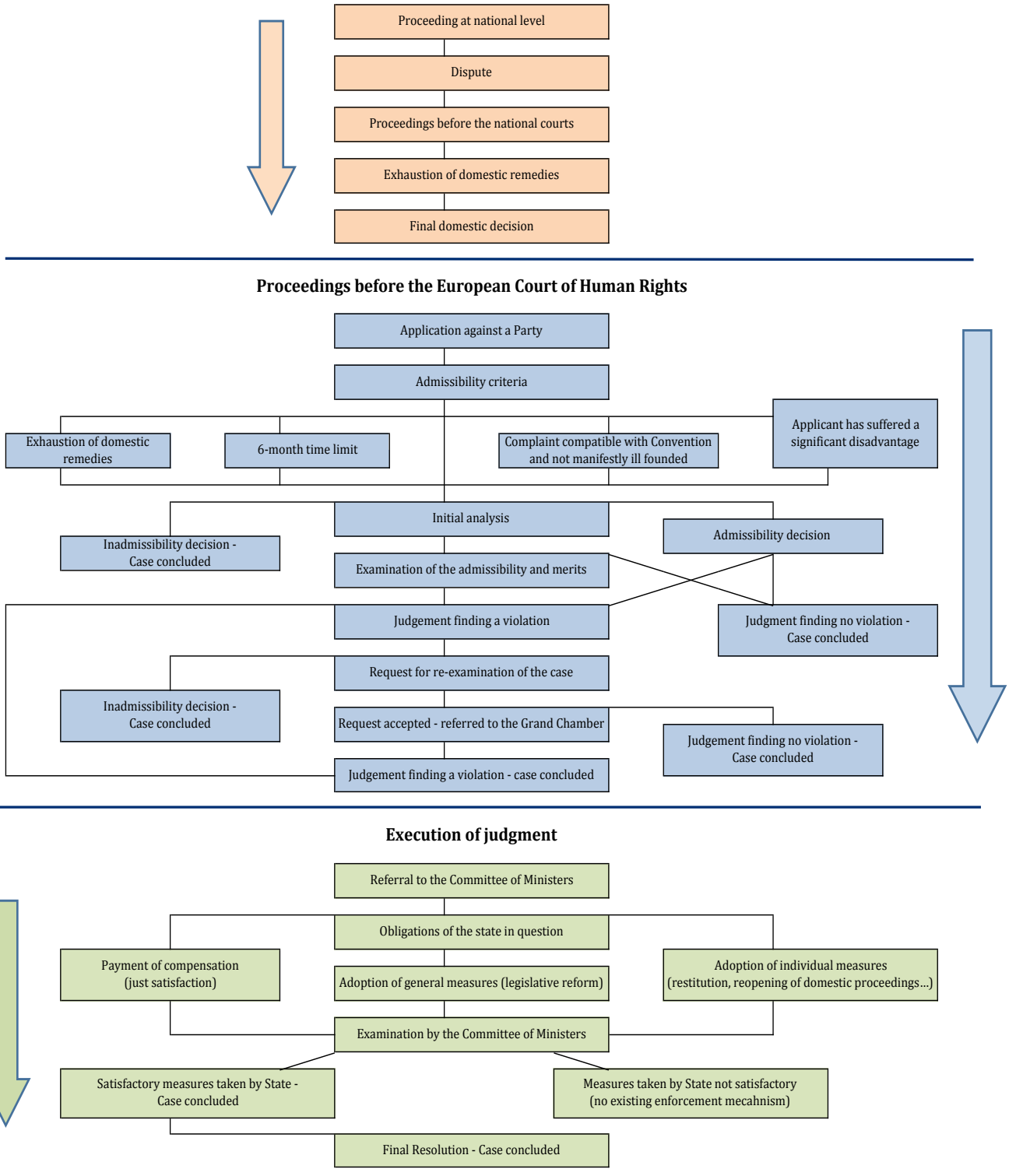
5	**Bligh v Brent**	Bligh v Brent	1837	2 Y & C Ex. 268	The issue before the court was whether a company's shares were property. In accordance with the prevailing view counsel argued that the company's shares were property because the company owned land. The Court rejected this view. The case, they argued, turned on 'the nature of the interest which each shareholder is to have', and In their view shareholders in incorporated joint stock companies had Interests only in the profits of companies and no Interest whatsoever in their assets. The shares were personality, irrespective of the nature of the company's ownership of land. **SIGNIFICANCE: This case was a turning point in relation to the nature of shares in unincorporated companies and In companies whose business activities were closely connected to land.**
6	**Doe et al.**	Unocal Corp. et al.	2000	110 F.Supp.2d 1294 (C.D. Cal. 2000)	Doe et al. v. Unocal Corporation et al. (2000): In this case, the plaintiffs used the Aliens Torts Claims Act (ATCA) in the United States to seek redress for the human rights abuses associated with the Unocal pipeline project in Burma. The plaintiffs were Burmese peasants who suffered a variety of egregious violations at the hands of Burmese army units that were securing the pipeline route, including forced relocation, forced labour, rape, torture, and murder. Unocal eventually settled the claims out of court, compensating the villagers who sued them. The case was settled out of court in 2005.
7	**Does 1-619**	Chiquita	2007	[14 November 2007] No. 08-cv-80480 (US District Court for the Southern District of New York)	In March 2007, Chiquita Brands International, Inc. admitted publicly that it had made payments to paramilitaries from 1997-2004. The President of Chiquita justified the payments to the paramilitaries due to their capacity to intimidate, claiming either they paid or risked seeing their employers killed or kidnapped. After admitting payments to the paramilitaries, Chiquita also admitted having paid the FARC (Martin Ortega, 2008: 5, ftnt 33). The relationship between major transnational corporations, such as Del Monte, Chiquita, and Dole, has been revealed during the confessions of paramilitaries in the context of demobilisation (ibid: 6).
8	**International Transport Workers Federation**	Viking Line ABP	2008	[2008] IRLR 143	The ECJ has limited the right to collective bargaining holding there is a qualified right to strike, but one which can only be exercised when it does not disproportionately affect the EU business right to freedom of establishment or providing services.).
9	**Kiobel**	Royal Dutch Petroleum Co.	2010; 2013	621 F.3d 111, 123–24 (2d Cir. 2010); (2013) 569 US; (17 April 2013) 133 S.Ct. 1659	The complaints charged the TNC and its subsidiaries with complicity in human rights abuses against the Ogoni people of the Niger Delta. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. The plaintiffs argued that in 1995 the oil company and its subsidiary colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9, a group of activists. The case was settled out of court in 2009.
10	**Laval Un Partneri Ltd**	Svenska Byggnadsarbetarefo rbundet	2008	[2008] IRLR 160	The ECJ has limited the right to collective bargaining holding there is a qualified right to strike, but one which can only be exercised when it does not disproportionately affect the EU business right to freedom of establishment or providing services.

11	**Lüth BVerfG**	Germany	1958	[15 January 1958] BVerfGE 7, 198 (Lüth).	Drittwirkung refers to the German theory of the application of fundamental rights and values in cases between private parties. It was used for the first time in 1958 in the Lüth case at the German Federal Constitutional Court wherein the "objective order of values" was argued to protect constitutional rights between private parties. The consequence of the Lüth Case has been to underline that fundamental or human rights do not apply between individuals directly, but rather through the mandatory rules of private law and the general application of private law. In this general application, private law must be interpreted in accordance with human rights. In the past twenty years, the horizontal effect has been broadly integrated into human rights law, although it remains a controversial doctrine.
12	**Salomon & Salomon**	Salomon v A Salomon & Co Ltd	1897	[1897] AC 22	Mr Salomon was owner, shareholder (along with each member of his family) and director of a leather business. The company was placed in insolvent liquidation. The liquidator alleged the company was an agent for Mr Salomon therefore he was personally liable for the debts of the company. The Court of Appeal agreed, finding that the shareholders had to be a bonafide association who intended to go into business and not just hold shares to comply with the Companies Acts. **SIGNIFICANCE: The first case to uphold the concept that a corporation is an independent legal entity and it interpreted limited liability in favour of the shareholder. The fact that some of the shareholders were only holding shares as a technicality was irrelevant for the Court; the registration procedure could be used by an individual to carry on what was in effect a one-man business. The Court found a company formed in compliance with the regulations of the Companies Acts is a separate person and not the agent or trustee of its controller. As a result, the debts of the company were its own and not those of the members. The members' liability was limited to the amount prescribed in the Companies Act.**
13	**Santa Clara County**	Santa Clara County v Southern Pacific Railway Co.	1886	118 U.S. 394	The state of California taxed fences owned by Southern Pacific Railway Company, but Southern Pacific asserted that the state constitution only allowed taxes on "the franchise, roadway roadbed, rails, and rolling stock." Southern Pacific also claimed that state tax board did not properly subtract its outstanding mortgages from the value of its property. Southern Pacific refused to pay taxes on its fences and the difference account for by subtracting outstanding mortgages. Santa Clara County brought action against it in a state court. The county argued that since it could tax the land which situated the fences, it could also tax the additional value of the land added by the fences. Southern Pacific had the action moved to a federal district court, which ruled that the state did not have jurisdiction to tax fences. The county appealed to the Supreme Court. **SIGNIFICANCE: This was the first American case dealing with corporate personhood, relating to what rights afforded under the law to natural persons should also be afforded to corporations as legal persons. The Supreme Court recognized that corporations were recognized as persons for purposes of the Fourteenth Amendment.**
14	**'SERAC' (Social and Economic Rights Action Centre and the Centre for Economic and Social Rights)**	Nigeria	2001	(2001) Communication No. 155/96, African Comm.	The Velásquez-Rodríguez Judgement has served as a basis for other international and regional human rights monitoring bodies, illustrating its important role in the evolving international human rights jurisprudence. Chirwa (2004) notes that the due diligence test was also adopted by the African Commission in the 'SERAC' v. Nigeria (2001).

15	**Sinaltrainal**	Coca-Cola	2003	256 F. Supp. 2d 1345 (S.D. Fla. 2003)	Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003); a lawsuit filed using ATCA by the National Union of Food Workers. The Union alleged that Panamco, a Colombian Coca-Cola bottling company, assisted paramilitaries in murdering several union members. The case was dismissed by the District Court in 2003 but allowed to continue by a Federal judge, only to be dismissed again in 2006. In reaction to the initial dismissal, Sinaltrainal launched its "KillerCoke" campaign calling for the boycotting of Coke.
16	**Theresa Rohner et consorts**	Appenzell Rhodes-Intérieures	1990	[Judgement of 27 November 1990] ATF 116 Ia 359	The recognition of women as legal persons is a relatively modern construction and is generally associated with universal suffrage, which has varied greatly around the world e.g. in Canada 18 October 1929 with Edwards v Canada (Attorney General) also known as 'The Persons Case'; in the Western world Switzerland was the last country to grant women the vote first in some Cantons in 1971 and universally as of 1991 in a judgment of 27 November 1990 in the case of Theresa Rohner et consorts contre Appenzell Rhodes-Intérieures.
17	**Trial of Major War Criminals (Goering *et al*.)**	USA, France, UK, USSR v Hermann Goering et al.	1945-46	International Military Tribunal (Nuremberg) Judgement and Sentence, 30 September and 1 October (London: HMSO) Cmd. 6964	Goering is indicted on all four counts. The evidence shows that after Hitler he was the most prominent man in the Nazi Regime. He testified that Hitler kept him informed of all important military and political problems. **SIGNIFICANCE: The Tribunals blurred the traditional distinction between the subjectivity and objectivity of persons under international law by holding individuals accountable for war crimes and crimes against humanity They established that individual 'flesh and blood' people were subjects of international law and thus liable under that law for gross violations of human rights. This is also the first case where there was an attempt to indict corporations for violations of human rights. The Tribunal was unable to prosecute judicial persons due to lack of jurisdiction.**
18	**Watson**	Sprately	1854	28 Eng. Law & Eq. 507	Ireland *et al.* (1987) explain that in this case regarding the natures of the shares of an unincorporated mining company, the court declared that shares were interests only in the profits of the company and thus shareholders thereafter had, by law, no interest in the physical assets of the company. Thus, as of the mid-1850s, in the UK, shares were legally an entirely separate form of property.
19	**Wiwa**	Anderson	2001	337 U.S. 562, 27	The complaints charged the TNC and its subsidiaries with complicity in human rights abuses against the Ogoni people of the Niger Delta. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. The plaintiffs argued that in 1995 the oil company and its subsidiary colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9, a group of activists. The case was settled out of court in 2009. It was held that TNCs could, in principle be directly liable for violations of human rights under the ATCA.
20	**Wiwa**	Dutch Petroleum *et al.*	2000	226 F.3d 88 (2nd Cir. 2000)	The complaints charged the TNC and its subsidiaries with complicity in human rights abuses against the Ogoni people of the Niger Delta. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. The plaintiffs argued that in 1995 the oil company and its subsidiary colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9, a group of activists. The case was settled out of court in 2009. It was held for the first time that TNCs could, in principle be directly liable for violations of human rights under the ATCA.

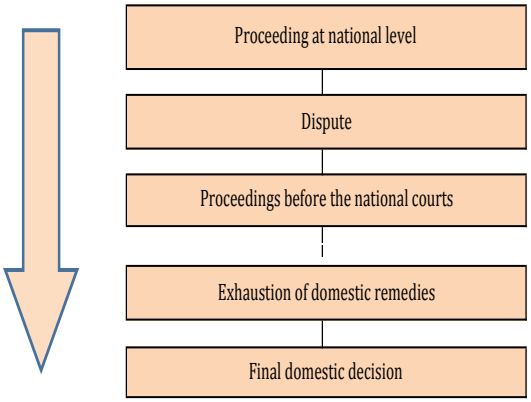
APPENDIX 3: The 'Life of an Application'

I. The European Court of Human Rights

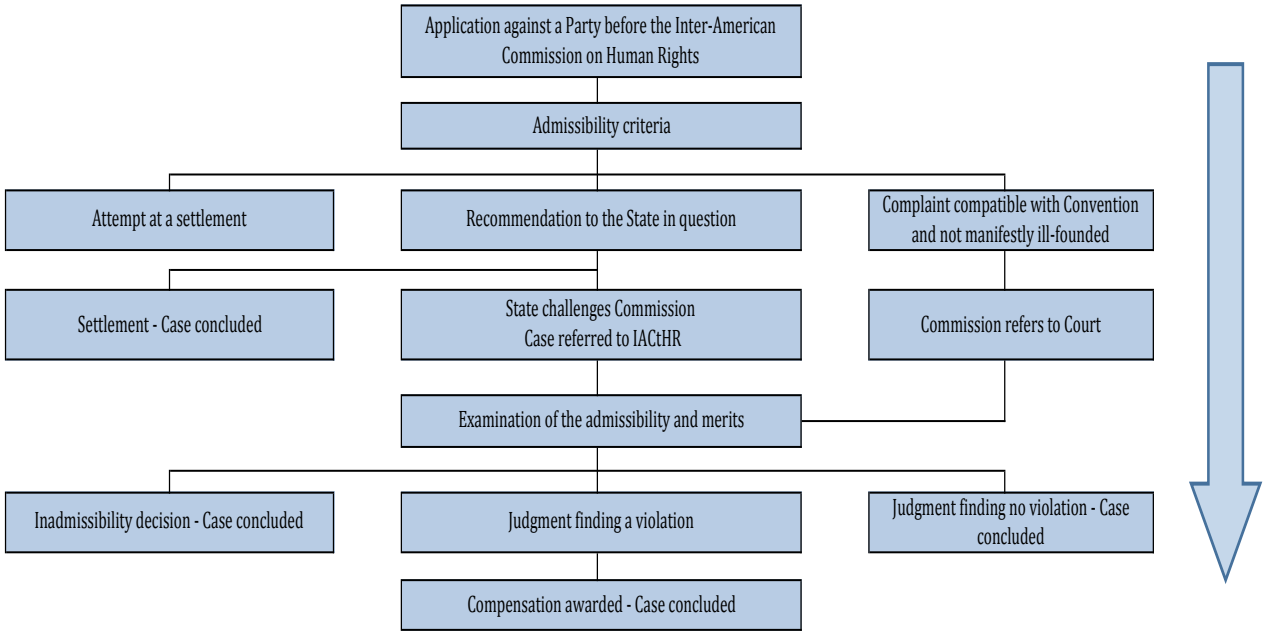


Source: Council of Europe (Oct. 2010) The Conscience of Europe: 50 years of the European Court of Human Rights. London: Third Millennium Publishing Ltd. p.67

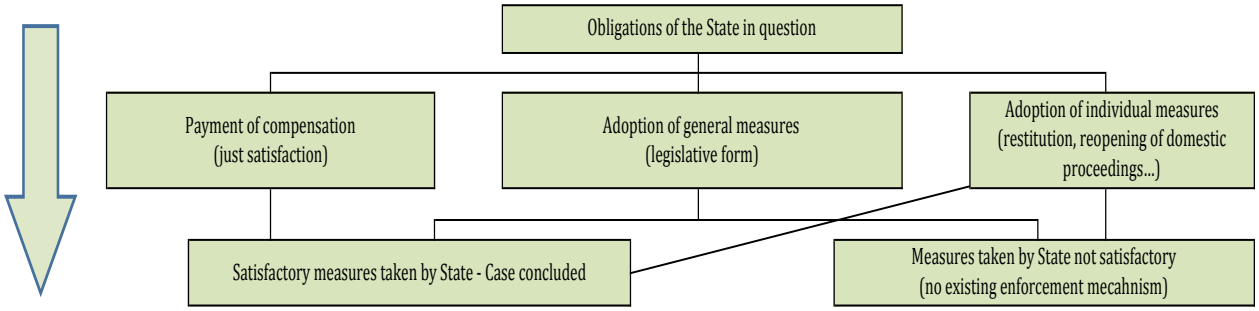
II. The Inter-American Court of Human Rights



Proceedings before the Inter-American Court of Human Rights



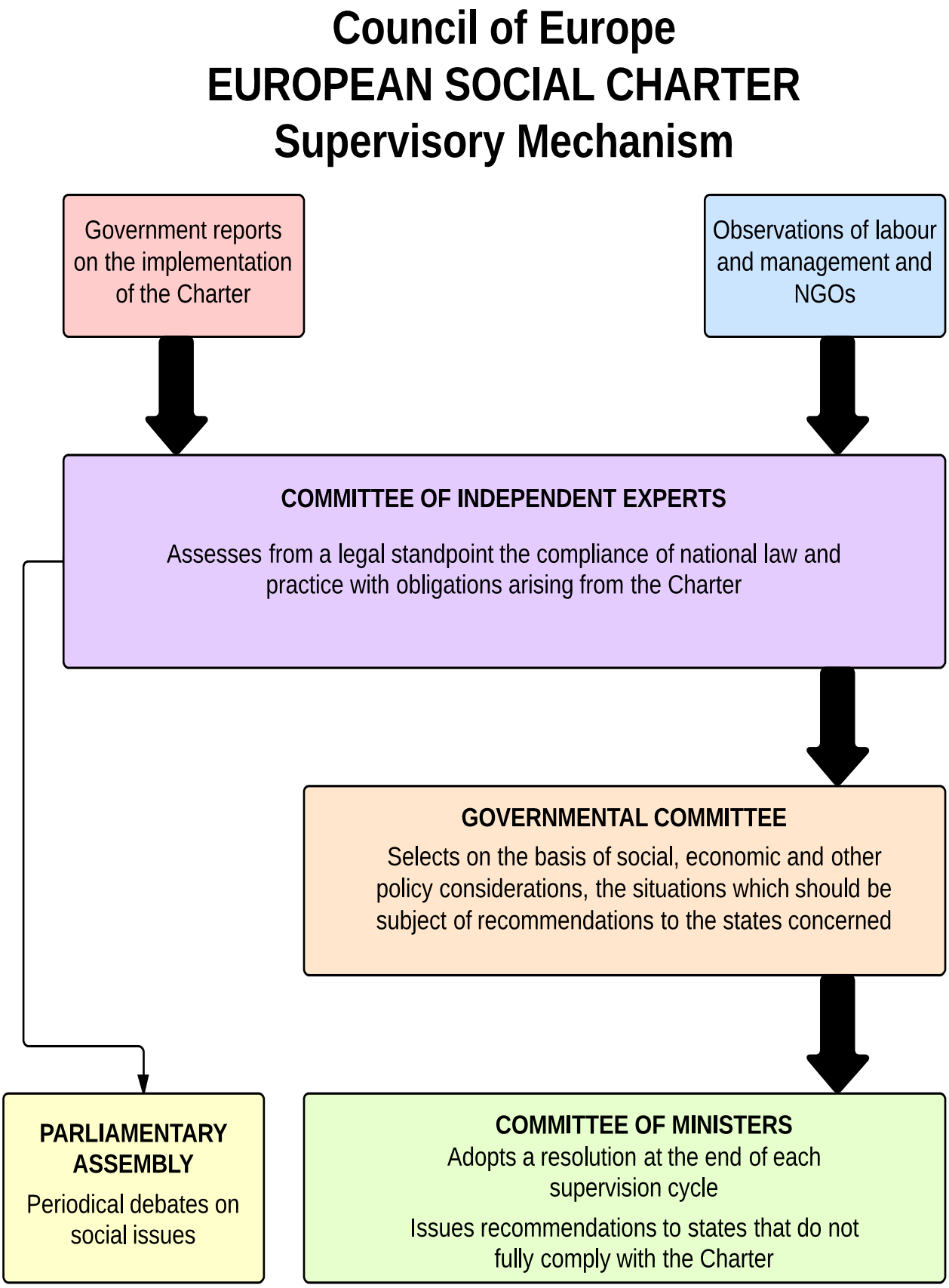
Execution of judgment



APPENDIX 4: Constellations of Subsidiaries

ource: Huffington Post Online, 27th April 2012, http://huffingtonpost.tumblr.com/post/21936372365/these-10-companies-basically-control-everything-w

APPENDIX 5: The Procedure of the European Social Charter



From *European Social Charter: The Charter, its Protocols, the Revised Charter* (ISBN 92-871-3272-0). Courtesy of the Council of Europe *DRPP/34/FR/CP*