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Droubi, Sufyan

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Sufyan Droubi
sufyan.droubi@gmail.com

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Sufyan Droubi†

Abstract

This Article is concerned with transnational corporations (TNCs) embryonic duty to respect international human rights law (IHRL). It assesses how TNCs duty to respect IHRL is progressively emerging in the practice of the United Nations (U.N.) and how that practice may foster and reflect the emergence of an international law obligation. It also reviews, although briefly, the main obstacles in the path of enforcing that obligation at the international and national levels.

A Introduction

National courts often face many obstacles in enforcing human rights law in the private sphere. There is the difficulty in determining the effect that human rights have in private legal relationships. With regard to criminal liability, only a very limited number of states have legislation that makes the attribution of criminal responsibility to legal entities possible. As to responsibility under civil law, it can easily become an empty exercise, if the company directly involved with the violation has no means to bear the costs of remediation, since it is an established

† Ph.D., University of Essex; Postdoctoral Research Fellow, University of São Paulo and São Paulo Research Foundation–FAPESP (2014/18188-9); Visiting Fellow, University of Essex.

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doctrine of corporate law in most jurisdictions that the owners of a company are not liable for the damage the company causes (corporate veil). Non-legal barriers, notably in countries in which the rule of law is weak, include costs of the judicial process; lack of political or economic independence of the courts; obstruction of the legitimate work of human rights defenders; and difficulties in securing legal representation or a lack of adequate resources to legal prosecutors.[1]

The above dilemma creates vulnerability for local populations facing violations of human rights carried out in the context of the activities of transnational corporations, notably in developing countries. It frequently happens that the barriers for sanctioning and remedying such violations in the countries hosting the corporations are insurmountable. As a consequence, cases had been multiplying in which victims of human rights violations, allegedly committed by transnationals in developing and the least developed countries, brought suits against the companies before the domestic courts of their home states or before the courts of other developed states where those companies are also present. Turning to the parent company has not been always successful, however.[2] These are some of the aspects of the context in which this Article is inserted.

This Article is concerned with transnational corporations' embryonic duty to respect *international* human rights law. Understanding how that obligation may be crystallizing and how courts address that responsibility is relevant for the enforcement of human rights at both the international *and* domestic levels. Professor André Nollkaemper explains that an international dispute is based on competing claims that are grounded in international law,[3] and many of the claims brought against transnationals in states where they are established or have legal presence are at least in part founded on international law. Accordingly, some courts have resorted to applying international legal standards when deciding such cases. Furthermore, international law provides national courts in different jurisdictions with a common ground and language to address the same type of problems under varying domestic laws, which directly or indirectly reflect international legal standards, allowing them to cooperate among themselves in enforcing the same legal standards, to build up an international case law[4] and

[1] The United Nations Guiding Principles on Business and Human Rights, drafted by John Ruggie and endorsed by the Human Rights Council in 2011, specifically identify, as a minimum set of human rights instruments to be respected by business in all contexts, the *Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*; and the *International Labour Organization's Declaration of Fundamental Principles and Rights at Work, Guiding Principles*. *See infra* note 14. John Gerard Ruggie, (Special Representative of the Secretary-General) Rep. on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* at 23, ¶ 26, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter, U.N. *Guiding Principles*].

[2] Bus. & Hum. Rts. Resource Ctr., *Corporate Legal Accountability Annual Briefing*, at 2 (June 20, 2012), *available at* `http://www.business-humanrights.org`.

[3] ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 9 (2011).

[4] Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009).

to foster the rule of law at the local and international level.[5]

This Article addresses the issue through a very specific perspective and does not attempt to be exhaustive. It assesses how transnational corporations' duty to respect international human rights law is progressively emerging in the practice of the United Nations, and how that practice may foster and reflect the emergence of an international law obligation to respect human rights. It also reviews, albeit briefly, the main legal obstacles in the path of enforcing that obligation at the international and national levels. The terms "transnational corporations (TNCs)," "transnationals," "corporations," and "businesses" are equivalently employed in their broader sense so as to encompass businesses in general while focusing on the corporations with activities and interests in different jurisdictions; a TNC is considered a non-state actor (NSA).

B The United Nations as a Crystallizer of International Obligation Upon NSAs

The legal obstacles to holding TNCs to international human rights standards are varied and complex. To a great extent, they arise from the state-centred structure of international law in general and international human rights law in particular, and the scarcity of mechanisms to enforce that law against NSAs and, notably, TNCs.[6] There is neither an international statute nor a customary rule expressly setting forth an obligation for businesses to respect international human rights. There is no international court or tribunal, or even international organs of quasi-judicial nature, with authority to enforce international human rights law against TNCs, which remain "at the margins of the resulting legal regime."[7]

At most, international human rights instruments may have provisions that directly or indirectly require states to enforce the respective standards in private legal relationships.[8] In fact, said obligation has been affirmed by the respective monitoring committees in reference to precise human rights norms.[9] However, the developments in international law described below are strengthening the grasp of international human rights law on TNCs. And the U.N., given its unique position in the international system, is a major player in fostering said developments.

Since its establishment, the U.N. has progressively strengthened its capacity to address human rights violations carried out by a state or NSA. The reasons for this are diverse and can only succinctly be viewed here. With 193 mem-

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[5] *See generally* Nollkaemper, *supra* note 3.

[6] Andrew Clapham, Human Rights Obligations of Non-State Actors 25–58 (2006).

[7] Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context: Law, Politics, Morals 1386 (3d ed. 2008).

[8] *See infra* notes 14, 80–82 and accompanying text (discussing U.N. treaty-based human rights bodies, the *1966 Covenants*, and human rights committees' published general comments. *See also* discussion of regional human rights courts, *infra* Part VI. *But see* sources cited *infra* note 102; *cf. infra* Part III.

[9] *See infra* Part IV.

bers and an "all-embracing" Charter,[10] the organization has acquired universal character, from which it derives a high level of legitimacy to function not only as an organization responsible for peace and security but also as one with a responsibility towards global governance.[11] Its responsibility in promoting respect for human rights concerns both spheres of competence. At the same time, the U.N. Charter provides the organization with the necessary legal authority to carry out such functions. The Charter may be understood both as a constitution of the U.N.[12] and as a rudimentary constitution of the entire international community, which is here defined as comprising states, international organizations (IOs), NSAs and individuals. Furthermore, it must be interpreted so as to enhance rather than encumber the effectiveness of the U.N. (principle of effectiveness), and, by constituting a living instrument, its meaning is continuously shaped by consistent and coherent practice of the U.N. organs.[13]

The preamble of the U.N. Charter, articles 1 and 2 (containing the purposes and principles of the U.N.) and other provisions (such as articles 51, 55, and 56) contain norms that guarantee the minimum rights for states (prohibition of use of force, sovereign equality, pacific settlement of disputes self-defence, etc.) and for individuals (humanitarian law, human rights and fundamental freedoms), and attention is placed on the latter category. Articles 1(3) and 55 set forth the ideal that the U.N. must promote respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion. In enacting article 56, U.N. members pledged to take joint action in cooperation with the organization for the attainment of the purpose laid down in article 55.

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[10] U.N. Charter art. 2 ¶¶ 6. (stating the organization shall ensure that non-members also act in accordance with U.N. principles); *accord the Repertoire Studies* (examining instances where the Security Council addressed itself to non-members of the United Nations), `http://legal.un.org/repertory/art2(6).html`. Further, the Charter has no provision on a right to withdraw from the organization (in contrast with the Covenant of the League of Nations), and no state has ever been excluded from it. Indonesia's withdrawal in the 1960s should be considered void. *See* Frances Livingstone, *Withdrawal from the United Nations: Indonesia*, 14 INT'L & COMP. L. Q., no. 2, April 1965, at 637–46; *see also* Thomas Franck, *Is the UN Charter a Constitution?*, *in* LIBER AMICORUM TONO EITEL 95, 96–99, 106 (Jochen A. Frowein et al. eds., 2003).

[11] Global governance refers to "a perceived need to foster the growth of multilateral systems of regulation and methods of management to encourage global interdependence and sustainable development." GRAHAM EVANS & JEFFREY NEWNHAM, THE PENGUIN DICTIONARY OF INTERNATIONAL RELATIONS 199 (1998). The notion must be placed within a unified and multidisciplinary approach that the U.N. has been adopting to address threats to international peace and security and to problems perceived as concerning the whole international community of such magnitude that requires commonly agreed upon responses (i.e., terrorism, arms trafficking, mass human rights violations, environmental catastrophes, etc.). This approach involves peace and security, respect and promotion of human rights, development, good governance and the rule of law both at the national and international level. *See generally,* U.N. Secretary-General, *Reports Submitted to the Security Council in 2013*, `http://www.un.org/en/sc/documents/sgreports/2013.shtml`.

[12] GEORGES ABI-SAAB, ET AL., THE CHANGING CONSTITUTION OF THE UNITED NATIONS (1997); Franck, *Is the U.N. Charter a Constitution?*, *supra* note 10.

[13] The General Assembly (GA), Security Council (SC), Economic and Social Council (ECOSOC), Secretariat, International Court of Justice (ICJ), and Trusteeship Council are the six principal organs of the U.N., which has also established a wide number of subsidiary organs. The ICJ is the principal judicial organ of the U.N. It was established in June 1945 by the U.N. Charter, and began work in Apr. 1946. *See* Franck, *Is the U.N. Charter a Constitution?*, *supra* note 10.

In 1948, the U.N. General Assembly (GA) adopted the Universal Declaration of Human Rights (UDHR); and, in 1966, it adopted the texts of the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) and opened them to signature, ratification and accession.[14] Together, the three make up for the International Bill of Rights and can be seen as the materialization of the pledge made by the U.N. and its member states towards the promotion of human rights. Holding true to the principle that the practice of U.N. member states and organs shapes the meaning of its Charter, it is now submitted that articles 1(3) and 55 are furthered and complemented by the International Bill of Rights.[15] Through the reiterated practice of the U.N., by the high levels of ratification of its covenants, and by morphing many of its norms into customary law or to the status of *jus cogens*, the Bill of Rights has become binding on U.N. members, and organs, although the specific rules that arise in regard to U.N. organs, notably the Security Council (SC), are far from clear. The same rationale may be applied, *mutatis mutandis*, to other instruments of a human rights character negotiated under the auspices of the U.N. and consistently reaffirmed in its member states' practices, such as the Genocide Convention.[16]

Another aspect that demands attention concerns the partial overlap between the purposes and principles of the U.N. and *jus cogens*. This overlapping is not coincidental because the *corpus juris cogentis* developed under the influence of the purposes and principles.[17] This overlapping is important because pursuant to some scholarly opinions and judicial rulings the status of *jus cogens* seems to strengthen the potential number of human rights norms in question that directly bind NSAs.[18] To be sure, such peremptory norms have grown relevant beyond the law of treaties and international responsibility;[19] in fact, they are here characterized as constituting the highest level of constitutional norms in the international community.[20] Indeed, while acts in violation of *jus cogens* are

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[14] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967), S. Exec. Doc. No. E, 95-2 (1978); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, S. Treaty Doc. 95-19, 6 I.L.M.360 (1967), S. Exec. Doc. No. E, 95-2 (1978).

[15] *See, e.g.*, Rep. of the U. N. Comm. on the Racial Situation in the Union of South Africa. 8 U.N. GAOR, Supp. (No. 16) at 20, 22, , U.N. Doc. A/2505 (1953) (statement of Amb. Malik describing the UDHR).

[16] Convention on Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, No. 1021, 1951 U.N.T.S. 278.

[17] Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 Colum. J. Transnat'l L. 529, 589 (1998); Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 Max Planck Y.B. U.N., at 11 (1997).

[18] *See generally* Andrew Clapham, *supra* note 6, at 90; *In re* Agent Orange Product Liability Litig., 373 F. Supp. 2d 7, 59, 84, 110, 112, 131 (E.D.N.Y. 2005).

[19] *Draft Articles on the Law of Treaties with commentaries*, [1966] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1966, ¶ 38, [hereinafter ILC 1966 Yearbook]; *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries*, [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/56/10, [hereinafter ILC 2001 Yearbook].

[20] Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 Am. J. Int'l L. 55, 55–63 (1966); Michael Byers, *Conceptualising the Relationship Between Jus Cogens and Erga*

void, acts in violation the U.N. Charter are voidable.[21]

Moreover, the violation of human rights of a peremptory nature often entails the commission of international crimes. The International Criminal Tribunal for the former Yugoslavia (ICTFY), in *Prosecutor v. Furundžija*, affirmed that the prohibition of torture is *jus cogens* and, a fortiori, is "a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."[22] They highlighted that *jus cogens* could not "be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[23] What is more, the tribunal held that a norm of *jus cogens* has effects at the inter-State *and* individual levels. The individual level was asserted as the level of criminal liability, and at this level "one of the consequences of the *jus cogens* character bestowed by the international community…is that every State is entitled to investigate, prosecute and punish or extradite individuals accused" of violating it,[24] which is an affirmation of each and every states' universal jurisdiction over such violations. But the individual level may well be that of civil liability, which is corroborated by the case law under the Alien Tort Claims Act (ATCA), as will become clear later in this Article.

Remarkably, the International Law Commission, while codifying the effect of *jus cogens* in treaty and international law, refrained from providing a catalogue of norms that have acquired that higher status. But the commentary to its drafted articles suggests some norms have been so elevated, such as those prohibitions against genocide, slavery, violations of *fundamental* human rights (not all human rights),[25] torture,[26] and racial discrimination,[27] and grave violations of humanitarian law, alongside the non-derogability and inalienability of prisoners' rights, and the principles of non-discrimination and equality of access to courts.[28]

A word is necessary with regard to the constitutional reading of international law adopted in this work, which is drawn from various sources.[29] The

Omnes Rules, 66 NORDIC J. INT'L L. 211, 219. (1997).

[21] José E. Alvarez, *Legal Remedies and the United Nations' a la Carte Problem*, 12 MICH. J. INT'L L. 229, 286 (1990). This concept should not be confused with the supremacy clause in article 103 of the Charter.

[22] Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 1, 58, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[23] *Id.* at 59, ¶ 153.

[24] *Id.* at 60, ¶ 156.

[25] ILC 1966 Yearbook, *supra* note 19, at 248.

[26] *See generally* Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment 2012 I.C.J. Rep. 1 (July 20); *see also*, Anto Furundžija, Case No. IT-95-17/1-T; The Rochela Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No.132 (May 11, 2007).

[27] ILC 1966 Yearbook, *supra* note 19, at 337 (cmt. to article 26); ILC 2001 Yearbook, *supra* note 19, at 84–85.

[28] A. A. CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM (6th vol. 2010).

[29] Fassbender, *supra* note 17 at 529; Anne Peters, *Global Constitutionalism Revisited*, in INT'L LEGAL THEORY Fall 2005 at 39–65 (vol. 11: Why Obey International Law?); Erika De Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. Q. 51, 51–76 (2006) [hereinafter Peters, *Global Constitutionalism*].

assertion that the Charter is a rudimentary constitution is not to deny its constitutional character regarding other legal norms found outside the four corners of the Charter.[30] It is submitted that the U.N. Charter provides a constitutional matrix for the international community, around which other norms form constitutional "networks."[31] Such norms derive from treaty and customary law, as well as from legal principles. This Article, however, is more concerned with the human rights norms. Furthermore, human rights treaties, irrespective of their universal or regional character, may be placed at a different level than general treaties, and so traditional notions of treaty law may not be fully applicable. To be sure, the U.N. Human Rights Committee (CCPR), the body of independent experts tasked with monitoring and implementing the International Covenant of Civil and Political Rights, has posited that such treaties "are not a web of inter-State exchanges of mutual obligation," but rather "[t]hey concern the endowment of individuals with rights" so that "[t]he principle of inter-State reciprocity has no place," except in matters of a clearly contractual (rather than constitutional) character.[32] Moreover, many norms found in such treaties have acquired the nature of customary law and, as has been said, of *jus cogens*. The latter clearly places them beyond the law-making capacity of the state.[33] It is submitted here that the human rights provisions of the Charter are furthered and complemented by the International Bill of Rights and by other instruments negotiated under U.N. patronage; that the constitutional character of the Charter and said instruments is shared by other human rights treaties of both universal and regional nature; and that the Charter functions as a "connecting factor" that ties different norms together. [34]

Furthermore, the Charter attributes different powers to separate U.N. organs, thus enabling them to address violations of human rights on different levels. While the General Assembly tends to appreciate all the aspects involved in the situations in which it is seized, the Security Council is more concerned with the aspects related to international peace and security. Together, this practice has progressively eroded the barrier established by article 12(1) of the Charter.[35] For instance, the complementary roles played by the GA and SC in de-legitimizing and asserting the illegality of apartheid in South Africa remains an indelible example of the importance of these U.N. principal organs in dealing with different

[30] *See* Peters, *Global Constitutionalism*, *supra* note 29.

[31] *See* De Wet, *supra* note 29.

[32] Human Rights Comm., Gen. Comment 24, General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (Art. 19), ¶ 17, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).

[33] *Id.* at ¶ 8; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, arts. 53, 64, 71.

[34] De Wet, *supra* note 29, at 56.

[35] Article 12, ¶ 1, of the Charter stipulates that, while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Council so requests. Accord Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (discussing the distinct and collaborative efforts of the General Assembly and Security Council).

aspects of gross violations of human rights. In the last decades, their practice has evolved so that they have been together addressing violations of human rights by NSAs, such as terrorist groups, rebels, parties to a conflict, and TNCs.[36]

Another factor that establishes the U.N. as a unique organization is the correlation between the practice of its political organs and the development of customary law and general principles of law. Resolutions of U.N. political organs may confirm existing legal norms, promote their crystallization, and trigger the emergence of new norms.[37] Irrespective of their nature, said resolutions may acquire strength in the presence of some specific elements—that is, their reiterated confirmation by later resolutions, and their adoption by a large majority of states. Both factors may evince not only U.N. consistent practices, which shape the meaning of the Charter, but also the buildup of state practice and *opinio juris* necessary for the emergence of norms of customary law. Besides, the International Court of Justice (ICJ) affirmed that a customary rule must be assessed against two key criteria: (i) what states say the rule is, and (ii) states regard for behaviour inconsistent with their understanding of the rule as a violation.[38] U.N. resolutions often entail both criteria and, as former-President Judge Rosalyn Higgins, noted, their adoption by "an overwhelming majority or by unanimous vote would surely provide probative evidence of the belief of States concerning certain rules of law."[39]

What is more, by expressly and repeatedly affirming norms of general character, resolutions may, through the same process described above, trigger or reflect the formation of general principles of law. Indeed, by repeatedly affirming a norm of general character, U.N. resolutions may evince that a general principle of law has been accepted and recognized, either *ab initio* or progressively.[40] As Judge Bruno Simma and Professor Phillip Alston have noted, "this process does

[36] *See, e.g.*, S.C. Res. 1214, ¶ 12 (Dec. 8, 1998) (demanding that Afghan factions cease discrimination against girls and women and other violations of human rights and humanitarian law, and adhere to international norms and standards in this sphere); S.C. Res. 1267, ¶ 1 (Oct. 15, 1999) (insisting that "the Afghan faction known as Taliban" cease supporting terrorist activities); S.C. Res. 1373, ¶ 5 (Sept. 28, 2001) (declaring that "the acts, methods, and practices of terrorism," including its financing and planning, are "contrary to the purposes and principles of the United Nations"); S.C. Res. 1540, 1, ¶ 1 (Apr. 28, 2004) (defining a non-state actor (NSA) as an individual or entity not acting under lawful authority of any state, and deciding that acquisition of nuclear, chemical and biological weapons, and their means of delivery and related materials to NSAs constitutes a threat to international peace); S.C. Res. 1572 (Nov. 15, 2004) (urging that all parties in the Côte d'Ivoire conflict, including the Force Nouvelles, comply with the ceasefire agreement); and S.C. Res. 2098 ¶¶ 7, 8 (Mar. 28, 2013) (strongly condemning armed groups in the Democratic Republic of the Congo for violations of human rights; demanding that they cease all forms of violence and disband, and reiterating that "those responsible for human rights abuses…will be held accountable.").

[37] Rosalyn Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 A.S.I.L. PROC. 119–24 (1965) [hereinafter Higgins, *59th Annual ASIL Proceedings*].

[38] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 98, (June 27).

[39] Higgins, *59th Annual ASIL Proceedings*, *supra* note 38, at 121 (Given its complexity, the theme cannot be exhausted here and it must be noted that it is under the consideration of Michael Wood in his capacity of International Law Commission special rapporteur on the topic of Formation and Evidence of Customary International Law.).

[40] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y. B. INT'L L. 82, 104 (1992).

not—or not yet—lead to the emergence of customary law but to the formation of 'general principles of law recognized by civilized nations' in the sense of Article 38 of the ICJ Statute."[41] With this background, attention is turned to the specific resolutions concerning TNCs.

C TNCs' Duty To Respect International Human Rights Law in the U.N. Practice

This analysis starts by recalling the preamble and article 30 of the Universal Declaration of Human Rights, which clearly states that "every individual and every organ of society…shall strive…to promote respect for these rights and freedoms…to secure their universal and effective recognition and observance,"[42] and deny to "any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[43] Although the UDHR has been repeatedly reaffirmed in the resolutions of U.N. organs, and though many of its provisions have clearly acquired the character of customary norms, a cautious approach recommends that the provisions highlighted above have not yet completely crystallized as customary norms.[44] To be sure, the 1966 Covenants have no similar provisions, and some scholars have plainly denied that the provisions have such nature.[45] But the provisions, continuously subjected to the ambivalent U.N., and to state practice, and to divergent scholarly opinion,[46] have progressively acquired a "surplus of value," an "element of law" that precedes the complete emergence of a new international norm.[47] Hence, they provide the basic legal framework for the following analysis, which places focus on recent GA resolutions that clearly affirm the TNC obligation to respect human rights.

The GA has been affirming the TNC duty to respect human rights in recent resolutions concerning globalization and its impact on the full enjoyment of all human rights. Since the 65th session, resolutions in this series contain standard provisions: "*Emphasizing* that transnational corporations and other business enterprises have a responsibility to respect all human rights," and that: "*Recognizes* that [they] can contribute to the promotion, protection and fulfilment of all human rights and fundamental freedoms, in particular economic, social and cultural rights."[48] The resolutions were adopted by large majorities comprised

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41 *Id.*

42 G.A. Res. 217 (III), *supra* note 14, preamble.

43 *Id.* at art. 30.

44 Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 Brook J. Int'l L. 17 (1999).

45 Larissa van der Herik & Jernej Černič, *Regulating Corporations under International Law*, 8 J. Int'l Crim. Just. 725, 734 (2010).

46 Henkin, *supra* note 44; Clapham *supra* note 6, at 40–41.

47 A.J.P. Tammes, *Decisions of International Organs as a Source of International Law*, in 94 Collected Courses of the Hague Academy of International Law 349 (1958).

48 G.A. Res. 65/216, at 3; ¶ 10, (Apr. 6, 2011).

chiefly of developing and the least developed countries.[49] Although significant members in the minorities, including some countries in North America and Europe, opposed their adoption.[50] Caution is then required from the interpreter assessing the effects of such resolutions. Isolated, they are mere recommendations; considered together, they constitute an incipient GA practice on a theme that is capable of giving rise to a legal norm that binds TNCs. At most, the high number of favourable votes indicates a building-up of *opinio juris* in that regard. Nevertheless, the GA resolutions acquire more strength if viewed in conjunction with the resolutions of other U.N. bodies.

In addition, the Human Rights Council (HRC), the U.N. subsidiary political organ established by the General Assembly,[51] expressly emphasizes, "that transnational corporations and other business enterprises have a responsibility to respect human rights." This language appears in *Resolutions 17/4* and *21/5*, both of which were adopted without a vote thus having the support of all forty-seven states of the organ.[52] Bear in mind that member states of the HRC are elected directly and individually by a majority of the members of the GA for a three-year mandate, and that membership is based on equitable, geographic distribution[53] in order to secure the presence of states that represent the "main forms of civilization" and "the principal legal systems of the world."[54] It is therefore remarkable that some states unopposed to the instant HRC resolutions were opposed to the aforementioned GA resolutions.[55] This provides more insight into the matter that the UN on the whole, and not just the GA through its practice of requiring states to respect international human rights, is building up. Furthermore, the fact that states in opposition to the prior resolutions did not oppose the instant ones strengthens the understanding that favourable *opinio juris* is progressively emerging.

For its part, the Security Council has affirmed the same responsibility, albeit in an indirect manner and in situations threatening international peace and security. For instance, it adopted targeted sanctions (travel bans and asset freezes)

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[49] For an overview of the criteria for attributing "developing" or "least-developed" status to a country, *see Development Definition: Who are the developing countries in the WTO?*, WORLD TRADE CENTER, (Nov. 24, 2015), `https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm`.

[50] G.A. Res. 65/216, *supra* note 48, was adopted by a 132-to-54 vote; G.A. Res. 66/161 (Mar. 22, 2012) (addressing globalization's impact on the full enjoyment of human rights) was adopted by a 137–to–54 vote (G.A. Dec. 66/161, annex, XI, U.N. Doc. A/11/1198 (Dec. 24, 2011)); and G.A. Res. 67/165 (Mar. 13, 2013) (also addressing globalization's impact on human rights) was adopted by a margin of 133–to–54 with 2 abstentions (G.A. Dec., annex, VII, U.N. Doc A/11/331 (Dec. 20, 2012)).

[51] Article 7 of the U.N. Charter established, among its principal organs, the General Assembly. *Id.* ¶ 1. Article 7 also empowered principal organs with the authority to establish subsidiary organs. *Id.* ¶ 2. The General Assembly resolved to establish the Human Rights Council in G.A. Res. 60/251, ¶ 1, U.N. Doc. A/RES/60/251 (April 3, 2006).

[52] Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 16, 2011); Human Rights Council Res. 21/5, U.N. Doc. A/HRC/RES/21/5 (Oct. 16, 2012).

[53] G.A. Res. 60/251, *supra* note 51, ¶ 7.

[54] Statute of the International Court of Justice, art. 9, Oct. 24, 1945.

[55] To wit, the member states of Western Europe along with some other groups were not opposed to the adoption of the aforementioned HRC resolutions but did oppose adopting the referenced GA resolutions.

against individuals *and* entities involved, *inter alia*, with serious violations of human rights and international humanitarian law on the Ivory Coast and in Darfur.[56] The same sanctions were administered against individuals and entities in the Democratic Republic of the Congo. In the latter case, the SC went so far as to establish detailed rules; they decided that "importers, processing industries and consumers of Congolese mineral products" should carry out due diligence so as to "mitigate the risk of further exacerbating the conflict …by providing direct or indirect support to …criminal networks and perpetrators of serious violations of international humanitarian law and human rights abuses."[57] This due diligence includes "strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings."[58] The SC established subsidiary organs (sanctions committees) to oversee the enforcement of the sanctions by states. These subsidiary committees maintain lists of named individuals and entities subject to the sanctions. The sanctions committee concerned with Darfur has listed companies suspected of providing assistance—including the sale of arms and munitions—to groups involved in human rights abuses, in violation of the embargo. Once listed, the individual, entity, or, in the case of Darfur, a corporation, is automatically subject to sanctions that are enforceable by states. Other resolutions addressing situations in different countries have also adopted the above mechanisms.[59] When taken together, these resolutions constitute a well-established practice by the SC, albeit less so in regard to the due diligence obligation. Moreover, the SC resolutions were adopted under Chapter VII of the Charter and are, per se, mandatory upon states and the individuals and entities, including TNCs, addressed. It is worth mentioning that although SC resolutions originally established obligation only upon states, with time they have also come to create obligations upon IOs and NSAs, which is legitimatized under the principle of effectiveness.[60]

Hence, the U.N. has been affirming, in a direct and indirect manner, the TNC obligation to respect international human rights law. This reiterated affirmation of the obligation seems to constitute an embryonic U.N. practice that reflects

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[56] *See* S.C. Res. 1572, ¶¶ 7, 9, 11 15 (Nov. 15, 2004); *see also* S.C. Res. 1591, ¶ 3, (March. 29, 2005); S.C. Res. 2035, ¶ 3 (Feb. 17, 2012).

[57] S.C. Res. 1952, ¶ 7, (Nov. 29, 2010).

[58] *Id.* at ¶ 8.

[59] *See* S.C. Res. 751, (April 24, 1992) (sanctioning Somalia for pirates); S.C. Res. 1907, (Dec. 23, 2009) (sanctioning Eritrea for forces in the Horn of Africa); S.C. Res. 1267, (Oct. 15, 1999) (sanctioning Afghanistan for Al-Qaeda and the Taliban); S.C. Res. 1904, (Dec. 17, 2009) (concerning Al-Qaeda and the Taliban); S.C. Res. 1518, (Nov. 24, 2003) (concerning Iraq-Kuwait); S.C. Res. 1521, (Dec. 22, 2003) (concerning Liberia); S.C. Res. 1636, (Oct. 31, 2005) (concerning the terrorist bombing in Beirut that killed former Lebanese Prime Minister Rafiq Hariri and 22 others); S.C. Res. 1718, (Oct. 14, 2006) (concerning North Korea); S.C. Res. 1737 (Dec. 23, 2006) (concerning Iran);. S.C. Res. 1970, (Feb. 26, 2011) (concerning Libya); (S.C. Res. 2048, (May 18, 1992) (concerning Guinea-Bissau).

[60] Stefan A.G. Talmon, *A Universal System of Collective Security Based on the Charter of the United Nations: A Commentary on Article 2(6) UN Charter* 28–29 (Univ. of Bonn Inst. of Pub. Int'l L., Research Paper No. 1, 2011), `http://ssrn.com/abstract=1962660`.

the *opinio juris* of many states and directs the progressive crystallization of a legal norm requiring TNCs to respect international human rights law—either as a customary norm or, more likely given the general character of the norm, a principle of international law. On this perspective, the TNC obligation to respect human rights will not be directly derived from existing human rights instruments but rather from an emerging norm—a new instrument that may expressly set forth the obligation.

A question may arise as to whether the emergence of such a principle or customary norm requires, alongside states' consent, the consent of TNCs. This question is reminiscent of the debate on whether corporations are subjects of international law. The Article submits another notion. Along the lines suggested by Rosalyn Higgins, TNCs are considered participants in the international legal process but without the same status that states enjoy.[61] To claim that TNCs are on equal footing with states distorts the debate and gives rise to unforeseen consequences.[62] Corporations' consent is not required because they are not lawmakers—least of all in the sense states are—although, they may be present in the law-making processes.[63] This Article adopts a "bottom-up" approach to assess whether U.N. practice evinces the emergence of a legal norm requiring a TNC to respect human rights—rather than attempting to derive such an obligation from a hypothetical corporation's personhood.[64]

Perhaps a fair description of the TNC *extant* duty to respect international human rights, from the perspective of the U.N. practice, is that it constitutes a moral standard that is gradually morphing into a principle of international law. But this Article suggests another description of the obligation. It seems clear from U.N. practice alone that the obligation is emerging as legal norm. If other factors are brought to the analysis—for example, the affirmation by the U.N. of an obligation to respect human rights falling upon other NSAs, such as those party to conflicts, or the establishment of treaty obligations on NSAs in clear violation impacting human rights, like those put forth by the provisions in the International Convention for the Suppression of the Financing of Terrorism,[65] and the work of renowned publicists affirming that NSAs do bear an obligation to respect human rights[66]—then the emergence of the norm becomes more tangible. It seems to stretch the lines of legal conservatism too far to infer from the present state of affairs, which is by no means static, that TNCs are simply free to disregard international human rights standards—especially those of a fundamental and peremptory character. That inference is reminiscent of the *Lotus*

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[61] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49–50 (report ed. 1995).

[62] José E. Alvarez, *Are Corporations "Subjects" of International Law*, 9 SANTA CLARA J. INT'L L. 11 (2011).

[63] Jean d'Aspremont, *International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?*, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 171–94 (Math Noortmann & Cedric Ryngaert, eds. 2010).

[64] Alvarez, *supra* note 62.

[65] International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. No. 106-49, 2178 U.N.T.S. 197–292.

[66] *See generally* CLAPHAM, *supra* note 6.

paradigm,[67] the strength of which has been severely undermined in the fields of international law with the character of public law or, as this Article has been asserting, with a constitutional character.

As Judge Simma explained in *Kosovo*, "by moving away from *Lotus*" it becomes possible to assess "whether international law can be deliberately neutral or silent on a certain issue."[68] Professor Anne Peters argues that a "[d]eliberate silence is the opposite of a legal lacuna" and that it may imply either a prohibition or an authorization, "depending on what one take's [sic] as the residual rule."[69] It cannot be affirmed that international law is inadvertently silent with regard to the TNC obligation to respect international human rights standards. The issue was patently present at many moments, such as the negotiation of the London Charter[70] or the Rome Statute,[71] and conscious decisions were made not to include legal entities under the respective tribunals' jurisdiction—although, it is submitted, a strong case can be made that the International Military Tribunal has a very restricted jurisdiction over "groups and organizations" because it is authorized to declare them criminal in respect to certain violations.[72]

The constitutional reading of international law on which this Article is grounded requires the understanding that the residual rule in the present case is not an authorization for a TNC to make a *tabula rasa* of international human rights standards, notably ones of a fundamental character or those having evolved into *jus cogens*. Recall the presumption of freedom as affirmed in *Lotus* "is a corollary of state sovereignty and the traditional idea of a state's priori unlimited regulatory competence."[73] This presumption hardly seems applicable to states in the field of international human rights law and, a fortiori, should not be lightly applied to NSAs. According to Judge Simma, the *Lotus* approach is "redolent of nineteenth-century positivism, with its excessively deferential approach to State consent" and implies that "everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from 'tolerate' to 'permissible' to 'desirable.'"[74] And Simma further explains, "[t]hat an act might be 'tolerated' would not necessarily mean

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[67] The S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 at 4 (Sept. 7), *superseded by treaty*, Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.

[68] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 478, 480 ¶ 9 (July 22) (separate declaration by Simma, J.).

[69] Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, 24 Leiden J. Int'l. L. 95, 99 (2011) [hereinafter Peters, *Kosovo in Lotus-Land?]*.

[70] Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, annex, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280.

[71] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, `http://legal.un.org/icc/statute/english/rome_statute(e).pdf`.

[72] London Charter, *supra* note 70.

[73] Peters, *Kosovo in Lotus-Land?*, *supra* note 69, at 100.

[74] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 478, 480 ¶ 8 (July 22) (separate declaration by Simma, J.).

that it is 'legal,' but rather that it is 'not illegal."'[75] On this perspective, it may be ascertained that international law, if it does not explicitly require a TNC to respect international human rights, it by no means provides TNC behaviour in violation of such norms with the colour of legality. At most, it can be said that such behaviour is tolerated. An international norm expressly requiring TNCs to respect international human rights law has not completely emerged yet, making it difficult to bluntly affirm that TNCs are prohibited from adopting behaviour contrary to that law. However, that norm is in the developmental process and has in it already an element of law, so it can be argued that such behaviour is "not legal." When fully crystallized, either as a principle or a custom, the norm will clarify and affix the illegality of TNC behaviour that is contrary to international human rights law. That said, the TNC legal obligation to respect fundamental human rights with mandatory character, if it has not yet fully materialized, is very close to doing so.

But the obligation, if and when plainly established, will require a maturation of its scope and the development of enforcement mechanisms before it can become fully operational. The next sections show both that there has been progress in identifying the minimum content of corporations' duty to respect human rights, as well as address some of the difficulties in enforcing corporations' responsibility for violation of international human rights.

D U.N. HUMAN RIGHTS BODIES

The Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CESCR) have also played important roles in fostering the development of the topic by asserting the states' responsibilities to enforce human rights in the private sphere, thereby providing an authoritative reading of the 1966 Covenants that may serve to promote the determination of the scope of the TNC obligation to respect human rights, as explained below. In 1999, the CESCR promulgated *General Comment 12* on the right to adequate food, in which it declared:

> While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food. […] The private business sector—national and transnational—should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.[76]

[75] *Id.* at 480–81, ¶ 9.

[76] Comm. on Econ., Soc. and Cultural Rights, General Comment 12: The right to adequate food, (Art. 11), ¶ 20 U.N. Doc. E/C.12/1999/5 (May 12, 1999).

The above statement is unique in that it explicitly calls for NSAs to respect the human right to food. More often, however, the human rights bodies call on states to enforce human rights in the private sphere. Indeed, *General Comment 20* of the CESCR ascertained:

> Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.[77]

Similarly, in *General Comment 34* the Human Rights Committee determined:

> The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.[78]

This notion—that while provisions in human rights treaties are not directly applicable to NSA, states have the obligation to enforce them in the private sphere—constitutes an authoritative interpretation of the 1966 Covenants, which, as seen, furthers and complements the Charter, thus providing the U.N. with the necessary legal grounds on which to progressively assert the scope of the TNC obligation to respect international human rights law. The same notion can also be found in the general comments or recommendations of other U.N. treaty-based human rights bodies, and in decisions of regional systems of human rights (see discussion below).[79] In these jurisdictions, the line between moral and legal

[77] Comm. on Econ., Soc., and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights (Art. 2, ¶ 2) ¶ 11, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

[78] Human Rights Comm., Gen. Comment 34: Freedoms of opinion and expression (Art. 19), ¶ 7, U.N. Doc. CCPR/C/CG/34 (Sept. 12, 2011).

[79] There are ten U.N. treaty-based human rights bodies. In addition to the CCPR and the ICESCR, others include the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee Against Torture (CAT), the Subcommittee on Prevention of Torture (SPT) the Committee on the Rights of the Child (CRC), the Committee on Migrant Workers (CMW), the Committee on the Rights of Persons with Disabilities (CED), and the Committee on Enforced Disappearance (CED). *See, e.g.*, Comm. Against Torture, General Comment 2: Implementation of article 2 by States Parties, ¶ 15, U.N. Doc. CAT/C/GC/2/CRP.1/Rev. 4 (Nov. 23, 2007); Comm. on the Elimination of Racial Discrimination, General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, ¶ 23, U.N. Doc. CERD/C/GC/32 (Seventy-fifth session, Aug. 2009); Comm. on the Elimination of Discrimination against Women, General recommendation No. 19: Violence against women, ¶¶ 9, 24(a), U.N. Doc. A/47/38 (Eleventh session, 1992); and Comm. on the Rights of Persons with Disabilities, Draft Gen-

duties is also very blurred. It is submitted here that the call upon states to enforce human rights in the private sphere constitutes, indirectly, an affirmation that such rights must be respected by NSAs. Hence, it may be interpreted as an indirect affirmation of the corporations' duty to respect the human rights in question.

E UN SPECIAL PROCEDURES

This Article affirms that the International Bill of Rights furthers and complements the Charter, providing normative content to the general provisions in the Charter that demand respect to human rights. As an obligation upon TNCs to respect human rights develops under the auspices of the U.N., it is natural that the Bill of Rights will provide the minimum content of the obligation. This notion has been corroborated by the outcome of work done by John Ruggie as U.N. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises in his 2011 publication: *Guiding Principles on Business and Human Rights*.[80]

The U.N. *Guiding Principles* contains thirty-one principles organized under three main headings: Protect, Respect and Remedy. Businesses' duty to respect is subject to the second cluster of principles. Principle 11 sets forth the proposition that: "Business enterprises should respect human rights." Meaning that, "they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[81] Commentary to this principle highlights that such responsibility "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations."[82] In what concerns the content of the obligation, it is principle 12 that stands out by setting forth that:

> The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, *at a minimum*, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[83]

Besides, the commentary to principle 12 makes express reference to the International Labour Organization's (ILO) eight core conventions concerning freedom of association and effective recognition of the rights to collective bargain-

eral comment on Article 12 of the Convention: Equal Recognition before the Law, ¶ 20, U.N. Doc. CRPD/C/11/4 (Nov. 25, 2013).

80 U.N. *Guiding Principles*, *supra* note 1.

81 *Id.* at 13

82 *Id.*

83 *Id.* (emphasis added).

ing,[84] the elimination of all forms of forced and compulsory labour,[85] the effective abolition of child labour,[86] and the elimination of discrimination in respect of employment and occupation.[87] Finally, the same commentary expressly includes the rights of indigenous peoples; women; national, ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.[88]

Another aspect that deserves mentioning concerns the TNC obligation to carry out human rights due diligence (HRDD), as is detailed in the *Guiding Principles* numbers 17 thru 21, so as to "identify, prevent, mitigate and account for how they [TNCs] address their adverse human rights impacts …The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[89]

Due diligence must tackle the human rights impacts that businesses may cause both directly and indirectly, including those caused by factors connected to business operations, products, services and relationships.[90] The obligation should be consistent with the complexity and size of the business and with the risk of serious human rights violations and the nature and context of the business's activities.[91] It should be continuously carried out, given that the potential risks involved may change.[92] The due diligence must rely on human rights expertise and involve "meaningful consultation with potentially affected groups and other relevant stakeholders."[93] The outcome of the due diligence must be incorporated "across relevant internal functions and processes," including the relevant decision-making, budget allocations and oversight processes; and appropriate action must be carried out.[94] Principles 20 and 21 provide directives for the assessment of whether the human rights impacts identified in the due

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[84] International Labour Organization Convention concerning Freedom of Association and Protection of the Right to Organize, July 4, 1950, ILO No. 87, 68 U.N.T.S. 17; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 18, 1951, ILO No. 98, 96 U.N.T.S. 257.

[85] International Labour Organization Convention concerning Forced or Compulsory Labour, May, 1, 1932, ILO No. 29, 39 U.N.T.S. 55; Convention concerning the Abolition of Forced Labour), January 17, 1959, ILO No. 105, 320 U.N.T.S. 291.

[86] International Labour Organization Convention concerning the Minimum Age for Admission to Employment, June 19, 1976, ILO No. 138, 1015 U.N.T.S. 297; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, November 19, 2000, ILO No. 182, 2133 U.N.T.S. 161.

[87] International Labour Organization Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, May, 23, 1953, ILO No. 100, 165 U.N.T.S. 303; Convention concerning Discrimination in Respect of Employment and Occupation, June 15, 1958, ILO No. 111, 362 U.N.T.S. 31.

[88] U.N. *Guiding Principles*, *supra* note 1, at 13–14, princ. 12, cmt. *Accord* the eight ILO conventions, discussed *supra* notes 84–87.

[89] U.N. *Guiding Principles*, *supra* note 1, at 15–17.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 18–19.

[93] *Id.* at 19, princ. 18(b).

[94] *Id.* at 20, princ. 19.

diligence have been properly addressed.[95]

Note how human rights due diligence was addressed both by the Security Council and the Special Representative, and how one complements and strengthens the other. Furthermore, the importance of carrying out due diligence may be enhanced by the multiplication of the so-called codes of conduct. Voluntary in essence, these collegiate or individually produced codes are usually the result of fragmented efforts carried out independent of each other, with rare exceptions, such as *ISO 26000*.[96] The content and level of detail of such efforts varies hugely, but the level of importance, for the present purposes, stays the same in shaping the general standards of care that are legally expected from businesses.[97] As standards of care for a sector of business or industrial activity are improved, meeting them may require, in specific circumstances, the carrying out of human rights due diligence.[98]

The outcomes of the efforts of two other organizations must be mentioned here because they strengthen the U.N. guiding principles: namely, the ILO's tripartite principles, and the Organization for Economic Co-operation and Development's *OECD Guidelines for Multinational Enterprises*.[99]

The ILO is characterized by its unique tripartite structure that brings together in its executive bodies representatives of states, employers, and workers. It adopted its *Tripartite Declaration of Principles Concerning Multinational Enterprises* in 1977, and the publication was last updated in 2006. This instrument clearly states that all of its parties "should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress."[100] Furthermore, the parties should "contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up."[101] On its turn, the OECD in chapter IV of its 2011 *Guidelines for Multinational Enter-*

[95] *Id.* at 22–24.

[96] Int'l Org. for Standardization [ISO], *Guidance on Social Responsibility*, ISO Doc. 2600: 2010, (Nov. 1, 2010), `https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en`.

[97] David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 955–958 (2004).

[98] A good example is The Kimberley Process, a joint venture involving states and non-state actors with the aim of stemming out "the flow of conflict diamonds—rough diamonds used by rebel movements to finance wars against legitimate governments." THE KIMBERLEY PROCESS, `http://www.kimberleyprocess.com` (last visited Nov. 25,2015). The initiative has the pull of the U.N., *cf., e.g.*, S.C. Res. 1306 (July 5, 2000) (prohibiting the direct or indirect import of rough diamonds from Sierra Leone), *and* G.A. Res. 55/56 (Jan. 29, 2001) (resolving to break the link between rough diamonds and armed conflict), *with* G.A. Res. 61/28 (Feb. 12, 2007) (report of the Chair of the Kimberley Process). The Chair rotates annually; in 2007, it was the European Union.

[99] Organization for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises (1976), 15 I.L.M. 967–79 (6th ed., 2011) [hereinafter OECD Guidelines].

[100] International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 I.L.M. 422, at ¶¶ 8, 48 (4th ed. 2006) [hereinafter MNE Declaration].

[101] International Labour Organization, Declaration on Fundamental Principles and Rights at Work and its Follow-up, June 18, 1998, 37 I.L.M.1233 (rev. ed., 2010).

prises, set forth the idea that enterprises should: "Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[102] Commentary to this guideline emphasizes that "[i]n all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights …and to the principles concerning fundamental rights set out in the 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work."[103] It is important to observe that the OECD guidelines also affirm that businesses should "[c]arry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts."[104]

Gradually, agreement caused a build-up in strength, so that now the International Bill of Rights and the ILO's Declaration on Fundamental Principles and Rights at Work contain the minimum human rights standards that businesses are required to respect. Also, the obligation to carry out human rights due diligence is being progressively reinforced. The focus placed on said instruments should not be understood as undermining the principle that "all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing."[105] Rather, it should be seen as a starting point. Remarkably, the U.N. *Guiding Principles* and the OECD Guidelines jointly emphasize that businesses may impact on the "entire spectrum of internationally recognized human rights," and each expressly lists, along with the above, other human rights standards.[106] Furthermore, explaining the normative contribution of the *Guiding Principles*—and his explanation may equally apply to the other two instruments—UN Special Representative John Ruggie asserted that it consisted:

> [N]ot in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[107]

The clear import from the above is that the maturation of the scope of the TNC obligation to respect human rights derives from two different and complementary approaches. On the one hand, there is an inductive approach based on the repeated affirmation of the TNC obligation to respect precise human rights standards in specific cases. This can be a very slow process indeed, but its outcome

[102] OECD Guidelines, *supra* note 99, at 31, ¶ 1.
[103] *Id.* at 32, ¶ 39.
[104] *Id.* at 31, ¶ 5.
[105] G.A. Res. 66/151, (Mar. 13, 2012), U.N. Doc. A/RES/66/151 at 2 ¶ 1.
[106] *Cf.* Human Rights Council Res. 17/4 at 13, princ. 12 cmt. ("Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights"), *with* OECD Guidelines, *supra* note 99, at 32, ¶ 40 ("Enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights.").
[107] U.N. *Guiding Principles*, *supra* note 1, at 5, ¶ 14.

is solid because the resulting obligations are precise, seasoned, and very tangible.[108] On the other hand, there is a deductive approach that attempts to derive human rights obligations upon TNCs from existing international instruments entered into by and among member states. This is a faster process, but weaker when contrasted with the former. All in all, the compilation of standards in the *Guiding Principles* constitutes recommendations offered to the international community. They were endorsed by the HRC in *Resolution 17/4*, which, as has been seen, was adopted with support by all forty-seven members. What this suggests is that the non-mandatory nature of U.N. principles does not prevent them from providing scope for the evolving TNC obligation to respect international human rights law.

F Regional Human Rights Courts

This section will briefly review the very important contribution to human rights the courts have been making to the development in the field. The main regional courts—the Inter-American (IACtHR) and the European (ECtHR) Courts of Human Rights—have played an important role in holding states to their obligation to ensure respect for human rights in the private sphere and their case law strengthens and complements the work of the U.N. human rights bodies and procedures. By way of illustration, it can be recalled that the ECtHR has held states responsible for failing to protect against violations of the right to privacy by media organizations.[109] Professor Andrew Clapham has cited many such instances in which the European court held states responsible for failing to protect against violations committed by NSAs, corporations included.[110] The same applies to the IACtHR. In *Ximenes-Lopez v. Brazil*, for instance, the Inter-American court ruled that: "States must regulate and supervise all activities related to the health care given to the individuals under the jurisdiction thereof, as a special duty to protect life and personal integrity, *regardless of the public or private nature* of the entity giving such health care."[111] The judges concluded that failure to do so would give rise to international liability.[112] In an opinion on a case involving migrant workers, the IACtHR placed the principle of non-discrimination among *jus cogens* norms, affirmed that it constituted an obligation *erga omnes*, and held that it applied in the private sphere.[113]

Furthermore, there is a set of cases heard by the IACtHR deserving of special attention, given their importance in standing for the notion of human rights

[108] This is reminiscent of the "*coutume sage*" referenced by Judge Bruno Simma and Professor Phillip Alston, *supra* note 40, at 89.

[109] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 294.

[110] CLAPHAM, *supra* note 6, at 317–42.

[111] Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, 1, 28, ¶ 89 (Jul. 4, 2006). (emphasis added).

[112] *Id.* at ¶ 90.

[113] Status and Rights of Undocumented Migrants, Advisory Opinion OC–18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 98, 101 (Sept. 17, 2003).

due diligence.[114] These cases concern the exploitation by private companies of lands claimed by indigenous communities. These decisions are important for different reasons—first, for holding states responsible for failing to prevent and remedy abuses committed by private corporations; second, for providing a new insight into the communitarian aspects of right to property under article 21 of the Inter-American Convention on Human Rights, and finally for promoting the understanding of the relationship between development and human rights. But the aspect now emphasized concerns the affirmation of the communities' right to *participate* in the decision-making concerning the exploration of their land. This is emphasized because it exposes another aspect of the obligation to carry out human rights due diligence. One example illustrates the point. In 2012, the ICtHR decided *Kichwa Indigenous People of Sarayaku v. Ecuador*.[115] At stake were the mechanisms of protection necessary to guarantee the right to communal property. In the case, lands had been licensed by the state to a private oil company, whose activities severely impacted the lives of the Kichwa community. The court emphasized that there were guidelines that had to be respected whenever states imposed limitations and restrictions on indigenous peoples' rights to exercise use over their lands, for the purposes of exploring and extracting their natural resources. It held that exploration and extraction of natural resources could not jeopardize the survival of the indigenous people. Notably, the court suggested that safeguards should be applied through the implementation of *participatory processes* that guarantee the efficacy of the right to consultation, particularly in the face of large-scale investments.[116] To strengthen the rights of affected populations in this way, it is submitted, is to strengthen the corporate obligation to carry out human rights due diligence. This conclusion is reinforced by the aforementioned U.N. *Guiding Principles*, specifically principle 18, and the OECD *Guidelines*.

It is clear that regional courts of human rights had already been corroborating the notion that human rights must be respected in the private sphere by affirming precise obligations in the cases they heard. They clearly relied on new readings of international human rights treaties, readings that were more consonant to the constitutional rather than contractual nature of such treaties.[117] Hence, the U.N. efforts in this field should be understood in the context of the

[114] *See, e.g.*, Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

[115] Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

[116] Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 157 (Mar. 29, 2006).

[117] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 79, ¶¶ 146–7 (Aug. 31, 2001) (the court observed that terms of international human rights treaties have an autonomous meaning, and that such "treaties are *live instruments* whose interpretation must adapt to the evolution of times and …to current living conditions." The court opined that there should be no restrictive interpretation of human rights, pursuant to article 29 (b) of the American Convention). *Id.*; *Accord* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No 36, 1144 U.N.T.S. 123.

larger picture provided by the decisions of these two human rights courts.

G SOME LEGAL BARRIERS FOR THE ENFORCEMENT OF THE TNC OBLIGATION TO RESPECT IHRL

There are many barriers in the path of judicial enforcement of the TNC obligation to respect human rights, although this latter field has been developing along with the former. As said, there are no international courts with jurisdiction to oversee TNC compliance with international human rights norms. Regional human rights courts and international criminal courts and tribunals are capable of only *indirectly* enforcing international human rights standards against TNCs. This is done, respectively, by holding states responsible for violations carried out in the private legal relations and holding businesspeople responsible for crimes that involve serious violations of human rights. Criminal law in particular should not be taken as a panacea for "solving theoretical and practical obstacles surrounding the debate on corporate human rights obligations" because it only sanctions the "most serious" violations of fundamental human rights norms, all having the character of jus cogens.[118] As there is no perception that any of the above will change in the near future, attention naturally turns to the role of national courts, notably those in countries where the TNCs are incorporated or have an established presence. In this regard, the U.S. federal courts have been unique in holding TNCs civilly liable for violations of international human rights standards. These cases have been heard by U.S. courts under the Alien Torts Claims Act, and although the case law seems far from firmly established in many aspects, there has been a clear inclination toward affirming the TNC responsibility to respect fundamental international human rights norms.

The ATCA was originally part of the 1789 Judiciary Act and is currently enshrined in section 1350 of the twenty-eighth title to the United States Code, where it reads—"the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[119] Resort to the ATCA remained very uncommon for almost two centuries.[120] Its modern application started in 1980 with *Filártiga v. Peña-Irala*, a case that concerned torture committed by a Paraguayan state agent against Paraguayan nationals, all of whom were living in the United States.[121] The conviction of the agent by the United States Court of Appeals for the Second Circuit opened the door for attempts to apply the ATCA in cases of violations of international human rights law by government agents. In the

[118] Herik & Černič, *Regulating Corporations under International Law*, *supra* note 45, at 742.

[119] 28 U.S.C. §1350 (2012) (corresponds to the Judiciary Act of Sept. 24, 1789, ch. 20, §9(b), 1 Stat. 79, n. 10).

[120] *See, e.g.*, GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 9 (2008) ("The ATCA evolved from a footnote to the Judiciary Statute of 1789 into an institution recognized in 1980 as a primary arena for litigating human rights.") The ATCA is also sometimes referred to as the Alien Torts Statute, or the ATS. This latter construct entered the law in the United States Supreme Court's major pronouncement on the meaning of the ATCA in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[121] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

1990s, suits were brought against corporations, too, on the grounds that they had facilitated the commission of crimes by foreign governments.[122] Dozens of cases were brought against TNCs, most of which concerned corporate responsibility as aiders and abettors in violations of international law.[123] The lawsuits alleged: "heinous crimes condemned by customary international law" that "took place abroad and in troubled or chaotic circumstances."[124] Illustrative cases were brought against companies that provided the "Agent Orange" for the U.S. government to deploy in Vietnam;[125] that were allegedly complicit in the forced labour, rape, and murder of Burmese villagers;[126] that were accused of complicity with the government in committing human rights abuses including murder, against local communities in Nigeria.[127] The complexity of the cases along with TNCs perception of the risk of multibillion-dollar verdicts being awarded has led many TNCs to settle cases before trial.[128] Hence, the federal courts of appeals have had the opportunity to decide no more than a handful of such cases, and the United States Supreme Court has had only two.[129] Consequently, a number of "unresolved issues" remain in the ATCA's jurisprudence.[130] This section is less concerned with such issues, however, than with the overall impact that the few decisions have had in promoting the development of the law in regard to the TNC obligation to respect international human rights standards.

However significant, the impact of these decisions should not be overstated. This is because, as the Supreme Court noted in *Sosa v. Alvarez-Machain*, courts are required, when recognizing causes of action under the ATCA, to exercise "vigilant doorkeeping"[131] and, therefore, "should not recognize private claims under federal common law for violations of any international law norm with *less definite content* and *acceptance* among civilized nations than the historical paradigms familiar when Section 1350 was enacted."[132] The Court's ruling sets forth the requirements for an international norm to trigger federal court jurisdiction under the ATCA. Namely, it must be specific, universal, and have mandatory character. Hence, it is understandable that many courts have emphasized the norms under which they recognize causes of action to have the character of *jus cogens* and, in so doing, clearly place them under the *Alvarez* umbrella.[133]

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[122] Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), and Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Ca. 2000) *aff'd in part, rev'd in part by* Doe I v. Unocal Corp, 395 F.3d 932 (9th Cir. 2002), *granted rehearing en banc by* Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003), *vacated on rehearing by* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (en banc).

[123] U.N. *Guiding Principles*, *supra* note 1, at ¶ 29.

[124] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

[125] *In re* Agent Orange Product Liability Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd*, Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104 (2d Cir. 2008).

[126] *Doe I*, 395 F.3d 932.

[127] *Kiobel*, 621 F.3d 111.

[128] *Id.* at 117.

[129] Sosa v. Alvarez, 542 U.S. 692 (2004); *Kiobel*, 133 S. Ct. 1659 (2013).

[130] *Kiobel*, 621 F.3d at 117.

[131] *Alvarez*, 542 U.S. at 729.

[132] *Id.* at 732.

[133] Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part by* Doe I

Take the 2003 ruling by the United States District Court for the Southern District of New York in *Talisman*.[134] In what became a well-known obiter dictum, Judge Schwartz noted:

> [S]ubstantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations. Extensive Second Circuit precedent further indicates that actions under the ATCA against corporate defendants for such substantial violations of international law, including *jus cogens* violations, are the norm rather than the exception.[135]

But the question of whether corporations can be held liable for violations of international human rights law soon appeared ripe for adjudication. For the most part, the district courts affirmed that possibility.[136] However, the Second Circuit overturned many of those cases on appeal,[137] deciding, for example, in *Kiobel v. Royal Dutch Petroleum* that "corporate liability is not a norm that we can recognize and apply in actions under the ATS because the customary international law of human rights does not impose any form of liability on corporations (civil, criminal, or otherwise)."[138] The reasoning for that holding is long and complex, and its review is beyond the scope of this Article. Nevertheless, it is worth noting that the U.N. resolutions were not weighed as evidence or considered a source of customary law, which to a certain extent is striking given their weight in *Filártiga*.[139] Also, the Second Circuit in *Kiobel* took the fact that international courts and tribunals lacked jurisdiction over corporations as evidence that international law does not recognize corporate responsibility, which is inaccurate.[140] It is submitted here that the issue of jurisdiction should be set apart from the issue of responsibility. Although the International Court of Justice ultimately decided in *East Timor* that it lacked jurisdiction to hear the charges against Australia, the court clearly affirmed the *erga omnes* character of the country's alleged breach of obligation—"the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."[141] It was on this distinction that Judge Leval concurred in judgment with the Second Circuit in *Kiobel*, but strongly dissented from the majority's position on corporate

v. Unocal Corp, 395 F.3d 932 (9th Cir. 2002), *granted rehearing en banc by* Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003), *vacated on rehearing by* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (en banc).

134 Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003), *aff'd by* 582 F.3d 244 (2d Cir. 2009).

135 *Talisman*, 244 F. Supp. 2d at 319.

136 *In re* Agent Orange Product Liability Litig., 373 F. Supp. 2d 7, 53 (E.D.N.Y. 2005), *aff'd*, Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104 (2d Cir. 2008).

137 Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd in part, rev'd in part, remanded to In re* South African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

138 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 147 (2d Cir. 2010) (emphasis omitted), *aff'd in part, rev'd in part*, 456 F. Supp 2d 457 (S.D.N.Y. 2006), *aff'd*, 133 S. Ct. 1659 (2013).

139 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

140 *Kiobel*, 621 F.3d at 127.

141 East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, ¶¶ 28–29 (June 30).

responsibility. Leval noted that international law "leaves all aspects of the issue of civil liability to individual nations" and that "there is no rule or custom of international law to award civil damages in any form or context, either as to natural persons or as to juridical ones."[142] Yet, Judge Leval continued, "[t]he fact that international tribunals do not impose *criminal punishment* on corporations in no way supports the inference that corporations are outside the scope of international law and therefore can incur no *civil compensatory liability* to victims when they engage in conduct prohibited by the norms of international law."[143]

Moreover, another point of divergence concerns extraterritoriality of the ATCA; an aspect made relevant because the suits concerning wrongs done abroad are of a much different nature than those historically under the ATCA jurisdiction. In granting the petition for *certiorari*, the Supreme Court in *Kiobel* affirmed the Second Circuit's holding that the ATCA offered no exception to the "presumption against extraterritoriality."[144] The Court held such presumption necessary for the protection "against unintended clashes between our laws and those of other nations which could result in international discord."[145] The majority decided that claims should "touch and concern the territory of the United States …with sufficient force to displace the presumption against extraterritorial application."[146] Furthermore, they opined, "corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[147] The decision has already impacted lower courts, who have interpreted *Kiobel* to bar causes of action under the ATCA that are based solely on "conducts occurring in the territory of another sovereignty."[148]

It appears that the ATCA may constitute a mechanism available to victims of human rights abuses by corporations in a very limited number of cases. To a great extent, the Act's ambivalent application reflects the dynamics of the emergence of a norm clearly requiring corporations to respect international human rights, and the progressive crystallization of the scope of such a norm. To another extent, however, it reflects the U.S. courts' apprehension in holding corporations accountable to international human rights standards for wrongs committed abroad, and in many cases done complicity with local governments. The American judiciary's apprehension is to a certain degree caused by the fact that no courts in other states abroad have exercised such a jurisdiction and foreign governments have often objected, sometimes as *amici curiae*, to the exercise of such a jurisdiction in the U.S. courts.[149] It seems the crystallization of an obligation upon TNCs to respect human rights and the further clarification of the

142 *Kiobel*, 621 F.3d at 152 (Leval, J., concurring in part and dissenting in part).
143 *Id.*
144 Kiobel v. Royal Dutch Petroleum Co, 133 S. Ct. 1659, 1665 (2013).
145 *Id.* at 1661 (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).
146 133 S. Ct., at 1669.
147 *Id.*
148 Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013).
149 *See, e.g.*, *In re* South African Apartheid Litigation, 617 F. Supp. 2d 228, 278 (S.D.N.Y. 2009), *denied reconsideration by* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 300 (2d Cir. 2007), *judgment aff'd by* American Isuzu Motors, Inc. v. Ntsebeza 553 U.S. 1028 (2008).

content of such an obligation, like that promoted by the UN, could eventually be realized through case law under the ATCA if courts are enabled to enlarge the range of norms that trigger jurisdiction under that Act. However, the issue of extraterritoriality will likely remain an obstacle, insomuch as the ATCA is a unique statute to the United States, without equivalence in other countries.

H CONCLUSION

This Article reviewed the role played by the U.N. resolutions in fostering the development of a norm of general character that establishes the TCA responsibility to respect international human rights law. It was shown that such a norm might eventually acquire the nature of an international legal principle in the sense that article 38 of the ICJ Statute has. Also, the effort carried out by the U.N., ILO, and OECD in giving normative content to that responsibility was catalogued. This content seems to derive from an inductive reasoning applied to specific situations, and from a deductive approach applied to human rights instruments. As John Ruggie affirmed, the task is less of one creating new law and more of one developing an understanding of how existing law applies to TNCs by taking full consideration of the manner and impact their activities have on human rights.

The Article does not suggest that a legal norm establishing the TNC responsibility to respect international human rights has completely emerged, and least of all that it is fully operative. Rather, the Article posits that there is strong evidence that such a norm is in the process of formation, and that it is progressively acquiring normative content through the work of different bodies. The U.N., with its universal character and the constitutional nature that may be attributed to its Charter, has played a major role to this end. Clarification of the scope of the human rights obligation has evolved and will continue to evolve together with the development of the obligation itself, and this includes, at a minimum, the International Bill of Rights and the ILO's Declaration of Principles and Rights at Work.

Finally, this Article reviewed the role played by regional human rights courts and national courts in indirectly or directly holding TNCs subject to violations of international human rights law. Regional human rights courts have clearly promoted the development of the field, albeit indirectly, by affirming state obligations to enforce specific rights in private relations. Finally, the Article also reviewed the main legal barriers for holding TNCs to IHRL. It singled out as main barriers the international judicial organs' lack of jurisdiction over transnational corporations and the jurisdictional impact upon national courts applying international law, including the resistance by U.S. federal courts to extend their jurisdiction extraterritorially over actions carried out abroad.