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# TIDES OF CHANGE - THE STATE, BUSINESS AND THE HUMAN

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## 1. INTRODUCTION

In recent decades international law has witnessed an undeniable shift away from the traditional Westphalian structure that has long kept sovereign states masters of their own domains. Globalisation, advancing technologies and increased interconnectedness among people has ushered in a greater awareness of ‘foreign’ places, people and politics. The past decade in particular has seen remarkable evolution in the field of international law in relation to the protection of human rights, though much of the law reflecting this evolution is either soft law or only binding at the domestic level. Businesses<sup>1</sup> formerly insulated by the cover of private law, are receiving greater attention for their role in human rights abuses, a field generally defined and defended by public law. Almost in parallel, the role of states in protecting human rights outwith their borders has also shifted. Gone are the days when states simply looked the other way as the populations of another state suffered due to the neglect or offenses of their government. A collective conscience has evolved – a conscience that no longer tolerates human deprivation and suffering at the hands of actors that were formerly ‘off-limits’ for the purposes of global human rights scrutiny. This chapter examines the expanding recognition of business as a human rights duty-bearer and how this expansion reflects the transitioning role of states through the responsibility to protect concept. The key to both developments lies in the need for states to focus on prevention by carrying out effective due diligence.<sup>2</sup>

In terms of business, this shift in international law stems from the recognition that human rights are impacted by business activity. Since World War II business actors have been recognised for their complicity in human rights abuses.<sup>3</sup> In this context, complicity is the indirect involvement of business in contributing to another’s abuse of human rights.<sup>4</sup> In other words, business often turned a blind eye in order to yield more lucrative business outcomes.<sup>5</sup> In other instances, business has been a direct abuser or an active co-conspirator.<sup>6</sup> These realisations have awakened the international community and principles of international soft law have been forged to combat these assaults on human dignity.

At the same time, the traditional state-human being relationship has evolved to consider not merely the role of the state in which human rights violations take place – the home state – but also the international community of states as a collective duty-bearer and defender of human rights. This idea is encapsulated by the concept of the ‘Responsibility to Protect’ (R2P) and has been defined as:

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<sup>1</sup> Throughout this chapter the terms ‘business’ and ‘businesses’ are used interchangeably to refer to domestic corporations, transnational corporations and other actors engaged in trade and commerce collectively.

<sup>2</sup> See, S. MICHALOWSKI, ‘The Relationship of Due Diligence and Complicity’ in S. DEVA and D. BILCHITZ (eds.), *Human Rights Obligations of Business*, CUP, Cambridge 2013; L. GLANVILLE, ‘The Responsibility to Protect Beyond Borders’ (2012) 12 *Human Rights Law Review* 1, 20; A. GATTO, *Multinational Enterprises and Human Rights*, Edward Elgar, Cheltenham 2011, p. 72; V.P. TZEVELEKOS, ‘In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors’ Human Rights Abuses That Are Not Attributable to It?’ (2009) 35 *Brooklyn Journal of International Law* 155, 177 *et seq.*; R. MCCORQUODALE and P. SIMONS, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 *Modern Law Review* 598, 618-19.

<sup>3</sup> S. RATNER, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443, 477. Though corporate abuse of human rights predates World War II, the discussion in this chapter will be limited to an analysis of rights abuse in what is referred to as the ‘modern’ era of human rights, which is post-1948 following the adoption of the Universal Declaration of Human Rights.

<sup>4</sup> J. RUGGIE, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Clarifying the Concepts of “Sphere of influence” and “Complicity”’, UN Doc. A/HRC/8/16 (15.5.2008) (‘Clarifying the Concepts’), para. 30.

<sup>5</sup> Such as the use of cheap labour in Apartheid South Africa to increase profits, see S. MICHALOWSKI, ‘The Relationship of Due Diligence and Complicity’ in S. DEVA and D. BILCHITZ (eds.), *Human Rights Obligations of Business*, CUP, Cambridge 2013, p. 226.

<sup>6</sup> Examples include: *Doe v. Unocal*, 395 F.3d 932 (9<sup>th</sup> Cir. 2002) where claimants from Myanmar sued oil businesses for aiding and abetting the state military in the commission of human rights violations in order to ensure the construction of an oil pipeline; the 1984 Bhopal disaster where there was a gas leak at a Union Carbide chemical plant following years of safety negligence by Union Carbide which resulted in the catastrophic loss of life to over 20,000, see AMNESTY INTERNATIONAL, *Clouds of Injustice: Bhopal Twenty Years On*, Alden Press, Oxford 2004; and executives of the company I.G. Farben were indicted for war crimes and crimes against humanity for their role in the production of the gas used to execute prisoners in Nazi concentration camps, see *United States v. Carl Krauch, et al.*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, ‘Introduction to the Holocaust’ in *Holocaust Encyclopedia* <<http://www.ushmm.org/wlc/en/article.php?ModuleId=10005143>> accessed on 20.8.2014.

‘[T]he idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.’<sup>7</sup>

This suggests that absolute state sovereignty – a foundation principle of international law – no longer stands as a bulwark against the international community of states when mass human rights abuses continue unchecked. The initial part of the definition, that states have a responsibility to protect their own citizens, is the basis of international human rights law. The latter half of the definition is where long-held principles of international law are challenged and the traditional concept of the home state as the sole actor with human rights obligations has faded. This essay examines whether the parallel developments in the R2P concept and the business and human rights framework suggest a more general paradigm shift in the overall protection of human rights, which focuses on the responsibilities of duty bearers as both complementary and alternative to the duties of the home state.

In section 2, this chapter will present the traditional role of states as the primary actors endowed with international legal personality and sole duty-bearers of human rights obligations. The section will consider how the responsibility to protect has reframed the role of states in the face of mass human rights violations which signals a shift in the traditional sovereignist model of international law to a collective human rights duty for the community of states. Section 3 will introduce the relationship between business and human rights and explain why it also necessitates an expansion of the traditional concept of human rights duty-bearer. The developing international legal framework for addressing business and human rights will be presented in section 4. Finally, section 5 will examine how states can close the gaps in domestic law in order to facilitate a move toward business as a human rights duty-bearer. The changes traced throughout this chapter reflect that R2P is one of several evolving concepts in international law indicating that human rights protection is no longer the sole responsibility of the home state and that to ensure protection, all duty-bearers must work to prevent human rights abuse.

## 2. THE ROLE OF STATES IN PROTECTING HUMAN RIGHTS

Since its beginning, international law has recognised states (or their forerunners) as the primary actors in international law. International law cannot be clearer – it is law made by states to govern the relations between states.<sup>8</sup> Over time, and in particular during the last half-century, this definition has expanded to include international institutions as other ‘actors’ for the purposes of international law.<sup>9</sup> Furthermore, individuals have been recognised as having ‘international legal personality’ for the purposes of human rights protection, as well as international investment law and international criminal law.<sup>10</sup> The duty to protect human rights, however, lies with the state. In the human rights context, states have three levels of obligation: to respect, to protect and to fulfil human rights.<sup>11</sup> The specific rights to which the tripartite obligation is designed to respond are outlined in a multitude of treaties, such as the International Covenant on Civil and Political Rights<sup>12</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.<sup>13</sup> The international obligations set out in human rights treaties are intended to be fulfilled at the domestic level (discussed below in section 5), generally through the adoption of domestic law and policy or through direct incorporation of the treaty. Regardless of the legal method by which a state seeks to satisfy its human rights obligations, the point is that though these obligations are international, their realisation takes place at the domestic level and the state is the duty-bearer.

### 2.1. THE EVOLVING NATURE OF STATES’ DUTIES

In 2000, then UN Secretary-General Kofi Annan asked:

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<sup>7</sup> INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), *The Responsibility to Protect: Report of the ICISS* (December 2001) (‘R2P Report’), p. VIII.

<sup>8</sup> M. DIXON, *Textbook on International Law*, 7<sup>th</sup> ed., OUP, Oxford 2013, p. 117.

<sup>9</sup> *Ibid.*, pp. 126 *et seq.*

<sup>10</sup> See, for example, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, 18.3.1965, art. 36; Rome Statute of the International Criminal Court, 2187 UNTS 3, 17.7.1998, art. 25.

<sup>11</sup> O. DE SCHUTTER, *International Human Rights Law*, 2<sup>nd</sup> ed., CUP, Cambridge 2014, p. 279.

<sup>12</sup> International Covenant on Civil and Political Rights, 999 UNTS 171, 16.12.1966

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16.12.1966.

‘...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’<sup>14</sup>

R2P was the response to this question. The collective responsibility of the community of states signifies a marked shift away from the fundamental international law principle of state sovereignty. R2P suggests that the territorial integrity of a state, as well as the basic tenet that a sovereign state is solely responsible for the activities that take place within its borders, may be set aside to stop mass human rights violations. At its core, R2P adheres to the primacy of states as has always been recognised in international law;<sup>15</sup> however, it alters the character of these international actors by suggesting collective responsibility of states in the face of a home state that is unable or unwilling to protect its own population.<sup>16</sup> It must be noted R2P applies only to four specified international crimes<sup>17</sup> as they are defined by the Rome Statute,<sup>18</sup> thus this chapter is concerned with tracking the common approaches utilised by both R2P and the move to assign human rights duties to business.

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) outlined that R2P engages three specific responsibilities: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.<sup>19</sup> These three elements were confirmed by the 2005 World Summit Outcome Document and subsequent documents produced by the UN.<sup>20</sup> The most important dimension of these three being prevention. As emphasised by the ICISS, prevention demands that the state ‘address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.’<sup>21</sup> In the modern, globalised world it is not merely state action or civil strife that poses a threat to populations. Human rights are increasingly suffering on the back of economic development and it is to that phenomenon that this chapter will now turn.

### 3. BUSINESS AND HUMAN RIGHTS

Business activity touches almost every aspect of human existence and it naturally follows that the catalogue of human rights potentially impacted by business activity is long. To name a few from an extensive list, these rights include: freedom of association; right to life, liberty and security; right to equal pay for equal work; right to peaceful assembly; right to education; the abolition of child labour; right to family life; freedom of thought, conscience and religion; right to non-discrimination; right to privacy; and freedom from torture. Many of these rights are equally cornerstones of employment or labour rights.

The past decade has seen an increased awareness of the connection between human rights abuses and international business.<sup>22</sup> Stories of violations such as those associated with Bhopal in India<sup>23</sup> or Nigeria’s ‘Oil Delta’<sup>24</sup> represent the most easily identified occurrences of human rights infringement by business activity due to the large-scale impacts and or the egregious nature of the abuse. A number of the most public confrontations

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<sup>14</sup> K. ANNAN, *Millennium Report: We the Peoples – The Role of the UN in the 21<sup>st</sup> Century*, UN, New York 2000, p. 48.

<sup>15</sup> A.J. BELLAMY and R. REIKE, ‘The Responsibility to Protect and International Law’ (2010) 2 *Global Responsibility to Protect* 267, 270.

<sup>16</sup> L. GLANVILLE, ‘The Responsibility to Protect Beyond Borders’ (2012) 12 *Human Rights Law Review* 1, 3-4; UN GENERAL ASSEMBLY, Resolution 60/1, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24.10.2005), paras. 138-39; see also UN DEPUTY SECRETARY-GENERAL, Deputy Secretary-General says preventing atrocity crimes ‘Both a national and an international responsibility’, Press Release, UN Doc. DSG/SM/689, GA/11412 (11.9.2013).

<sup>17</sup> UN SECRETARY-GENERAL, Implementing the responsibility to protect, Report of the Secretary-General, UN Doc. A/63/677 (12.1.2009), para. 10(a).

<sup>18</sup> Rome Statute of the International Criminal Court, 2187 UNTS 3, 17.7.1998, art. 5, *et seq.*

<sup>19</sup> ICISS, R2P Report, p. XI.

<sup>20</sup> UN GENERAL ASSEMBLY, 2005 World Summit Outcome Document, UN Doc. A/60/L.1 (15.9.2005), paras. 138-39; see, also, UN SECRETARY-GENERAL, Responsibility to protect: State responsibility and prevention, Report of the Secretary-General, UN Doc. A/67/929 – S/2013/399 (9.7.2013); UN SECRETARY-GENERAL, Implementing the responsibility to protect, Report of the Secretary-General, UN Doc. A/63/677 (12.1.2009), para. 11.

<sup>21</sup> ICISS, R2P Report, p. XI and 17 (para. 2.29).

<sup>22</sup> See generally, UN Framework; S. DEVA and D. BILCHITZ (eds.), *Human Rights Obligations of Business*, CUP, Cambridge 2013; S. DEVA, *Regulating Corporate Human Rights Violations: Humanizing Business*, Routledge, London/New York 2012; A. GATTO, *Multinational Enterprises and Human Rights*, Edward Elgar, Cheltenham 2011; TZEVELEKOS, ‘In Search of Alternative Solutions’; D. KINLEY and R. CHAMBERS, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6 *Human Rights Law Review (HRLR)* 447; D. KINLEY and J. TADAKI, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations in International Law’ (2004) 44 *Virginal Journal of International Law* 931.

<sup>23</sup> AMNESTY INTERNATIONAL, *Clouds of Injustice: Bhopal Disaster 20 Years On*, Amnesty International Publications, London 2004.

<sup>24</sup> For the history of the Niger Delta, see I. OKONTA and O. DOUGLAS, *Where Vultures Feast: Shell, Human Rights and Oil*, Verso, London 2003.

between business and human rights involve environmental protests responding to natural resource operations, such as those chronicled by cases against Exxon Mobil<sup>25</sup> and Moterrico Metals.<sup>26</sup> These cases require the determination of the victims to shine a public light on corporate human rights abuse. Environmental damage caused by petroleum refining, such as with the 2000 Guanabara Bay oil spill in Brazil or the 2010 Deepwater Horizon oil disaster off the coast of the US, potentially infringes numerous rights not only of nearby residents but also of local fisherman. Deprivation of the right to pursue one's livelihood or the right to health are obvious socio-economic rights affected in the case of the oil spills at sea and the right to a clean environment is increasingly recognised as necessary to ensuring other rights, including the right to health.<sup>27</sup> Incidents featuring environmental harm are often linked to industry operating without the correct licenses or the failure of the regulating state to enforce its laws.<sup>28</sup> Thus, this particular type of business harm demonstrates that a lack of due diligence on the part of states contributes to human rights violations by private actors.

A number of consumer goods projects also have been forced into the spotlight for alleged violations. One example is Vodafone's suspension of mobile phone and internet access at the request of the Mubarak regime in Egypt during the social upheaval of the Arab Spring in January/February 2011.<sup>29</sup> Further examples can easily be found in the international goods markets and in connection with international retailers,<sup>30</sup> such as claims associated with the deaths and poor working conditions for Bangladeshi factory workers in the Primark supply chain in 2012.<sup>31</sup> Since January 2013, over 500 alleged human rights violations linked to business activities were reported to the Business & Human Rights Resource Centre.<sup>32</sup> The plain and simple fact is that business contributes to human rights violations in countless ways.

As noted in the introduction, business has abused human rights in a number of ways – as a direct abuser, a co-conspirator and through complicity. Businesses have the potential to curb nefarious practices inadvertently resulting in violations by guarding against all acts that could be viewed as complicity in human rights abuse.

[A]voiding complicity is viewed as an essential ingredient in the due diligence carried out to respect rights because it describes a subset of the indirect ways in which companies can have an adverse effect on rights through their relationships.<sup>33</sup>

It is through due diligence that most human rights violations can be halted before they begin. Due diligence must be exercised by the state and by business. How to translate this moral imperative to legal reality is the difficulty, particularly on the part of business.

Until recently, international law did not recognise human rights abuse by actors other than the state, thus the abuse is most often framed as the legal failure of the state to uphold its international human rights obligations due to a lack of due diligence. It is international soft law that makes a connection between business and human rights. However, that soft law is beginning to transform the ways that states treat corporate human rights abuses at the domestic level by strengthening due diligence measures and closing loopholes in the law relating to duty bearers. A multitude of states have adopted national measures to implement the increasing number of soft law regimes, as will be discussed below. Though not uniform across state borders, the collective challenge to transnational business actors to respect human rights has solidified the idea that human rights

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<sup>25</sup> *Doe VIII v. Exxon Mobil Corp., et al.*, (Consolidated Case Nos. 09–7125, 09–7127, 09–7134, 09–7135) DC Circuit Court of Appeals, (8.6.2011).

<sup>26</sup> *Guerrero & Others v Monterrico Metals PLC and Rio Blanco Copper SA* [2009] EWHC 2475 (QB). This case deals with the freezing of Moterrico's assets in order to satisfy claims under its out of court settlement in Peru, however, it provides a concise description of the conduct alleged and admitted by employees of Moterrico.

<sup>27</sup> A.E. BOYLE, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

<sup>28</sup> For example, *Lopez Ostra v. Spain* [1994] 20 EHRR 277; *Taskin v. Turkey* [2006] 42 EHRR 50.

<sup>29</sup> C. MARSDEN, 'Corporate responsibilities in time of civil unrest: the case of Egypt and Vodafone' Hot Topics in Corporate Responsibility, July 2011 <<http://www.som.cranfield.ac.uk/som/dinamic-content/media/Doughty/Corporate%20Responsibilities%20in%20Times%20of%20Civil%20Unrest%20the%20case%20of%20Egypt%20and%20Vodafone.pdf>> accessed 20.8.2014.

<sup>30</sup> See consultations in INTERNATIONAL COMMISSION OF JURISTS (ICJURISTS), Expert legal panel on corporate complicity in international crimes: Corporate complicity and legal accountability, vol. I, Geneva 2008.

<sup>31</sup> See S. NEVILLE, 'Bangladesh factory collapse: Primark urged to sign up to safety agreement.' The Guardian, 25 April 2013. Online at: <http://www.guardian.co.uk/world/2013/apr/25/bangladesh-factory-collapse-primark-inspections> (accessed 12 June 2013).

<sup>32</sup> Business & Human Rights Resource Centre, weekly updates <<http://business-humanrights.org/Documents/Update-Charts>> accessed 20.8.2014. The Business & Human Rights Resource Centre is a non-profit that tracks the positive and negative impacts of over 5100 companies operating in over 180 countries.

<sup>33</sup> Clarifying the Concepts, 1.

protection must be a priority for states and the businesses that operate within them or use them as a corporate base. Just as the idea of collective responsibility among states for mass human rights deprivation has been advanced by R2P, addressing human rights violations by business is driven by collective action on the part of states and business both at home and across borders. The next section introduces a number of the most visible international guidelines on business and human rights, and will be followed by examples of how states are adopting domestic strategies to put these soft laws into practice.

#### 4. THE LEGAL FRAMEWORK FOR PUTTING BUSINESS RIGHT

The international legal obligation to protect human rights is intimately tied to the state as the sole human rights duty-bearer in law; therefore, attributing an international legal wrong to a transnational corporation operating contrary to human rights norms is not recognised by positive international law. Neither is the idea of corporate responsibility for human rights generally recognised by the majority of domestic legal systems. Thus, whilst it is not difficult to locate evidence of rights violations in relation to business activity, a legal duty that would engage corporate responsibility for a human rights violation is often the evasive element that prevents any type of remedy at both the international and domestic level. The state is the actor that has a positive obligation to protect human rights – including against abuse by non-state actors and other third parties.<sup>34</sup> This duty is fulfilled by ensuring that domestic laws make the legal connection between corporate accountability for human rights violations and remedies against corporate wrong-doers. This is generally achieved through criminal, tort or administrative law. However, it is not simply a question of access to justice or remedies. It is most importantly understood as taking action to prevent abuse, just as with the essential ‘prevention’ element of R2P. This is where due diligence plays the most fundamental role in the protection of human rights. This chapter will now turn to a survey of the soft law mechanisms that seek to clarify how states and business can work to prevent human rights abuse.

##### 4.1. INTERNATIONAL SOFT LAW

###### 4.1.1. *The UN Protect, Respect and Remedy Framework on Business and Human Rights*

In 2008, the UN Protect, Respect and Remedy: a Framework for Business and Human Rights<sup>35</sup> (UN Framework) introduced a framework for delegating human rights responsibilities between governments and business. Significantly, the framework outlined not only the state responsibility to protect against human rights abuses by third parties, including businesses, but also outlined the corporate responsibility to respect human rights and the need for effective access to remedies in response to violations at both the state and corporate level.<sup>36</sup> Before the UN Framework, there was no common policy framework addressing human rights from a multi-stakeholder approach. Key to the development of the framework was the multitude of consultations with governments, transnational corporations, business leaders, national human rights institutes, civil society and other stake-holders – what some have referred to as the ‘diplomatic’<sup>37</sup> element of the project – as well as the on-going multi-stakeholder efforts made at the UN and civil society levels.<sup>38</sup> These continuing efforts promise to inform concerned actors until the precise relationship between business and human rights is resolved both in law and practice.

The UN Framework features three distinct but interrelated pillars: protect, respect and remedy.<sup>39</sup> The first pillar addresses the need for states to clarify and strengthen their domestic human rights policies which

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<sup>34</sup> See *X and Y v. the Netherlands*, Ser. A No. 91 [1985] 8 EHRR 235; *Velásquez-Rodríguez v. Honduras* (Merits), Ser. C, No. 4, (1988), paras. 172 – 175, the Inter-American Court of Human Rights opined that the failure to prevent harm by a third party triggered the international responsibility of the state; reaffirmed *Ximenes-Lopes v. Brazil*, Ser. C, No. 149 (2006); 55/96, *SERAC and CESR v. Nigeria*, 15th Annual Report of the ACHPR [2002] 10 IHRR 282 (2003). See A. NOLAN, ‘Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: a Comparison of Regional Approaches to the “Obligation to Protect”’ (2009) 9 *HRLR* 225.

<sup>35</sup> J. RUGGIE, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, UN Doc. A/HRC/8/5 (7.4.2008) (‘UN Framework’).

<sup>36</sup> UN Framework, paras. 17 – 26 (overview of framework).

<sup>37</sup> C. PARKER and J. HOWE, ‘Ruggie’s Diplomatic Project and Its Missing Regulatory Infrastructure’ in R. MARES (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Martinus Nijhoff, Leiden 2011, p. 273, pp. 276 *et seq.*

<sup>38</sup> See for example WORKING GROUP ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES website <<http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>> accessed 5.1.2014.

<sup>39</sup> UN Framework, paras. 17 – 26.

would include closing gaps in regulatory regimes and access to justice in order to protect against human rights abuses, including those by businesses. This reflects similar commitments found in other fields of international law as well as obligations under international human rights treaties.<sup>40</sup> It is the first pillar that asserts the state obligation to ensure policy alignment and coherence in order to support business and ensure compliance with all applicable domestic law.<sup>41</sup> As with R2P, the critical message to states is that prevention is the best way to protect human rights.

The second pillar requires that businesses respect human rights and serves as a blueprint to guide businesses through the steps they should take to ensure human rights are respected. To ‘do no harm’ is the most basic explanation of respecting rights and is the fundamental requirement for business under pillar two of the UN Framework.<sup>42</sup> This requires familiarisation with human rights issues and due diligence that is sensitive to human rights. Obviously corporations are bound to comply with national law, but under the framework, respecting human rights means observing international human rights standards even in the absence of domestic law. The obligation to respect human rights even in the face of weak governance is key to the second pillar and was underscored by the largest global business organisations in their joint submission to the consultation process, which states that companies ‘are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.’<sup>43</sup> For transnational corporations, this should equate to applying best practice across its operations, no matter in which state it operates or what the external state’s domestic laws fail to consider. One way in which states are encouraging this way forward is by adopting stricter, human rights-oriented reporting processes as part of their due diligence obligations.

The third pillar focuses on access to justice by ensuring that where people are harmed by business activities there is adequate accountability and effective redress, whether judicial or non-judicial. The UN Framework has already been referenced by various countries, including France, Norway, South Africa and the UK, during their evaluations of current business policies.<sup>44</sup> The International Chamber of Commerce also highlighted the importance of this tool for understanding the relationship between business and human rights<sup>45</sup> and many international organisations have welcomed the framework as a means of addressing incoherent law and policy at the state level.<sup>46</sup>

#### 4.1.2. *Further Soft Law Mechanisms*

A number of initiatives designed to address the relationship between business and human rights have developed in response to the obvious impact that private enterprise has on the human population worldwide. Two of the most successful mechanisms that predated the UN Framework include the Global Reporting Initiative<sup>47</sup> (GRI) and the UN Global Compact<sup>48</sup>. Both regimes offer a guide to states and business about how to approach human rights and they offer voluntary reporting mechanisms for businesses to share best practice. The GRI makes frequent reference to international human rights and labour conventions, namely: the Universal Declaration on Human Rights,<sup>49</sup> the International Covenant on Civil and Political Rights,<sup>50</sup> the International Covenant on

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<sup>40</sup> For example, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Art. 3. Each of the UN human rights treaties oblige states to adopt measures to ensure that the obligations outlined at the international level are given effect in domestic law, for example. ICCPR, Art. 2(2); CRC, Art. 4.

<sup>41</sup> UN Framework, paras. 33 – 42.

<sup>42</sup> UN Framework, para. 55; Clarifying the Concepts, para. 3.

<sup>43</sup> INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE), INTERNATIONAL CHAMBER OF COMMERCE, (ICC) BUSINESS AND INDUSTRY ADVISORY COMMITTEE TO THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (BIAC-OECD): Business and Human Rights: The Role of Government in Weak Governance Zones, December 2006, para. 15; see also, B.K. SEN and P. GUTTER, ‘The Burmese junta’s abuse of investment laws’ (2001) 9 *Legal Issues on Burma Journal* 44, citing Burma’s failure to observe its own laws a reason behind several transnational corporate divestments.

<sup>44</sup> For example, France Diplomatie, ‘Corporate Social Responsibility (CSR)’ (1.12.12) <<http://www.diplomatie.gouv.fr/en/french-foreign-policy-1/economic-diplomacy/corporate-social-responsibility/>> accessed 20.8.2014; UK Human Rights Joint Committee, Any of our business? Human Rights and the UK private sector <<http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/507.htm>> accessed 20.8.2014.

<sup>45</sup> IOE, ICC, BIAC-OECD, Joint Statement on Business & Human Rights to the United Nations Human Rights Council, Geneva, 30.5.2011 <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Joint-Statement-on-Business-Human-Rights-to-the-United-Nations-Human-Rights-Council/>> accessed 20.8.2014.

<sup>46</sup> For example, INTERNATIONAL COUNCIL ON MINING & METALS (ICMM), ‘ICMM endorsement of the “Guiding Principles on Business and Human Rights Implementing the UN ‘Protect, Respect and Remedy’ Framework,” 25.5. 2011 < [http://business-humanrights.org/sites/default/files/media/documents/icmm-letter-to-john-ruggie-25\\_may\\_11.pdf](http://business-humanrights.org/sites/default/files/media/documents/icmm-letter-to-john-ruggie-25_may_11.pdf) > accessed 20.8.2014.

<sup>47</sup> <<https://www.globalreporting.org/>> accessed 20.8.2014.

<sup>48</sup> <<http://www.unglobalcompact.org/>> accessed 20.8.2014.

<sup>49</sup> Universal Declaration on Human Rights, UNGA Res. 217 A (III), 10.12.1948.

<sup>50</sup> International Covenant on Civil and Political Rights, 999 UNTS 171, 16.12.1966.

Economic, Social and Cultural Rights,<sup>51</sup> as well as other international declarations such as the 1988 ILO Declaration on Fundamental Principles and Rights at Work<sup>52</sup> and the Vienna Declaration and Programme of Action.<sup>53</sup> Essential to the GRI reporting framework is corporate knowledge and consideration of these instruments. Much like the UN Framework, the success of the GRI can be attributed to the use of a multilevel stakeholder framework, which is a priority and includes over 20,000 stakeholders across 80 countries.<sup>54</sup>

The Global Compact, another UN initiative, is closely aligned with the universally accepted principles embedded in the core UN human rights treaties. In joining the Global Compact, companies commit to uphold the UN Framework and they join a network, which as of June 2014 has over 12,000 participants, including over 8000 businesses in 145 states.<sup>55</sup> Both of these initiatives began prior to the introduction of the UN Framework and their strategies have evolved to reflect the framework and can be easily viewed as extensions of the UN Framework and its Guiding Principles<sup>56</sup>, which outline how to make the UN Framework operational. The tangible impact of the GRI and the Global Compact is the uptake of the two reporting mechanisms by a broad range of states and businesses across the globe and will be examined below. But these are not the only human rights sensitive initiatives seeking to guide the relationship between business and human rights. Other initiatives include: OECD Guidelines for Multinational Enterprises,<sup>57</sup> ISO 26000 Guidance Standard on Social Responsibility,<sup>58</sup> the Equator Principles,<sup>59</sup> and the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>60</sup>.

## 4.2. STATE RESPONSE TO INTERNATIONAL SOFT LAW

This section will examine two prongs of R2P – the responsibilities to prevent and to react. This examination will be set in the context of business and human rights in order to demonstrate the common movement toward greater state responsibility to prevent and respond to human rights violations. It is argued that the well-recognised international obligation of states to protect human rights includes both the responsibility to prevent and to react to human rights violations whether the violations are by the state or a private business actor.

### 4.2.1. *The Responsibility to Prevent: Educating Business*

It is the state's responsibility to prevent where there is the most to gain by engaging international business. The state duty to protect – which includes prevention and is fundamental to due diligence – is the positive obligation embedded in international human rights treaties and elaborated upon in the UN Framework.<sup>61</sup> Unlike states, which are constrained by an obligation to respect the territorial sovereignty of other states, transnational corporations enjoy almost unfettered access across the globe as states bid for foreign direct investment and the chance to boost their economies. Therefore it is in a state's best interest to ensure that businesses operating within and across its borders are educated about human rights. Prevention is best achieved by comprehensive due diligence on the part of the state.

In response to the civil society-led GRI and the Global Compact, states and intergovernmental organisations, such as the European Union and the World Bank, are increasingly demanding that businesses across the globe strengthen their sustainability performance in both social and environmental outlook, as examined below. The hope is that more thorough socially and environmentally sensitive reporting will improve the delicate balance that exists between transnational corporations and their effects on society, strengthen the quality of companies from within and enable affected populations to benefit from business activity.

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<sup>51</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16.12.1966.

<sup>52</sup> 1988 ILO Declaration on Fundamental Principles and Rights at Work <<http://www.ilo.org/declaration/lang--en/index.htm>> accessed 20.8.2014.

<sup>53</sup> Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN Doc. A/CONF.157/23 (12.7.1993).

<sup>54</sup> <<https://www.globalreporting.org/information/news-and-press-center/Pages/The-Three-Is-of-Sustainability-Reporting's-Future.aspx>> accessed 20.8.2014.

<sup>55</sup> <<http://www.unglobalcompact.org/>> accessed 20.8.2014.

<sup>56</sup> UN HUMAN RIGHTS COUNCIL, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (21.3.2011).

<sup>57</sup> <<http://www.oecd.org/corporate/mne/>> accessed 20.8.2014.

<sup>58</sup> <<http://www.iso.org/iso/home/standards/iso26000.htm>> accessed 20.8.2014.

<sup>59</sup> <<http://equator-principles.com/>> accessed 20.8.2014.

<sup>60</sup> <[http://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm)> accessed 20.8.2014.

<sup>61</sup> R. MCCORQUODALE and P. SIMONS, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598, 619. See TZEVELEKOS, 'In Search of Alternative Solutions', 177 *et seq* for a thorough account of the international principle of due diligence.



The European Commission released a new European Strategy on Corporate Social Responsibility in 2011, which outlines how companies can improve disclosure of information related to social impacts and details the prominence that human rights play in social sustainability.<sup>62</sup> In 2013, the EU took further steps in ensuring the accountability of EU based corporations by introducing new Transparency and Accounting Directives.<sup>63</sup> These directives are designed to increase social impact reporting of projects taking place both in and outside the EU.

In conjunction with overarching European regional efforts, European states have been particularly active in promoting socially responsible reporting for businesses. It is intended that increased domestic oversight of business activity will encompass external activities, including activities outside Europe, therefore directly impacting transnational corporations. Sweden, for example, has rolled out increasingly detailed reporting guidelines for state-owned companies, which mandate reporting ‘on the positions adopted by the company in its own policy documents and in the form of international conventions, such as the UN Global Compact.’<sup>64</sup> A recent Finnish resolution calls on state-owned companies to report in a more transparent manner with respect to business activity in keeping with the principles of corporate social responsibility.<sup>65</sup> Denmark, too, has led the GRI implementation initiative by continuing to increase legal reporting requirements on social responsibility through its Danish Financial Statements Act: the Danish Government reports that 97 per cent of large businesses in Denmark comply with socially responsible reporting requirements as outlined in the Act.<sup>66</sup> In October 2011 Germany adopted a Sustainability Code outlining twenty sustainability indicators that parallel the GRI and is designed to make the sustainability performance of reporting corporations measurable and comparable.<sup>67</sup>

Outwith Europe, the uptake of the GRI and Global Compact is also strong. The Australian Government encourages socially responsible disclosure and participates in the GRI, though it has stopped short of mandating such disclosure.<sup>68</sup> South Africa maintains several programmes across the sustainability spectrum and in 2008 launched the National Framework for Sustainable Development which focuses on responding to emerging human development, among other things.<sup>69</sup> Other large economies, including Brazil, India and the US to name a few, have also engaged with the GRI and many cities from Chile and Colombia in South America to Korea and Mongolia in the East have committed to the Ten Principles of the Global Compact.<sup>70</sup> These examples represent a small sample of forward-thinking governments’ commitment to sustainability reporting which increases the onus on business to educate itself about human rights and aids in fulfilling their due diligence obligations.

The GRI has also been strengthened by the results of the June 2012 UN Conference on Sustainable Development, commonly referred to as Rio+20. The outcome document of the conference highlights the responsible business practices laid out in the Global Compact and in paragraph 47 encourages ‘companies, where appropriate, especially publicly listed and large companies, to consider integrating sustainability information into their reporting cycle.’<sup>71</sup> Several leading GRI countries, including Brazil, Denmark, France and

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<sup>62</sup> European Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final. Brussels 2011, p. 5-8, specific reference to the Global Compact and the UN Framework at para. 3.2.

<sup>63</sup> Council Directive 2013/34/EU of 26.6.2013 [2013] OJ L182/52, see para. 44 and Ch. 10; Council Directive 2013/50/EU of 22.10.2013 [2013] OJ L294/13, para. 7.

<sup>64</sup> Sweden, Guidelines for external reporting by state-owned companies. Stockholm 2007 <<http://www.government.se/content/1/c6/09/41/25/56b7ebd4.pdf>> accessed 20.8.2014.

<sup>65</sup> Finnish Government, Communications Unit: Ownership policy to be based on openness, long-term goal setting and responsibility, Press Release 315/2011. Helsinki 2011.

<sup>66</sup> Danish Commerce and Companies Agency, Corporate Social Responsibility and Reporting in Denmark. Copenhagen 2013 <[http://samfundsansvar.dk/file/358879/csr\\_rapport\\_2013\\_eng.pdf](http://samfundsansvar.dk/file/358879/csr_rapport_2013_eng.pdf)> accessed 20.8.2014. The report specifically references the GRI at p. 10 and reporting statistics begin at p. 14.

<sup>67</sup> The German Sustainability Code <<http://www.deutscher-nachhaltigkeitskodex.de/en/home.html>> accessed 20.8.2014, with specific reference to the GRI at p. 3.

<sup>68</sup> D. BRADBURY, Opening Keynote Address to Australasian Investor Relations Association, 26.11.2010 <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2010/002.htm&pageID=005&min=djb&Year=&DocType=>> accessed 20.8.2014.

<sup>69</sup> A National Framework for Sustainable Development in South Africa <[https://www.environment.gov.za/?q=content/documents/strategic\\_docs/national\\_framework\\_sustainable\\_development](https://www.environment.gov.za/?q=content/documents/strategic_docs/national_framework_sustainable_development)> accessed 20.8.2014.

<sup>70</sup> UN Global Compact, Participants and Stakeholders <<https://www.unglobalcompact.org/ParticipantsAndStakeholders/cities.html>> accessed 5.1.2015.

<sup>71</sup> UN, The Future We Want, UN Doc. A/66/L.56 (24.6.2012), paras. 46—47.

South Africa, have taken the Rio+20 outcome document a step further to form 'Friends of Paragraph 47', a group effort designed to lend greater support to integrated socially responsible reporting.<sup>72</sup>

The multitude of pro-human rights initiatives focused on improving the social responsibility of business, only a few of which have been discussed here, underscores the impact the global human rights regime has had on international business. Implementation of these standards is achieved in a variety of ways, primarily through soft law, but as evidenced by the work of the International Commission of Jurists (see section 5.1) and various EU regulations,<sup>73</sup> there are also harder forms of law and legal interpretations where human rights language and norms are impacting other legal norms. Regardless of how they are implemented, the standards promoted by these initiatives facilitate fulfilment of the state duty to prevent human rights violations by educating businesses about how they can avoid committing human rights abuses, or allowing them to occur. This focus on prevention of abuse by business reflects the same preventative focus outlined by the ICISS as essential to R2P. These trends reflect the increasing role that human rights have on the collective conscious of the international community. Having explored the state responsibility to prevent, the state responsibility to react to violations by business will be examined to demonstrate how domestic law is evolving to accommodate the expanding cast of human rights abusers just as international law is evolving to ensure that its principles reflect the modern global environment.

#### 4.2.2. *The Responsibility to React: Taking Business to Court*

When considering the state responsibility to react in terms of R2P, discussions tend to revolve around the use of force and breaches of territorial integrity. It was this very element of R2P that was watered down from the original ICISS R2P structure when the R2P principle was eventually adopted at the UN as part of the 2005 World Summit Outcome Document.<sup>74</sup> However, there is a more basic element of the responsibility to react that engages an essential component of most legal systems; there must be access to justice in the event of domestic law violations, including violations of human rights (as incorporated into domestic law) by business. While access to justice is an autonomous human right, it is also a conduit through which other human rights may be fulfilled as part of effective due diligence. The R2P responsibility to react is echoed in pillar three of the UN Framework – the responsibility to remedy.

International soft law recognises that business has a baseline responsibility to respect human rights as set out in the UN Framework. Failure of business to meet this responsibility in states with strong domestic laws assigning a duty of care to private actors can subject business to charges in actual courts as well as to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors.<sup>75</sup> Legal actions based on corporation human rights violation are on the rise (see section 5.2) and though many of these involve natural resource projects, there have also been consumer goods (e.g.: the beverage industry such as Coca-Cola) projects as well as private international service providers<sup>76</sup> that have allegedly disregarded human rights. It is clear that a greater expansion of the scope of duty-bearers at the domestic level across the global community of states is necessary in order to fulfil this arm of the responsibility to react to human rights violations by business and a brief discussion of how states can progress this agenda is provided below.

## 5. CLOSING THE GAPS: BUSINESS AS DUTY-BEARERS

States have a duty to protect against human rights violations by third parties<sup>77</sup> though most domestic legal systems do not expressly recognise business as owing a duty to protect human rights. Legal responsibility is assigned to business in terms of breaches of criminal, tort and administrative law, where clear legal duties can

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<sup>72</sup> UN ENVIRONMENT PROGRAMME, Brazil, Denmark, France & South Africa Join in Commitment to Sustainability Reporting, Press Release 20.6.2012. Rio de Janeiro 2012 <[http://www.unepfi.org/fileadmin/events/2012/Rio20/Press\\_release\\_Rio\\_outcome\\_document.pdf](http://www.unepfi.org/fileadmin/events/2012/Rio20/Press_release_Rio_outcome_document.pdf)> accessed 20.8.2014.

<sup>73</sup> See fn. 62.

<sup>74</sup> UN GENERAL ASSEMBLY, 2005 World Summit Outcome Document, UN Doc. A/60/L.1 (15.9.2005), paras. 138-39; the following year saw the first mention of R2P by the UN Security Council, Resolution 1674 (2006), UN Doc. S/RES/1674 (28.4.2006).

<sup>75</sup> UN Framework, para. 54.

<sup>76</sup> For example, *Saleh et al., v. Titan Corp. et al.*, No. 1:05-cv-1165 (D.D.C.). In this US case Iraqi plaintiffs sued private translation and interrogation firms for violation of various human rights, including torture. The case was ultimately dismissed by the US Supreme Court but represents one of many coursing through the judicial system at present. See also *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Aldana v. Del Monte Fresh Produce N.A.*, 416 F.3d 1242 (11th Cir. 2005). Several civil society websites track such litigation, including Red Flags website <<http://www.redflags.info>> accessed 5.1.2015.

<sup>77</sup> See n. 31 above.

be pinpointed or at the very least interpreted as applying to private corporate entities. Therefore it is difficult to attribute an international or domestic legal obligation to business in terms of human rights protection. A shift in the concept of duty-bearers is required in order for business to be brought under the human rights umbrella. Linking business to human rights in international law requires throwing off the traditional view that the state is the only duty-bearer.<sup>78</sup> However, in order to change thought processes regarding business on the international level, states must first progress their thinking on the domestic level in the context of holding business accountable for human rights violations. Within every jurisdiction it is only with sure access to justice for rights violations by business and enforcement of judgments that a state can begin to fulfil its international human rights obligations. States are slowly moving toward the idea of business as a human rights duty-bearer as evidenced above by the global initiatives advancing corporate social responsibility. There is also growing evidence that the impact of business activity on human rights is being recognised at the judicial level yet states have been slow to provide clear guidance on the association between business and human rights from a litigation standpoint. The fact remains that domestic laws must be changed in order to ensure legal accountability for human rights abuse.

### 5.1. MOVING THE LAW FORWARD

The International Commission of Jurists has undertaken multiple, extensive studies on the issue of corporate human rights abuses and access to justice.<sup>79</sup> It determined that whilst the constitutions and laws of some states permit a reading of the duty to observe human rights obligations that encompasses non-state actors, including corporations, there are often roadblocks that prevent effective access to justice.<sup>80</sup> For example, it has reported that the 1988 Brazilian Constitution presents a progressive legal regime, which not only protects an extensive catalogue of rights but also requires that these be observed by private actors. Brazilian law presents multiple methods for obtaining remedies against business for rights infringement, though these actions have had limited success in many cases due to costs and non-compliance with judicial decisions, among other barriers.<sup>81</sup> The Indian Constitution also expressly guarantees a number of human rights against non-state actors.<sup>82</sup> While direct horizontal application of these protections should not be problematic against corporations, effective remedies are not always achieved due to lax enforcement of existing laws or gaps in the law.<sup>83</sup> The greatest Indian successes against corporate rights violations have been through the use of tort law.<sup>84</sup> The Commission's studies underscore the imperative for states to re-evaluate domestic legal regimes in light of the recognition of the relationship between business and human rights abuses as well as ensure appropriate enforcement of such laws.

### 5.2. SMALL ADVANCES IN DOMESTIC COURTS: US CASES

A growing minority of states are entertaining cases where human rights abuses are alleged against business defendants. Typically these cases are framed as violations of criminal law, tort law or other domestic statute that has implemented an international human rights obligation.<sup>85</sup> Whilst a number of states are increasingly amending their laws to enable access to justice for violations of human rights by business, the following overview will be limited to the United States as it has been host to a number of high-profile cases, particularly in the last decade.

The use of the US as the primary jurisdiction for judicial actions by private persons alleging corporate responsibility for international human rights violations is due largely to the Alien Tort Statute<sup>86</sup> (ATS), which provides: '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.' Since the 1980 Second Circuit decision in *Filartiga v. Pena-Irala*,<sup>87</sup> the ATS has been recognised as providing an avenue by which

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<sup>78</sup> K.M. LEISINGER, Special Advisor to the Secretary General on the Global Compact, 'On Corporate Responsibility for Human Rights', Basel 2006.

<sup>79</sup> For example, INTERNATIONAL COMMISSION OF JURISTS (ICJURISTS), *Access to Justice: Human Rights Abuses Involving Corporations-India*, Geneva 2011; ICJURISTS, *Access to Justice: Human Rights Abuses Involving Corporations-Brazil*; ICJURISTS, *Expert legal panel on corporate complicity in international crimes*, vols. 1, 2 and 3, Geneva 2008.

<sup>80</sup> ICJURISTS, *Expert legal panel on corporate complicity in international crimes*, vol. 3, Geneva 2008, pp. 7-9.

<sup>81</sup> ICJURISTS, *Access to Justice: Human Rights Abuses Involving Corporations-Brazil*, Executive Summary, Geneva 2011, pp. 2-4, and 8.

<sup>82</sup> ICJURISTS, *Access to Justice: Human Rights Abuses Involving Corporations- India*, Geneva 2011, p. 7.

<sup>83</sup> *Ibid*, pp. 48 *et seq.*

<sup>84</sup> *Ibid*, pp. 17-18.

<sup>85</sup> ICJURISTS, *Expert legal panel on corporate complicity in international crimes*, vols. 2 and 3, Geneva 2008.

<sup>86</sup> 28 USC §1350. Also known as the Alien Tort Claims Act (ATCA).

<sup>87</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

international human rights litigation could be brought by aliens against foreign non-state actors in US federal courts for violations of international law occurring outside the US border.<sup>88</sup> This decision and its progeny have not been uncontroversial either in the US or abroad.<sup>89</sup> Outwith the ATS and under general US domestic law, corporate liability for torts has been recognised in the US since 1818.<sup>90</sup> It is only in the recent past that these two legal phenomenon have married and opened an avenue through which international human rights claims against corporate actors could be brought. The case discussion here is not an exhaustive account of every case coursing through the US system but instead serves to demonstrate the legal tension inherent in applying international law to private corporate actors generally deemed not to have international legal personality. It is intended that this brief overview of the US approach will demonstrate the opportunity available to states to expand domestic law in order to permit claims against business by assigning a duty-bearer role to business and overcoming the presumption against extraterritoriality.

In 2001, villagers from the Indonesian town of Aceh filed a complaint alleging that the security forces of Exxon Mobil, a US corporation, committed murder, torture, sexual assault, battery, and false imprisonment.<sup>91</sup> Each of the alleged offenses are contrary to the ICCPR, to which both the US and Indonesia are party, as well as contraventions of the domestic law in both states. Having no success in pursuing their claims in Indonesia, the villagers exercised an alternative choice of jurisdiction and filed the claim in US court relying on the ATS. On appeal, Exxon Mobil argued that corporations were immune from liability under ATS. In July 2011, the DC Circuit Court of Appeals held in *Doe VIII v. Exxon Mobil* that corporations could be held liable for violations of international law under the ATS,<sup>92</sup> thereby joining the Eleventh Circuit in accepting this type of corporate liability. The *Doe VIII* decision specifically departed from the Second Circuit's finding that corporations are not subjects of international law as intended by the ATS,<sup>93</sup> and created a divide among US federal courts as to the question of corporate liability for human rights violations. The DC Circuit stated:

The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents. This is confirmed in international practice, both in treaties and in legal systems throughout the world. Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for "shockingly egregious violations of universally recognized principles of international law."<sup>94</sup>

The DC Circuit judgment bolsters the Eleventh Circuit's line of opinions,<sup>95</sup> confirming that corporations are not immune from liability under ATS and that no corporation is beyond the reach of the law, whether for breach of domestic or international law.

Following *Doe VIII*, the US Supreme Court heard arguments on *Kiobel v. Royal Dutch Petroleum*<sup>96</sup> which specifically questioned whether corporations are immune from tort liability for violations of the law of

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<sup>88</sup> On the history of the ATS, see C. BRADLEY, 'State Action and Corporate Human Rights Liability' (2010) 85 *Notre Dame Law Review* 1823.

<sup>89</sup> Noted by C. KAEB and D. SCHEFFER, 'The Paradox of *Kiobel* in Europe (2013) 107 *American Journal of International Law* 852; see also, T. ADAMSKI, 'The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' *International Relations* (2011) 34 *Fordham International Law Journal* 1502; R.G. STEINHARDT, 'The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and its Discontents: A Reality Check' (2003-04) 16 *St. Thomas Law Review* 585.

<sup>90</sup> *Doe VIII v. Exxon Mobil*, 654 F.3d 11 (D.D.C. 2011), part III. Part III of the opinion provides a concise history of corporate liability for torts in the US.

<sup>91</sup> *Doe I v. Exxon Mobil Corp.*, 393 F.2d 20 (D.D.C. 2005).

<sup>92</sup> *Doe VIII v. Exxon Mobil*, part III, para. 4. This case must be distinguished from the recent US case *Mohamad v. Palestinian Authority*, 566 U.S. \_\_\_ (S. Ct. 2012), 132 S. Ct. 1702, where the basis of the claim was the Torture Victim Protection Act of 1991 which specifically attaches liability to natural persons alone (not corporations or associations), as ultimately confirmed by the Court.

<sup>93</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). The Second Circuit dismissed the claims against Shell stating that no corporate actor had ever been held accountable for the violation of international human rights law violations and that the ATS was not designed for such purpose as it only addressed recognized subjects of international law: '...the ATS merely permits courts to recognize a remedy (civil liability) for heinous crimes universally condemned by the family of nations against individuals already recognized as subjects of international law. To permit courts to recognize corporate liability under the ATS, however, would require, at the very least, a different statute—one that goes beyond providing jurisdiction over torts committed "in violation of the law of nations" to authorize suits against entities that are not subjects of customary international law.'

<sup>94</sup> *Doe VIII v. Exxon Mobil*, part III, para. 6, quoting *Zapata v. Quinn*, 707 F.2d 691 (2d Cir.1983).

<sup>95</sup> *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008), 1315; *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005), 1242.

nations such as torture, extrajudicial executions or genocide or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations? The original case was filed in 2002 by Nigerian plaintiffs against Royal Dutch Petroleum (Shell) alleging that the company aided and abetted the human rights violations committed by the Abacha dictatorship in the Ogoni region of the Niger Delta.<sup>97</sup> In April 2013, the Supreme Court delivered its opinion finding that the presumption against extraterritoriality applied to the ATS and, therefore, prevented the case from proceeding on the merits as there were not sufficient links between the alleged activity and the territory of the US – the ‘touch and concern’ test.<sup>98</sup> It was, however, silent on the issue of whether a corporation could be sued for human rights violations, and observers have treated this silence as leaving the door open for potential human rights claims against corporations.<sup>99</sup>

Most recently, the Fourth and Eleventh Circuits issued conflicting opinions based on the *Kiobel* decision. In *Al Shimari, et al, v. CACI Premier Tech., Inc.*,<sup>100</sup> the Fourth Circuit used the *Kiobel* ‘touch and concern’ test to determine that the ATS claims under review were sufficient enough to displace the presumption of extraterritoriality that felled the *Kiobel* claims. Employing the same test, the Eleventh Circuit dismissed a case against Chiquita Brands International alleging torture by the non-state actor<sup>101</sup>. The Court held that despite Chiquita being a US corporation, the actions alleged did not ‘touch and concern’ the US sufficiently to be allowed under the ATS.<sup>102</sup> Only time will tell whether business will be exposed to further suits for international human rights violations in the US and whether its legislature will work to dispel the presumption against extraterritoriality, a necessary move as indicated by the series of US cases. This overview of the US federal judiciary’s approach to business violations of human rights demonstrates that the problem of reacting to business abuses can be addressed if the right political and legal climates converge. Though the tide seems to be changing slowly, the question remains when will domestic legal systems effectively address the issue of preventing human rights violations by business?

## 6. FINAL REFLECTIONS

A push for greater prevention of human rights abuse underscores both R2P and the move toward holding business to account for human rights violations. It is only with a shift of the concept of human rights duty-bearers that change can be realised. For R2P, this shift is articulated as the expansion of human rights duties from the single sovereign state to the collective of states. The shift to business as a duty-bearer in addition to the state defines the international and domestic initiatives to end impunity on the part of business for its role in human rights abuse.

Whilst R2P has been generally associated with large-scale atrocities, such as genocide and mass starvation, rarely has business been implicated in an event that reaches a level of violation so great that R2P would be engaged.<sup>103</sup> However, R2P is not simply about reacting to significant rights violations. The developing R2P discourse is becoming more nuanced in response to the realities of the world and *preventing* human rights violations is part and parcel of R2P. Prevention is an essential feature of both concepts addressed by this chapter as is the expansion of recognised human rights duty-bearers that should take preventative action.

The changes traced throughout this chapter suggest that R2P is one of several evolving principles of international law indicating that human rights protection is no longer the sole responsibility of the home state. Prevention is increasingly a collective effort and necessitates attaching legal duties to the collective international community as well as private corporate actors. Whilst R2P seeks to achieve this through an international

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<sup>96</sup> US Sup. Ct. Docket No.10-1491, on appeal from *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), petition filed 6.6.2011, petition granted 17.10.2011.

<sup>97</sup> *Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457 (S.D.N.Y 2006).

<sup>98</sup> *Kiobel v. Royal Dutch Petroleum*, 565 U.S. \_\_\_, 133 S.Ct. 1659 (Slip Opinion, 17.4. 2013), 1669. See also, R. ALFORD, ‘Kiobel Insta-Symposium: Interpreting “Touch and Concern”’, *OpinioJuris*, 19.4.2013 <<http://opiniojuris.org/2013/04/19/kiobel-insta-symposium-interpreting-touch-and-concern/>> accessed 20.8.2014.

<sup>99</sup> For example, O. HATHAWAY, ‘Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases’, *SCOTUSblog*, 18.04.2013. <<http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>> accessed 20.8.2014; M. LEDERMAN, ‘Kiobel Insta-Symposium: What Remains of the ATS?’ *OpinioJuris*, 18.04.2013. <<http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/#more-28626>> accessed 20.8.2014.

<sup>100</sup> 2014 WL 2922840, at \*12 (4th Cir. June 30, 2014), the Court found that the defendant had aided and abetted overseas torts from within the US.

<sup>101</sup> *Cardona, et al. v. Chiquita Brands International*, No. 12-14898 (11<sup>th</sup> Cir. July 24, 2014), J. Martin dissenting.

<sup>102</sup> As of April 2015, the plaintiffs are awaiting a decision on a petition for a writ of certiorari, filed 30 December 2014, with the US Supreme Court.

<sup>103</sup> The notable exception being during WWII and the atrocities committed by business in cooperation with the Nazi regime.

collective duty on the part of states, individual states must also address the gap in domestic laws to ensure that business is held to account for its role in human rights abuse. The holistic approach underpinning R2P – prevent, react, rebuild – is echoed across the global human rights project. The bottom line is that states must take appropriate steps to prevent, investigate, punish and redress human rights violations in order to effectively protect human rights.