Human Rights Limitations: Clarifying the Emerging Obligations of Business

Doctoral Thesis

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Abstract

The United Nations recognises that businesses have responsibility for human rights and there are ongoing negotiations that may lead to the adoption of legally binding framework to ascribe human rights obligations to businesses. The present study considers that ascribing human rights obligations to businesses raises the corresponding need to clarify whether human rights limitations could be factored into their obligations. In contribution to the clarification of this issue, this thesis examines two requirements for permissible limitation of human rights, namely, the concepts of 'law' and 'legitimate aims'. It undertakes a legal analysis of these concepts in terms of whether within the specific context of business, they might respectively include (i) rules that are generated by businesses themselves and (ii) the core interests of businesses as grounds for human rights limitations. It shows how the doctrine of private delegation explains the disposition of businesses to generate rules that may serve as valid bases for human rights limitations and finally proposes the core interests of businesses that may also have to be prioritised as the 'equivalents' of legitimate grounds for human rights limitations in business contexts.

Declaration

I hereby declare that this thesis embodies the result of my study and research on the topic specified on the front page. It has been composed by myself under assigned supervision and has not been presented to any other institution for the award of any degree.

Name: Abraham T. Afrim-Narh

Date: 30 September 2015

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Dedication

To my beloved family

Abbreviations

FOC	Flag of Convenience
FRC	Financial Reporting Council
FSU	Finish Union of Seamen
GPs	United Nations *Guiding Principles*
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ITF	International Federation of Transport Workers Union
OECD	Organisation for Economic Cooperation and Development
PCAOB	Company Accounting Oversight Board
SRS-G	Special Representative of the United Nations Secretary General
UDHR	Universal Declaration of Human Rights

Explanation of Key Terms

Human Rights Limitation:

A technical expression used interchangeably as human rights restrictions to denote the conditions and modalities that govern instances where human rights may justifiably be limited in pursuit of other legitimate interests.

Interference with Human Rights:

Denotes an instance where a specific measure impacts negatively on human rights but must be subjected to further verification to determine if it amounts to human right violation. It may be used interchangeably with human rights limitations or restrictions.

Human Rights Violation:

This denotes an instance where an interference with a specific human right has been assessed judicially and found to be unjustified.

Legitimate Aims:

These are the main interests that have been provided for in human rights instruments as the legitimate grounds for which certain human rights may be limited.

Business:

There are various categories of businesses including multi-national corporations, medium and small-scale enterprises, either State-owned and fully private. This study uses business, enterprises, corporations and companies interchangeably to include all profit-seeking ventures.

Duty/Obligation/Responsibility:

There is a tendency in business and human rights research to use the terms duties and obligations interchangeably to denote legally binding responsibility and the term responsibility to denote the opposite of these. This differentiation is quite problematic but it is also obviously maintained in the field. The present study uses them interchangeably but maintains their legal connotations.

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1
General Introduction

1.1 Research Overview

The recognition by the United Nations and beyond that businesses have responsibilities for human rights constitutes a significant development in human rights law. This development is premised on a two-fold assumption: (i) that businesses could play a significant role in the advancement of human rights but that (ii) they need to make changes to ensure that their operations work in harmony with, rather than perpetrate actions that constrain human rights. Primarily, States have the duty to prevent corporate violation of human rights in their jurisdictions. However, at least, some of them are not able to do so, making it necessary to focus directly on businesses, especially in contexts where State regulations are non-existent.[1]

In an effort to define and clarify the responsibilities that businesses must have for human rights, Professor John Ruggie, in his erstwhile mandate as the Special Representative of the United Nations (UN) Secretary-General on the issue of Business and Human Rights (SRS-G), has developed a conceptual *Framework on Business and Human Rights*, stating that the responsibility required of businesses is to respect human rights with due diligence, and to provide access to remedies when human rights aberrations occur in their operations.[2] This *Framework* has been advanced into a set of *Guiding Principles on Business and Human Rights*,[3] adopted by the UN Human Rights Council[4] and currently represents the UN-based authoritative focal point on the human rights responsibilities required of businesses.[5]

Much scholarship has been devoted to analysing the claims of the *Guiding Principles.* Some have criticised the limited scope of responsibility ascribed to businesses as unsatisfactory

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[1] Paul Griseri and Nina Seppala, *Business Ethic and Corporate Social Responsibility* (Cengage 2010) 177.

[2] HRC, 'Protect, Respect and Remedy: A *Framework* for Business and Human Rights', *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (7 April 2008), henceforth referenced as UN Doc. A/HRC/8/5 (2008).

[3] HRC, '*Guiding Principles* on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" *Framework*', *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (21 March 2011). Henceforth, the GPs may be cited as a document, referenced as UN Doc. A/HRC/17/31 (2011).

[4] The Human Rights Council adopted Resolution 17/4 (A/HRC/RES/17/4) on 6 July 2011 to endorse the GPs.

[5] Henceforth the *Framework* and the GPs are cited inter-changeably since the GPs elaborate the *Framework.*

because they are not required to protect and fulfil human rights.[6] Others have criticised the *Guiding Principles* as lacking victim orientation because they are not legally binding to ensure reliable redress of human rights violations.[7] Such criticisms have proliferated into an enduring debate, referred to as the 'treaty debate', on whether businesses must have binding obligations for human rights, governed by a legal framework beyond the *Guiding Principles*.

In response to the 'treaty debate', the UN Human Rights Council has adopted Resolution 26/9 on 26 June 2014 to pave way for further negotiations that may lead to the development of such a treaty and established an inter-governmental working group to lead this task.[8] This development has intensified the debates on whether and how human rights obligations could be assigned to businesses. One major question that still remains unclear is whether as part of the human rights obligations of businesses, they may also have the corresponding right to subject human rights to permissible limitations so as to resolve conflicts that might arise between their unique interests and the demands of human rights.[9] Some analysts have noted that any attempts to assign human rights obligations to businesses must incorporate the logic of limitations[10] and that the lack of clarification of how this applies to the responsibility of businesses is a major short-coming of the *Guiding Principles* and must be rectified.[11]

This thesis takes up the issue of limitations and seeks to contribute to its clarification in relation to the human rights obligations of businesses. It addresses the question of whether human rights limitations should be factored into the obligations of businesses and if so, the conditions under which businesses may validly subject human rights to permissible limitations. The study does not deal with all aspects of human rights limitations. It focuses on two of the core requirements that govern permissible limitations of human rights,

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[6] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012) 104-114; David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7:12 IJHR 198-233.

[7] Jernej Černič, 'Two Steps Forward, One Step Back: the 2010 Report of the UN Special Representative on Business and Human Rights' (2010) 11 GLJ 1279-80.

[8] On 26th June 2014, the Human Rights Council adopted Resolution 26/9 proposing a binding framework.

[9] Human Rights limitations are the conditions under which the bearer of human rights obligations may restrict certain human rights in order to take care of other interests. Detailed description of the centrality of human rights limitations in human rights law and the modalities that govern such limitations is provided in section 1.2 below.

[10] Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 YLJ 513.

[11] David Bilchitz, 'The Moral and Legal Necessity for a Business and Human Rights Treaty' (Feb. 2015) 5. Link: http://business-humanrights.org/en/treaty-on-business-human-rights-necessary-to-fill-gaps-in-intl-law-says-academic, Accessed: 14 June 2015.

namely: the requirements that such limitations must (i) be in 'accordance with the law' and (ii) pursue 'legitimate aims'.[12] These requirements are singled out for analyses because as shown in section 1.5 below, they pose unique dilemmas that require further research from a corporate perspective. Thus, the study examines what the concepts for law and legitimate aims imply within the context of businesses for the purposes of human rights limitations.

The backdrop to this research is that conceptually, human rights have some limits embedded in them, and as such they do not just impose binding obligations on duty-bearers to comply without flexibilities.[13] Normally, the entity that bears human rights duties, traditionally the State, has the right also to take measures that deviate from its obligations where necessary and permissible, to take care of other interests, either in normal situations to balance competing interests,[14] to derogate from its obligations in emergency situations[15] or to resolve conflicts between human rights.[16] The crux of all these is that flexibilities are factored into human rights obligations and there are modalities that govern such flexibilities in order to avoid arbitrary restrictions on human rights and to increase their practicality and feasibility.

As explained in the next section, this aspect of human rights law is well developed in respect of the human rights obligations ascribed to States, such that States may validly deviate from their obligations, where necessary and permissible, and provide justifications for such deviations if cases arise out of their measures. This provides necessary flexibility in State discharge of human rights obligations and makes it possible and meaningful for them to do so in tandem with their needs to satisfy other interests. In respect of businesses, the *Guiding Principles* have only assigned responsibility to them, encouraged them to exercise due diligence in carrying out their responsibility, but did not clarify whether, how and under what conditions businesses may or may not deviate from their expectations in order to take care of competing interests. There is therefore a certain lack of clarity as to how corporate

[12] It is central in human rights law that any measures that interfere with human rights must be prescribed by law and pursue legitimate aims to be justifiable. See for instance the second paragraphs of Articles 8-11 of the European Convention on Human Rights. The requirements of law and legitimate aims are not the only tests required for justification of measures that interfere with human rights. There are other requirements such as the test of proportionality and pressing social needs. Section 1.5 below explains why these two requirements are singled out for this thesis in exclusion of the others.

[13] Wiktor Osiatyński, *Human Rights and their Limits* (CUP 2009).

[14] Rhona Smith, *Textbook on International Human Rights* (4th edn, OUP 2010) 176-182.

[15] For purposes of clarity, the term derogation is reserved for human rights limitations in emergency situations. It differs from human rights limitations in contexts of balancing competing interests or to resolve conflicts between human rights. See Smith, note 14, pp.176-182.

[16] Eva Brems, 'Introduction' in Eva Brems (ed) *Conflicts between Fundamental Rights* (Intersentia 2008) 1-16.

interference with human rights could be fully scrutinised to determine instances where their deviations from human rights expectations are justified and instances where they are not.

The present study is of the view that if businesses must have obligation for human rights, which forms basis for assessing their performances, then there is equally the need to clarify what human rights violations imply judicially within their specific contexts. This is based on the understanding that businesses also have unique interests that they pursue and that in normal pursuits of such interests, conflicts may arise between their interests and the demands of human rights, or between competing human rights. For them to be in position to resolve these conflicts appropriately, they need guidance on how the conditions that govern permissible limitations of human rights could be tailored specifically to their unique context.

The expression 'human right limitation' may be misleading to some, especially if applied to businesses. It therefore needs to be made clear at the onset of this study that the expression human right limitation is not necessarily negative: it is a technical expression that describes the internationally accepted conditions under which human rights may be restricted in pursuit of other interests, with the identification of conditions under which they may not. Human rights limitations therefore provide modalities for acceptable balance of human rights with other legitimate interests. Applying this to businesses does not, of course, imply that they may to take active steps or adopt policies that undermine human rights. Rather, it is about understanding that situations may arise in normal operations that require businesses to make choices, and that if such situations involve human rights, the extent to which the choices they make can be exercised appropriately to safeguard the essence of human rights.

Human rights 'limitation' is used interchangeably in this thesis with expressions such as 'human rights restrictions' and 'interference with human rights' to convey the idea of subjecting human rights appropriately to permissible restrictions in a manner that ensures necessary balance of competing and conflicting interests. A related expression, 'derogation', involves the duty-bearer exempting itself from specific human rights obligations in times of emergency. For States, derogations would normally occur at times when they have and declare national emergencies. However since this study is not about emergency situations and pertains to non-state actors, the question of whether and how businesses may derogate from their human rights obligations in emergency situations is not covered in this thesis.

This study is of the view that even though businesses are known to violate human rights and that it is difficult to assign binding obligations to them and hold them judicially accountable for violations, there is a need to engage with the question of how human rights limitations apply in their context. This is because assigning human rights responsibilities to businesses, whether binding or not, does not necessarily curtail the chances that their interests will conflict with human rights in business contexts. Such instances pose the risk of businesses interfering arbitrarily with human rights if no clear guidelines are provided on this aspect of human rights law. This is because businesses may not be in the position to determine when an interference with specific human rights is acceptable and when it is not. Even where interference may be permissible, they may not be able to clearly determine what is required of them. The present study aims to contribute a clearer view of how to determine instances where corporate interference with human rights constitutes human rights violation, and where it constitutes justified deviation from standards. It makes the fundamental assumption that as human rights limitations are embedded into human rights law, they must be engaged as such in relevant contexts, including for evaluating business interference with human right.

Some readers of this thesis may argue that human rights limitations should remain as the preserve of States, so that the modalities for assessing human rights violations in business contexts are considered from the perspectives of States as already existing in human rights law. It will be argued in later sections of this thesis that factoring human limitations into the obligations of businesses does not exclude the role and significance of States in this regard, in the same vein as the human rights responsibility of businesses is not detached from the roles of States. However, the context of business is different from that of State, and as such, the modalities for human rights limitations must be tailored into business contexts to cover all the details that must be considered in respect of corporate interference with human rights. Even though this study is relevant to diverse stakeholders, it is particularly geared toward judicial institutions, in terms of the factors that they must consider in settling human rights cases that arise from corporate contexts so as to preserve the essence of human rights.

This study is grounded in methodology of legal positivism, designed to examine the issues in light of international human rights law as is codified[17] and/or widely recognised in

[17] Alan Bryman and Emma Bell, *Business Research Methods* (3rd edn, OUP 2007) 16.

customary international law.[18] This is basically in respect of the fact that human rights law positively recognises permissible limitations as part of the discharge of human rights obligation and must be studied as such in business contexts. Thus, an assignment of human rights obligations to businesses must take into consideration the applicability of permissible limitations. Based on this orientation, the study adopts a doctrinal legal research approach to resolve the issues identified. Richard Posner characterises doctrinal legal research as a task that extracts doctrine from a line of cases or from statutory texts, re-states it, criticises it or extends it for sensible results in new contexts, using logic, analogy and legal principles.[19]

The approach adopted for this study is fashioned in that direction, looking mainly for existing doctrines in human rights law that may provide a better understanding of how the conditions for human rights limitations may be met in business contexts. The aim is to determine whether for the purposes of human rights limitations in business context, separate law-making is required, or whether the existing framework for human rights limitations is sufficient. For instance, chapter three derives doctrine from human rights law on how rules that are generated by private actors could conform to the requirement of law for permissible for human rights limitations. Chapter four also examines the texts of human rights treaties to determine whether business interests are subsumed into the grounds for permissible limitations of human rights or whether doing so would 'over-stretch' human rights law. Guided by this orientation, the study took steps at vantage points to identify and apply doctrines in human rights so as to focus the analyses unto businesses while maintaining human rights law as it is. In the end, the study produces new insights into how existing tenets in human rights law could be applied from a corporate perspective for the purposes of human rights limitations. In order to enhance the discourse throughout the study, the next section provides an exposition into the centrality of human rights limitations in human rights law as a lead into why it must also be considered in relation to the obligations of business.

[18] Brian Leiter, 'Positivism, Formalism and Realism Review Essay: Legal Positivism in American Jurisprudence' (1999) CLR 1144.
[19] Richard Posner, 'Legal Scholarship Today' (2002) 115:5 HLR 1316.

1.2 The Centrality of Human Rights Limitations in Human Rights Law

Prior to the promulgation of the *Guiding Principles*, it had been argued that any human rights responsibilities ascribed to business must incorporate the imperative of balancing human rights with business interests.[20] This suggestion reflected the recognition that a right does not simply translate into a corresponding duty; i.e. a right of a person is not a duty in itself but a ground for a duty, a ground that if not counteracted by other considerations, justifies that the other person holds the duty.[21] This imperative of balance of interests as embedded in the concept of human right limitation, is well grounded in human rights law.[22] The Universal Declaration of Human Rights (UDHR), promulgated in 1948 and credited as the 'parent' source of human rights law, does not only entreat all organs of society to respect and promote human rights; it sets a two-pronged promulgation of human rights that spells out priorities to be observed as human rights and limitations on the enjoyment of human rights.[23] Article 29 of the UDHR states that the enjoyment of rights and freedoms may be subject to '… such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in democratic society'.[24] Following this, the main human rights treaties formulated on the basis of the UDHR have also expressly provided for human rights limitations in various ways but without significant deviations from the scope and expressions used in the UDHR to provide for limitations.

The *International Covenant on Civil and Political Rights* (ICCPR) for instance permits limitations on the freedom to express thought, conscience and religion in Article 18(3), the right to freedom of association in Article 22(2), the right to freedom of opinion and expression in Article 19(3) and the right to peaceful assembly in Article 21.[25] Similarly, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides a general limitation clause in Article 4 to cover all human rights embodied in it and a specific

[20] Ratner (n 10) 513.
[21] Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 171.
[22] Oscar Garibaldi, 'General Limitations on Human Rights: The Principle of Legality' (1976) 17:3 HILJ 503.
[23] UNGA, 'The Universal Declaration of Human Rights' (Adopted 10 December 1948). Henceforth, UDHR.
[24] Ibid, Article 29.
[25] UNGA, 'International Covenant on Civil and Political Rights' (adopted 16 December 1966, in force 23 March 1976) [UN doc A/6316]. Henceforth, ICCPR.

limitation in Article 8 on the right to form and join trade unions.[26] This pattern of human rights limitation is also reflected in the regional human rights instruments. The *European Convention for the Protection of Human Rights and Fundamental Freedoms,* henceforth, the European Convention on Human Rights, provides a series of limitation clauses in the second paragraphs of Articles 8-11, covering the rights to private and family life, freedom of thought, conscience and religion, expression, association and assembly.[27] The *African Charter on Human and Peoples' Rights* subjects human rights to limitations in the form of 'claw-back' clauses that make human rights conditional on State interests.[28] The imperative of limitations is recognised also in the *Inter-American Convention on Human Rights*.[29]

Thus, generally, human rights limitations are central in international human rights law and are essentially designed for legal assessments of the quality of performance of human rights responsibilities. Article 1 of Protocol 1 of the *European Convention on Human Rights* suggests that the permission granted to the bearer of human rights obligations to subject certain human rights to limitations constitutes a right.[30] It could therefore be suggested that human rights obligations naturally come with the right to subject human rights to permissible limitations. The existence of limitations on human rights is to be distinguished from the permission granted to States to derogate from human rights in times of national emergencies. For instance, Article 4 of the ICCPR provides a list of human rights issues that may not be subjected to derogations under any circumstances. These include the right to life, the prohibition on torture or cruel and inhuman or degrading treatments or punishment, slavery, servitude, imprisonment for inability to fulfil contractual agreements, retroactive punishments, freedom of thought, conscience and religion and the denial of recognition as a person before the law. Thus, under no circumstances can the State or business interfere with these rights and provide justifications for such interferences.

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[26] UNGA, 'International Covenant on Economic, Social and Cultural Rights' [UN doc A/6316] (adopted 16 December1966, in force 3 January 1976), Art 4, 8. Henceforth referenced as ICESCR.

[27] Council of Europe, 'European Convention on Human Rights and Fundamental Freedoms' (adopted 4 November 1950, in force 3 September 1953) Articles 8-11. Henceforth the European Convention.

[28] Muna Ndulo, The Commission and the Court under the African Human Rights System' in (Ed) A Gudmundur et al, *International Human Rights Monitoring Mechanisms* (Martinus Nijhoff 2009) 635.

[29] Laurence Burgorgue-Larsen and Amaya de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011) 600.

[30] Aharon Barak, 'Human Rights and their Limitations: the Role of Proportionality' (2010) 4:1 LEHR 1.

Outside these, most human rights are subject to limitations, and therefore the realisation of such rights must take into consideration other legitimate interests that the duty-bearer may hold.[31] This brings forth the legal importance of the concept of limitations; that human rights obligations must be performed by taking other legitimate interests into account. However, the duty-bearer does not have an unfettered right to adopt measures that interfere with human rights. In order to protect the essence of human rights and to avoid arbitrary interferences with human rights, human rights adjudicating institutions use standard criteria to analyse and to determine the justification of specific measures that affect human rights in given contexts. This aspect of human right law is well developed in its application to States, such that the framework of core legal principles that govern permissible limitations on human rights and the dynamics of balancing human rights with legitimate interests are well practiced and researched in relation to States.[32] This aspect must therefore be clarified in order to make complete sense of the assignment of human rights obligations to businesses. The framework for assessment of human rights limitations is presented below to set out the basics for identifying the core conditions for permissible limitations of human rights.

1.3 The Framework for Assessing Human Rights Limitations

The development of standard legal criteria for interpretation and assessment of human rights limitations can be traced back to the European Court of Human Rights in its formative judgement in 1968 on the *Belgian Linguistic* case.[33] In that case, the court was tasked to analyse whether some measures of language-based differential treatment of children in access to schools in Belgium were justified. To help its analyses, the court introduced an analytical framework for interpretation and assessment of measures that interfered with the right to non-discrimination. According to this criterion, a difference in treatment must have objective and reasonable justification, assessed in relation to the aims pursued and the effects of the measure.[34] Throwing further light on this, the Court ruled that measures that interfere with the right to non-discrimination must pursue "legitimate aims" and must have a

[31] Smith (n 14) 176-182. Also see generally James Nickel, *Making Sense of Human Rights* (Blackwell 2007).
[32] Smith (n 14) 176-182.
[33] Case "*Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium*" v *Belgium* (1968) [1474/62; 1677/62; 1691/62; 1769/63; 1994/63;2126/64] ECHR 10. Henceforth *Belgian Linguistic* case.
[34] ibid, par. 10

reasonable relationship of proportionality between the aims pursued and the means employed to achieve them.[35] Through practice, the court developed this framework into a standard for assessing interferences with any human rights, apart from non-discrimination, and to determine instances where interferences amount to human rights violations.

For instance in *Perdigão* v *Portugal* where the court was asked to determine whether or not Portugal's limitation of the applicant's right to peaceful enjoyment of property was justified, emphasised its jurisprudence in support of the requirement that any measures that interfered with human rights "must be prescribed by law" and be "necessary in democratic society".[36] The court clarified that the expression 'necessary in democratic society' is an eclectic phrase that includes that the measure must pursue "legitimate aims" and must display proportionality between the aims articulated and the means set out to achieve them.[37] The standard for human rights protection thus permits the duty-bearer, herein the State, not only to adhere to the demands required of it to ensure the realisation of human rights but also with the commensurate right to restrict certain rights in pursuit of competing interests if such measure is objectively and reasonably justified.[38] The determination of 'objectively and reasonably justified' interference with human rights is governed by specific legal tests, hence the human rights duty-bearer can be deemed to have violated human rights only if it takes measures that are not underpinned by law, pursue legitimate aims and do not have reasonable proportionality between the aims pursued and the means adopted to achieve them; all of which must be considered to determine instances of human rights violations.[39]

The detailed analysis provided by the *European Court of Human Rights* on the core legal requirements for assessment of limitations on human rights is considered as particularly instructive for the determination of human rights violations.[40] As noted above and will be substantiated in later sections, human rights adjudicating institutions essentially take this as a standard format for assessing human rights limitations. It is therefore imperative that

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[35] ibid, par. 10, 42
[36] *Perdigão* v. *Portugal* [Grand Chamber] ECHR, Application no 24768/06; Judgment 16 November 2010.
[37] ibid.
[38] Henry Sterner, Philip Alston and Ryan Goodman, *International Human Rights Law, Politics, Morals: Texts and Materials* (3rd Edn, OUP 2008) 154
[39] Barak (n 30) 1; Oddný Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Kluwer 2003) 42-51.
[40] Arai Yutaka 'The System of Restrictions' in van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 333.

within this legal context of assignment and enforcement of human rights obligations, the current global aspiration to extend human rights responsibilities to business entities, however limited this may be, must also provide insight into what really constitutes corporate violation of human rights when it comes to the assessment of corporate performance in respect of human rights. Given that there are permissible restrictions on some human rights, it is inconsistent with human rights law to expect businesses to refrain from interference with human rights without seeking to balance human rights and business interests.[41] Similarly, since human rights cannot be limited for just any reason imaginable, it is important that each of the core conditions or requirements for human rights limitations is clarified with a specific focus on businesses and the challenges around these are resolved.

1.4 The State of Knowledge on Business and Human Rights

The contemporary discussion on business and human rights implies a paradigm shift from the classical view of States as absolute bearers of human rights responsibilities, into a new realm that is grappling with how businesses could also be called upon to contribute to the realisation of human rights. There is not much debate that businesses do impact on virtually all human rights.[42] It is also widely accepted that most States lack the ability, preparedness or political will to ensure corporate compliance with human rights in their territories. These form the bedrock of the need to focus directly on businesses in addressing human rights challenges that emanate from their activities, though various aspects of this remain unclear.[43]

Central among these is that the human rights obligations of businesses are seen as part of the realm of corporate social responsibility (CSR) which is saddled with a lack of conceptual clarity and practicality.[44] The CSR debate is built on the argument that business, society and the environment have a symbiotic relationship that requires businesses to manage their relationships with society and the environment in a way that goes beyond the profit motives and legal commitments, so as to add value to society and to gain identifiable business ends.[45]

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[41] Further clarifications of this and further reflections are provided in section 1.9 below.
[42] *Guiding Principles* (n 3).
[43] Griseri and Seppala (n 1) 177.
[44] Michael Blowfield and Alan Murray, *Corporate Responsibility: a Critical Introduction* (OUP 2008) 31.
[45] George Frynas, *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenge* (CUP 2009) 6.

The CSR debate has so far discredited the view that the sole purpose of business is to maximise profits.[46] This, in essence, has contributed tremendously to the projection of human rights as issues that businesses must address beyond the profit motive. However, given that corporate approach to the management of non-profit motives within the CSR universe still remains voluntary,[47] there are differences between CSR and the human rights obligations of businesses in terms of the notions of responsibility and accountability, given that dealing with human rights does not have to be voluntary as CSR issues.[48] In view of this voluntariness embedded in CSR, there are significant concerns as to whether the CSR framework with its predominant difficulties for accountability is appropriate for the conceptualisation and implementation of corporate responsibility for human rights. Opinions are therefore divided on whether corporate responsibility for human rights should be voluntary or legally binding. As mentioned earlier and will be elaborated later, this thesis contributes to the debate by analysing the form that the responsibility of businesses ought to take, and the role that the idea of human rights limitations could play in this regard.[49]

Much of knowledge on business and human rights is reflected in debates on the *Guiding Principles.* The *Guiding Principles* have limited the scope of the responsibility of businesses to 'respect' for human rights with 'due diligence', leaving other engagements to corporate discretion. This has been a source of significant academic critique.[50] For David Bilchitz, the *Framework,* and for that matter the *Guiding Principles* is an inadequate and limited postulation of corporate responsibility for human rights. He suggests instead that business entities should have the full range of duties identified as relevant for realisation of human rights.[51] Dennis Arnold argues that the *Framework* lacks academic enquiry and its justification merely rest on moral grounds.[52] Similarly, Jernej Letnar Černič argues that the *Framework* lacks victim-orientation.[53] These criticisms concern the established range of duties required to give meaningful effect to human rights. In General Comment 31, the

[46] Donald Johnston, 'Promoting Corporate Social Responsibility: The OECD Guidelines for Multinational Enterprises' in R Mullerat (ed.) *Corporate Social Responsibility: the Corporate Governance of the 21st Century* (Kluwer 2005).
[47] Blowfield and Murray (n 44) 31.
[48] Anita Ramasastry, Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability (2015) 14 JHR 237.
[49] Much on this debate is presented in section 5.2 of this thesis.
[50] *Framework* (n 2) para. 51-81.
[51] Bilchitz (n 6) 198-233.
[52] Dennis Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20:3 BEQ.
[53] Černič (n 7) 1279-80.

United Nations Human Rights Committee, the monitoring body for the ICCPR, outlines the scope of obligations required to give effect to human rights as including the duties to respect and ensure human rights and added that these dimension of the duty typology are duties required to fully protect and fulfil human rights.[54] Although this classification is traditionally applied to States, each of these dimensions of duties entails specific but interrelated implications that will be analysed from a corporate perspective in chapter two of this study.

As a prelude[55], the duty to respect human rights is framed as a negative responsibility that requires addressees to refrain from infringing upon human right and may include taking positive steps to ensure that no harm is caused to human rights.[56] The duty to protect human rights requires addressees to take active measures to prevent third parties from infringing upon the rights of individuals, and the duty to fulfil is two-pronged, requiring addressees to promote and facilitate the enjoyment of specific rights or to directly provide for these rights where so required. This thesis will argue that these dimensions of human rights obligations are not neatly separable and as such limiting the scope of corporate responsibility to respect for human rights as espoused in the *Guiding Principles* is problematic.

Another dimension of the discourse that has attracted significant interest is the lack of clear international legal avenues to hold businesses accountable for human rights violations. Analysts are keenly extrapolating measures to circumvent this challenge. Some have thought through the possibility and challenges of holding businesses and business leaders criminally liability for human rights violations.[57] For instance, Hans Vest reasons that punitive actions for aiding and abetting and contributing to crime by group of persons acting in common purpose, such as prohibited under Article 25(3d) of the Statute of the International Criminal Court, are avenues to hold corporate leaders accountable for human rights abuses.[58] Norman Farrell also argues that attribution of criminal responsibility to military leaders and other

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[54] Human Rights Committee, 'General Comment 31: The Nature of General Obligations Imposed on State Parties of the Covenant' CCPR/C/21/Rev.1/Add.13, 26 May 2004.

[55] This is a prelude because section 2.4 below explains the types of human rights obligations in details.

[56] For explanation of the meanings attached to the types of human rights obligations, see Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd Ed, MNP 2001) 23.

[57] For a more recent analysis of criminal liability dimensions of corporate accountability for human rights violations see Nadia Bernaz, 'Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L Cases at the Special Tribunal for Lebanon' (2015) 13:2 JICJ 313.

[58] Hans Vest, 'Business Leaders and the Mode of Individual Criminal Responsibility under International Criminal Law' (2010) JICL 851.

officials in international criminal law provides an important insight into the attribution of criminal responsibility to corporations and leaders.[59] Volker Nerlich suggests that corporate liability may also arise if transnational corporations assume leadership roles in the course of which they abuse human rights.[60] Others are concerned about whether litigation is even an appropriate strategy to compel corporate compliance with human rights. Adrienne Margolis for instance recommends non-judicial remedies, noting that businesses have the tendency to over-litigate in cases due to their financial powers.[61] Juan Bohoslavsky and Mariana Rulli suggest that strengthening corporate financial discipline could enhance compliance with human rights.[62] All these are very useful reflections of thinking around how businesses could be held accountable for human rights violations, but the issue still remains unclear.

The prevalence of this problem has led to a further debate on whether States could adopt measures with extra-territorial implications or assert direct extra-territorial jurisdictions over multinational enterprises that originate from their jurisdictions so that they may hold such businesses accountable for human rights violations committed overseas. Nadia Bernaz assessed this option and discussed it thoroughly in relation to the question of whether international law places such obligations on businesses and whether such extra-territorial reach could be the best way to hold businesses accountable for human rights violation.[63] She found that even though there are some indications to that effect, international law does not yet require States to adopt extraterritorial legislations or to use extraterritorial adjudicative action but beyond the issue of obligation, extraterritoriality, through more subtle measures, is currently the best available option to enhance corporate accountability.[64] This discourse on extra-territoriality is also far from settled and remains to be seen with the passage of time.

These are significant indications that efforts have been made to clarify various challenging issues with regards to the human rights obligations for businesses and how to hold them accountable for human rights violations. These efforts confirm, even though much debated,

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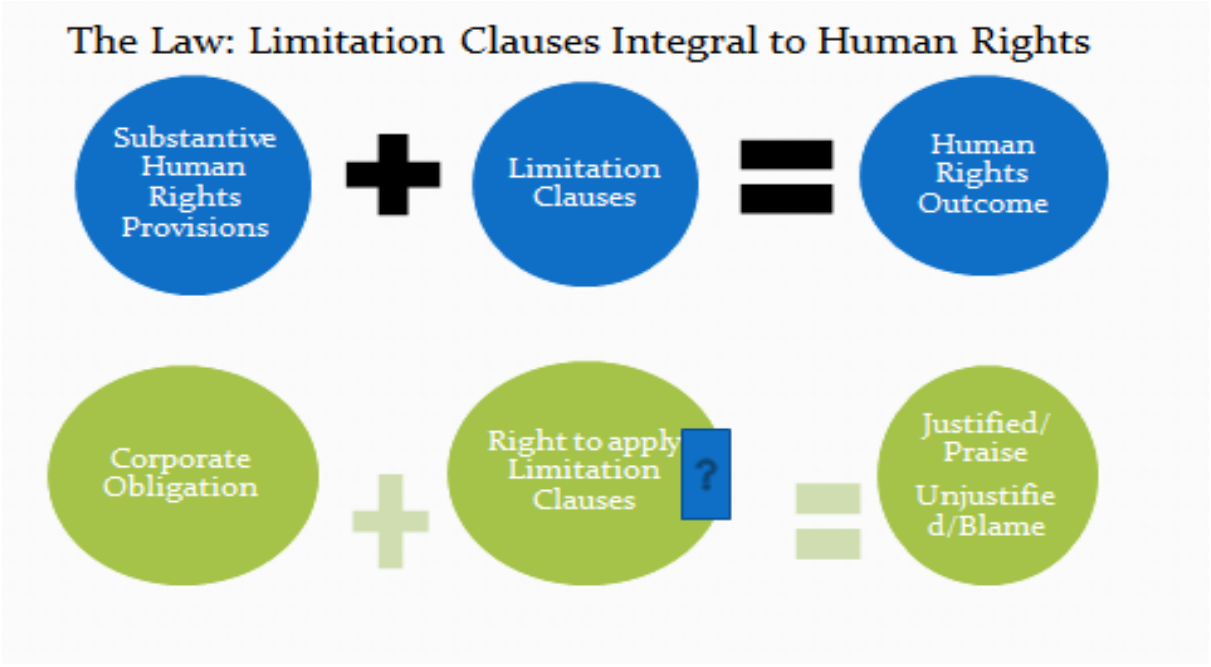
[59] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from International Tribunals' (2010) JICJ 873.
[60] Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) JICJ 895.
[61] Adrienne Margolis, 'Prioritising Profit over People' in International Bar Association: the Global Voice of the Legal Profession (2010), accessed 19th Nov. 2010.
[62] Juan Bohoslavsky and Rulli Mariana, 'Corporate Complicity and Finance as "Killing Agent": the Relevance of the Chilean Case' (2010) JICJ 829.
[63] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extra-Territoriality the Magic Potion?' (2013) 117 JBE 493; 510.
[64] Ibid, 510.

that businesses as non-State actors have rights and obligations in international law.[65] They also suggest that the nature of obligations that businesses must have for human rights still remains unclear even after the promulgation of the *Guiding Principles*, but at least most of the problems have been identified and are in debate. What is lacking is how to factor the modalities of human rights limitations into the assessments and determination of corporate violation of human rights and the justifications thereof. Thus, there is a lack of academic understanding of how to incorporate business interests into their human rights obligations so as to determine instances where corporate failure to comply with human rights could amount to human rights violations or justified interference with human rights. This gap in knowledge on the human rights obligations of businesses is depicted in the diagram below:



This pictorial representation summarises the nature of human rights law. It is such that some substantive human rights are formulated with limitation clauses and are therefore not absolute rights. To respect, protect or fulfil such rights involves appropriate consideration of the respective limitation clauses so as to balance human rights with other interests. The outcome of the balance of interests determines whether human rights violations occur or not.

[65] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 82.

This relationship between rights and limitations, and its relevance for assessing measures that interfere with human rights, is missing in *Guiding Principles* in terms of the description of responsibility attributed to businesses. It is not clear whether businesses could also utilise the limitation clauses in their dealings with human rights. Therefore, it is unclear how to determine whether specific instances of corporate interference with human rights are justified or unjustified and therefore amount to human rights violations. This gap in knowledge is what the present study aims to fill. It is one of the issues that need to be clarified for the responsibilities ascribed to businesses to be consistent with human rights law. This is also imperative for companies who ought to understand how limitations on human rights could serve to justify their measures that interfere with human rights, what is required of them for such justifications and conditions under which they are absolutely prohibited from interfering with human rights. It is crucial to engage with this and to clarify the problems outlined earlier with regards to the extent to which the core legal requirements for permissible limitations of human rights could be addressed from a corporate perspective. The problem that these requirements pose for research is outlined in the statement below.

1.5 The Problem Statement

Human rights limitations are integrated into some human rights provisions and therefore businesses will have to deal appropriately with such limitations to fulfil legally binding obligations for human rights. As shown in section 1.2 above, some human rights that are explicitly subject to limitations are exemplified in Articles 8-11 of the European Convention on Human Rights and Articles 18(2), 19, 21 and 22 of the ICCPR and include the freedom to manifest religion, freedom of expression, freedom of assembly, freedom of association and the right to private and family life. Apart from those rights that are explicitly subject to limitations, other human rights are inherently subject to limitations. For instance, economic social and cultural rights are generally subject to permissible limitations.[66]

The existence of such provisions of limitations in human rights law affords the bearer of human rights obligations the right to subject such human rights to permissible limitations but the exercise of this right requires the fulfilment of certain conditions. These include the need

[66] Article 4 of the ICESCR (n 26) places general limitations on economic, social and cultural rights.

to clearly show that any interference with human rights is prescribed by law, pursues legitimate aims and necessary in democratic society.[67] The expression 'necessary in democratic society' is broad and assessed in relation to whether a particular measure pursues pressing social needs and has reasonable relationship of proportionality between the aims pursued and the means employed to achieve them.[68] These tests are usually applied to State practices. When considered in relation to businesses, two of these tests, namely, whether an interference with human right is prescribed by law and whether it pursues legitimate aims, are particularly problematic from a legal perspective and pose dilemmas for further research.

First, the concept of law as required for acceptable limitation of human rights normally refers to the domestic law of a given State as the human rights duty-bearer. The State has the power to make its own law, to use the law as a basis to take measures that restrict human rights, and to assess whether the impugned measures that emanate from its law, are justified. The only limit on the State is that it must not just prescribe the law; the law must have some qualities to be acceptable. These qualities include that the law must be formulated with sufficient precision and must be accessible to enable those affected to foresee the reasonable consequences of the law, so that, if possible, they may avoid impairments of their rights.[69]

It is only if the State's law does not meet the qualities of precision, accessibility and foreseeability that the State is required to amend its laws in order to enhance human rights protection. These indicate that an important question in respect of human rights limitations is whether the duty-bearer is in position to create appropriate laws which can be used as bases for permissible limitations of human rights. If businesses were to assume binding obligations for human rights, as currently being discussed in the United Nations and beyond, the dilemma arises and needs to be clarified whether they could also have the standing to validly make rules that conform to the requirement of law and that they may legitimately base on such rules to govern their respective operations that interfere with human rights.

The main challenge that arises in respect of this is that States have the monopoly of power to make laws to govern the activities of subjects in their jurisdictions. Businesses, as predominantly non-state actors (the exceptions being public sector utilities), are subject to

[67] See for instance the case of *A, B and C* v *Ireland* (2010) ECHR [25579/05] 219-242.
[68] Ibid.
[69] Ibid.

laws made by States. Consideration of the requirement of law therefore takes attention directly to the State as law-maker and obscures the essence of examining this requirement closely from a business perspective. Research suggests that States do not make all rules and to 'command and control' businesses, that is to completely regulate all aspects of business operations, and therefore businesses also make some rules to regulate their operations.[70] This study provides further details on this issue, showing that business decisions that affect human rights are not based entirely on laws that are directly made by States but depend also on rules that businesses generate for themselves and not grounded in public authority.[71]

This indicates that for a complete understanding of how the requirement of law may be met or implied for purposes of human rights limitations in business contexts, clarity is needed as to how rules that are generated by businesses could also conform to the requirement of law for permissible limitations of human rights. This is needed in contexts of business operations outside the range of direct State regulations, that is, in situations or on issues that businesses are not directly regulated by concerned States. The question of whether businesses are in a position to make rules that conform to the requirement of law for permissible limitations of human rights is challenging because as non-state actors, businesses clearly do not have law-making capacity as States. Yet, the issue requires further analyses since States have the power to delegate rule-making to certain actors in some circumstances. The option remains for businesses as to whether for purposes of subjecting human rights to limitations in their contexts, States may delegate certain rule-making powers to them and whether they are rightly in position to exercise delegated rule-making function. Considering that from a human rights perspective the concept of law is substantive rather than formal and includes lower-ranking norms,[72] and also that businesses are 'semi-autonomous' institutions that have recognised capacity to make rules that affect society,[73] there is no certain answer to the question of whether they are in position to generate rules that may serve as valid bases for human rights limitations. This issue remains a significant dilemma that must be examined.

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[70] Claes Cronstedt, 'Some legal Dimensions of Corporate Code of Conducts' in Ramon Mullerat (ed) *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer 2011) 450; Dimity Smith, 'Governing the Corporation: the Role of Soft Regulation' (2012) 35:1 UNSWLJ 386.

[71] This is taken in more details in sub-sections 3.2 and 3.3 below.

[72] Anna-Lena Svensson-McCarthy, *International Law of Human Rights and States of Exception* (Kluwer 1998) 52.

[73] Sally Falk Moore, 'Law as Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study (1973) LSR 720.

The second problematic issue is in respect of what constitutes 'legitimate aim' for the purposes of human rights limitation in business context. Primarily, the substantive grounds for permissible limitations of human rights are State interests. As exemplified in Article 12 of the *International Covenant on Civil and Political Rights*, legitimate aims for limitations include national security, public order, public health or morals and the rights and freedoms of others.[74] These interests may be considered as the interests of States and their populace and since businesses are members of society, the interests of States are also in the interests of businesses. However, businesses also have their unique interests that directly bear on human rights. Section 4.3 below will show that the specific core interests of businesses include factors such as profit-making, revenue generation, customer attraction, reputation management, the licence to operate and others that are directly linked to business growth. These core interests are not explicitly listed in human rights instruments as grounds for human rights limitations and therefore the application of human rights limitations in business contexts requires clarification of how such business interests could be factored into the permissible grounds for human rights limitations. Should they be considered as subsumed in the list of legitimate aims already provided for in the human rights treaties as grounds for human rights limitations or they should be considered separately on their own merits in terms of how they may serve as relevant bases for human rights limitations?

This thesis will show that human rights instruments have explicitly placed restrictions on the purposes for which human rights may be limited.[75] Article 5 of the European Convention on Human Rights specifically refers to this principle as "limitation on the use of restrictions on rights". On the basis of this principle, this thesis is of the view that if business interests were considered as subsumed in the list of permissible grounds for human rights limitations, there is the risk of contradicting the limit that human rights instruments have placed on the use of human rights limitations for purposes other than those specifically prescribed. If business interests were considered as not subsumed in the list of permissible grounds for human rights limitations, the question arises as to which business interests must be prioritised and adopted as 'legitimate aims' of businesses that may have to be balanced against human rights. This raises further question as to whether such business interests may pose any

[74]The list is presented in details in chapter 4 of this thesis.

[75] See for instance Article 18 of the European Convention on Human Rights and Article 5(1) of the ICCPR which prohibit the use of limitations for purposes other than specifically provided for in the given instruments.

unique challenges for judicial assessment of the balance that they may have with specific human rights. If these issues are not resolved, imposing legal obligations on businesses with the corresponding right to subject human rights to limitations may lead to the situation where businesses may cite any business interests as grounds for interference with human rights and could create instances of unpredictable limitations of human rights. This thesis therefore evaluates the requirement of 'legitimate aims' from a corporate perspective, identifying the core interests of businesses and examining what they may look like in judicial context if adopted as legitimate grounds for permissible limitations on human rights.

The study therefore focuses on the two conditions for human rights limitations: namely, the requirement of law i.e., as to whether it might include rules that are created by businesses themselves; and the requirement of legitimate aims as to whether it might include business interests. These two aspects of human rights law are the most basic grounds for permissible limitations of human rights and are generally applied by human rights adjudicating institutions, including the Inter-American Court of Human Rights[76] and the Human Rights Committee.[77] As noted earlier, the phrase 'necessary in democratic society' as used in contexts of assessing human rights limitations encompasses the test of proportionality and pressing social needs.[78] Based on jurisprudence of the European Court of Justice, it is assumed that the test of proportionality may be required of measures taken by any actors, whether State or non-state actors, and therefore it does not pose any special dilemmas in its application to measures taken by businesses than may be required of measures taken by States.[79] This means that whether a measure is taken by a State or business, it may have to display an appropriate relationship of proportionality between the aims pursued and the means adopted to achieve them. Therefore, the scope of this study does not cover the tests of proportionality and pressing social needs for further examination. They may be taken up in further research as part of the clarification of human rights limitations in business contexts.

[76] Burgorgue-Larsen and De Torres (n 29) 553-558. See also Mohammed Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments', (2011) 7:4 IJHR 64.
[77] HRC, 'General Comment No.34: Freedom and Expression and Opinion' CCPR/C/GC/34, para 22.
[78] See for instances the breakdown of the terms as used in *A, B and C* v *Ireland* (n 67).
[79] See for instance the opinion of the European Court of Justice in *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet, et al* (2007) ECJ [C-341/05] 94-97.

1.6 Research Question

There are limitations on some human rights. Could businesses validly subject human rights to permissible limitations and if so, under what conditions may they do so?

Sub-questions

(I) Are businesses in position to generate rules that conform to the requirement of law for permissible interference with human rights without undermining State authority?

(II) What are the core interests of business that may constitute legitimate bases for corporate interference with human rights and to what extent does human rights law provide for such interests as permissible grounds for human rights limitations?

1.7 Justification of the Research Questions

The justification of the main research question lies in the fact that bearing human rights obligation implies the corresponding right to limit the application of certain rights, where permissible, to pursue other competing interests. To the extent that corporations must assume human rights obligations, it is illogical to suggest that they must comply with all human rights without allowing for the balance of interests, unless it can be proven that there is something peculiar about businesses, which unlike States, makes it logical for them to consider all human rights as absolute without limitations. The study posits that in as much as States are not assigned absolute responsibility for all human rights, it is doctrinally inconsistent with human rights law to require businesses to fulfil their obligations without the flexibilities embedded in human rights limitations law.[80] If they are entitled to subject certain human rights to limitations, there is the need to understand and assess the instruments that underpin their measures and the aims that they pursue. The instruments that underpin corporate measures in specific circumstances need to be given special attention because States do not command and control all business activities. Similarly, the core interests of businesses are different from the interests of States and therefore the unique legal significance of corporate interests in relation to permissible limitations of human rights must

[80] Additions clarification is provided in section 1.9 below as a further reflection on this position.

be analysed. It must be reiterated that the enquiry of this study is in respect of instances where specific business activities are not directly regulated by concerned States. Therefore, this study does not minimise instances where State-centred laws, interests and other provisions in human rights instruments are relevant and applicable for assessing corporate interferences with human rights. This is explained further in various sections of the study.

1.8 Contribution to Knowledge

Prior to the adoption of the *Framework* and *Guiding Principles*, John Knox raised the objection that businesses should not be assigned human rights duties that include the right to apply limitations on human rights because this would destroy human rights law.[81] The present study partly puts this claim to test. There are struggles within the United Nations to design legally binding framework(s) on business and human rights. Previous attempts at this have failed, and the prevailing position that corporate responsibility for human rights is voluntary, is also challenged. This study adds value to that field by suggesting that by means of application of human rights limitations law, corporate responsibility can move beyond voluntariness to binding obligation without harming corporate interests. It engages corporate fears of being subjected to absolute obligations for human rights that they consider are not framed in consonance with principles that drive business growth, and as a consequence, that they act as unfair and unjustifiable breaks on business interests. This study thus seeks to foreclose this fear and demystify the dreaded legally binding obligation of businesses.

It does so by pinpointing some of the ingredients that may go into such a framework, including the kind of corporate interests that must be considered as legitimate competing claims to human rights and how the concept of law ought to be construed in order to give legal force to legitimate corporate measures that result in human rights restrictions. In the end, the study proposes a concept of corporate 'self-regulatory' accountability which holds that corporate measures that are not directly regulated by States but result in human rights interferences could also be subjected to judicial scrutiny to ensure accountability in all circumstances where businesses have the capacity to interfere with human rights. As noted

[81] John Knox, 'Horizontal Human Rights Law', (2008) 2:1 AJIL 1.

in preceding sections, the imperative of human rights limitations is an integral part of human rights law such that limitations were designed to give shape and meaning to the idea of human rights and to aid their enforcements by taking practicalities into account. It is the hypothesis underpinning this work that such practicalities concerning the human rights responsibilities required of businesses need to take permissible limitations of human rights into consideration and must indicate the kind of infringements on human rights that are not permissible under any circumstances. Therefore, the study does not only contribute to understanding and streamlining the applicability of human rights limitations to corporate responsibility for human rights; it brings the issue in line with human rights law. This central proposition, though, has certain caveats embedded in it as explained the following section.

1.9 Caveat in the main Assumption underlying the Study

The central proposition of this thesis is that the concept of human rights limitations must be factored into the human rights obligations for businesses. Underlying this is the assumption that imposing human rights obligations on businesses must also engage the imperative of balancing their oft-stated business interests with human rights, in the same vein as the interests of States are factored into their obligations for human rights. States are responsible for crime prevention and to protect law and order, public health, economic well-being and all internationally recognised human rights for all subjects in their respective jurisdictions.[82] Businesses, as juridical persons, are also subjects within the jurisdictions of States and are mainly private actors with interests that are primarily focused on profit-seeking.[83] State interests are therefore generally public and overarching in nature, extending beyond the narrower interests of businesses. In view of this, one may wonder whether the need to incorporate permissible restrictions on human rights in order to factor flexibilities into the human rights obligations of States, could serve as an analogous basis to permit limitations on human rights in respect of the obligations required of businesses, or whether State interests and business interests are sufficiently similar to permit analogous flexibilities and balancing of interests in their obligations for human rights.

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[82] Chapter four of this thesis discusses the interests of States that are recognised as bases for human rights limitations and how these differ from the core interests of businesses.
[83] Section 4.3 of this thesis elaborates on the list of core interests of businesses that may conflict with human rights.

The need to clarify and factor human rights limitations into the emerging corporate obligation for human rights, as this thesis embarks upon, is justified on grounds other than resting on a comparison between the interests of States and businesses. One factor that justifies this is the lack of suitable alternative. The initial attempt to compel businesses to respect human rights, as embarked upon by the Sub-Commission for the Protection and Promotion of Human Rights, yielded few results, and created an ambience of antagonism.[84] By contrast, the new approach that underlies the *Guiding Principles* appears to pay more attention to businesses, while not fully explaining how business interests will be handled in legal contexts when they come in conflict with human rights. As the momentum towards the clarification of these in the form of a binding treaty grows, it is imperative that any emerging regime that imposes human rights duties on businesses pays attention to business interests, or it will suffer the same lack of effectiveness that characterised the discussion thus far.

The other factor that justifies the incorporation of permissible limitations into the human rights obligations of businesses is the need to foreclose the inherent difficulties that pertain to the claiming of certain rights. Consideration of this issue is significant to create fairness in the assignment of obligations to businesses in a manner that parallels, rather than compare with, the flexibilities accorded to States. Steven Ratner argued towards this point, noting that business enterprises "have different goals and interests that fundamentally rest on the need to maintain a profitable income stream", and therefore, "to talk about duties of business entities vis-a-vis individuals necessitates taking into account not only the rights of the individuals, but also these interests".[85] He added that due to the uniqueness of business interests, "the company's responsibility must, as an initial matter, turn on a balancing of the individual right at issue with the enterprise's interests and on the nexus between its actions and the preservation of its interests".[86] Thus, the necessity to factor flexibilities into the human rights obligations of businesses "simply parallels the basic notion of human rights law that the State may limit many rights to the extent necessary in a democratic society, with its concomitant notion of proportionality between means and ends".[87] In this sense, incorporating permissible limitation on human rights, and thus the imperative of balance of interests into the obligations of businesses, as accorded States, is based on fairness.

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[84] See the assessment made by John Ruggie in the Framework (n 2) par 51.
[85] Ratner (n 10) 513.
[86] ibid.
[87] ibid, 514.

The notion of fairness as the basis to consider human rights limitations in respect of the human rights obligations of businesses becomes clearer if the issue is considered at the conceptual level of limitations as related to the nature of human rights themselves rather than on the disposition of the duty-bearer. Conceptually, the factors that call for limitations on certain human rights are related to the nature of claiming those rights themselves. Section 1.1 of this thesis provided some theoretical constructs that set bases for the imperative for balancing human rights with other legitimate interests. In addition to those constructs, the texts of some human rights limitation clauses also indicate the reasons why States are allowed to limit certain human rights. Examining the texts of those limitation clauses can throw further light on the reasons why the obligations of businesses must also incorporate the imperative of human rights limitations as factored into the duties of States.

For instance, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights indicates that the realisation of this set of rights requires the availability of resources from the duty-bearer.[88] This shows that the availability of resources sets the basis to impose a general limitation clause in Article 4 of the Covenant to place flexibilities into the obligations of States in respect of economic, social and cultural rights.[89] Thus, the need to impose the limitations on economic, social and cultural rights is not based on the State per se but rather on the conceptual level that the nature of the rights involved would require resources and whatever is needed to realise them, rather than based on anything peculiar that pertains to the identity of the State as the duty-bearer. Similarly, corporate engagement with economic, social and cultural rights requires the availability of resources and thus engages the logic of limitations to provide permissible flexibilities in the obligations of businesses.

Article 19(3) of the International Covenant on Civil and Political Rights can also be seen as a further exemplar of the need to focus the imperative of limitations on the nature of rights themselves instead of on the duty-bearer. This article states that the exercise of the rights embedded in freedom of expression "carries with it special duties and responsibilities" and "it may therefore be subject to certain limitations".[90] Article 10(2) of the European Convention on Human Rights also emphasises this caveat in the exercise of freedom of

[88] ICESCR (n 26) Art 2(1).
[89] ibid, Art 4.
[90] ICCPR (n 25).

expression.[91] These caveats within the freedom of expression indicate that the right itself is prone to abuse and that calls for relevant limitations to make its claim meaningful. This means that the chances of abuse that are inherent in the exercise of freedom of expression instigate the need to place limitations on it, rather than a focus on the duty-bearer. To a large extent, most of the rights that are subject to limitations are inherently prone to abuses of some kind, making it sensible to impose restrictions on them to ensure sanity in their claims.

The above suggests that human rights limitations are factored into some human rights because of some inherent characteristics and difficulties pertaining to the exercise and claim of those human rights and that the imperative of limitation serves the purpose, for instance, of foreclosing the abuse of rights to which they are especially prone. In this sense, human rights limitations are linked to the concept of human rights itself, rather than to the identity of the duty-bearer. Understanding limitations in this way gives credence to the idea that human rights, with the exception of certain non-derogable rights, naturally have limits embedded in them.[92] A similar reasoning is necessary to understand the nature of human rights obligation that can be imposed upon businesses; it is unfair to impose obligations on them without factoring in the safeguards to address the difficulties that come with the claim of certain rights and the need to foreclose such difficulties to protect corporate interests.

Considering the logic of human rights limitations in this way eliminates the need to compare State interests with business interests as the basis to justify the imperative of applying limitations within the context of businesses. Further, as section 4.4 below will show, it means also that applying limitations in the context of business, with the need to factor business interests into the grounds for permissible balancing with human rights, does not necessarily rest on assumption that business interests have the weight to trump human rights. It would also be in keeping with the fairness principle: it is unfair to permit reasonable limitations in respect of the obligations of States while denying similar consideration to businesses as emerging actors in the international society. This is because the challenges pertaining to the claim of certain rights, such as the chances of abuse of rights, which are likely to hurt the interests of States, are also certainly inimical to the interests of businesses.

[91] ECHR (n 27).
[92] Osiatyński (n 13).

The idea of fairness precisely overcomes traditional objections often raised by businesses: (i) that they are different from States and that any regime designed keeping in mind State obligations cannot be appropriately transferred to businesses; and (ii) that the profit motive, among others, that (legitimately) drive business, is inadequately catered for when designing systems that seek to enhance social justice. Failing to accept these two fundamental objections while attempting to design a business and human rights regime is doomed to failure, unless such a regime can be imposed upon businesses through strong (State) political will, for which no evidence is yet discernible in the international community.

Of course, States and businesses are fundamentally different in structure and purposes and as such there may be certain peculiar reasons that warrant the accommodation of human rights limitations in the specific context of States. For instance, States are normally governed by political formalities and are not primarily or avowedly profit-seeking entities as businesses, but they have the power to wield forces such as law, expropriation of properties and taxation to get what they need to address their interests. Businesses on the other hand are primarily profit-seeking and must adopt strategic managerial measures to retain profits and growth. These fundamental differences however point to the need to examine the imperative of human rights limitations within the context of businesses, as this study seeks to do, rather than adopting wholesale the modalities for human rights limitations as defined for States and importing them into the context of regulating businesses. Further, businesses are not signatories to existing human rights treaties and therefore imposing human rights obligations on them without factoring in their unique interests goes against the general principle of fairness within public international law. Apart from the need to avoid this problem, the clarification of human rights limitations in the context of businesses, as this thesis embarks upon, would bring out the specifics of what is required for appropriate balancing of conflicting and competing interests within the context of businesses. This is important to enhance greater clarity and predictability in assessing human rights interferences in business contexts. In this vein, the attempt to clarify limitations in business contexts aims to enhance rather than impede the need to hold businesses accountable for human rights violations.

In section 1.1 above, it was noted that the idea of human rights limitations simply involves appropriately subjecting human rights to restrictions so as to balance competing and conflicting interests in a manner that preserves the conceptual essence of human rights. In

this vein, incorporating the idea of limitations into the obligations of businesses does not necessarily let businesses 'off the hook' of accountability for human rights violations. Rather, clarity with regards permissible limitations of human rights in the obligations of businesses serves the purpose of helping to avoid arbitrary restrictions on human rights and to reduce the chances that such instances may evade appropriate verification and remedy. In sum, the emphasis that this study places on the need to factor business interests into the human rights obligations of businesses does not minimise the weight and importance of State interests as bases for permissible restrictions on human rights; neither does it equate State interests with business interests in terms of power and weight to engage and justify limitations on human rights. Rather, it enhances the assignment of human rights obligations to businesses and improves certainty for their accountability for human rights violations.

1.10 Thesis Structure

This study is composed of five chapters. Chapter one ends here and chapter two continues in the next sections to set out the theoretical context for imposing human rights obligations on businesses. It discusses the reasons why businesses must have obligations for human rights, why such obligations must be mandatory instead of voluntary, the postulation espoused in the *Guiding Principles* and critiques around it. Chapter three draws on the doctrine of private delegation to examine how rules generated by businesses could also serve as valid bases for subjecting human rights to limitations without undermining the authority of States.

Chapter four identifies the main factors that constitute the core interests of businesses and examines the extent to which human rights law provides for such interests as grounds for human rights limitations. It proceeds to examine whether each of those factors could pose any unique challenges in judicial assessment if in conflict with human rights and provides further reflections on what the focus on business interests actually imply as legitimate bases for balancing with human rights. Chapter five concludes the study by placing the main findings of the thesis into the larger debate on whether businesses should have legally binding human rights obligations. It suggests how the logic of human rights limitations could resolve the treaty debate and concludes the study with suggestions for further research.

2

Theoretical Context of Corporate Responsibility for Human Rights

2.1 Chapter Introduction

The question of whether business entities should have human rights obligations has long attracted attention in international law and has been variously addressed, yet it continues to attract intense debates.[93] Given that the present study concerns how corporate measures that interfere with human rights should be assessed in accordance with human rights law, it entails the presumption that corporations have human rights obligations. It is therefore imperative that the theoretical basis for ascribing human rights obligations to businesses and the nature that such obligation ought to take, must be fortified. This chapter is meant for that purpose. It refreshes the debate that has already gone into clarifying corporate responsibility for human rights and adds more to it by providing additional insights into why businesses must have binding obligations for human rights and why human rights limitations are required to assess their performances. This task rests on the presumption that unless businesses have obligations for human rights, it is meaningless to explore how human rights limitations law could add value to assessing their infringements on human rights.

The chapter draws on the capacity of States to harm human rights as the main basis for ascribing human rights obligations to States and argues that businesses have also demonstrated the capacity to harm human rights and that identifies them as legitimate bearers of binding obligations for human rights. This point is followed by a review of the contemporary notion of corporate responsibility for human rights as espoused in the UN *Framework* and *Guiding Principles*, and discusses the supports for and criticisms against them. Another section argues that it is in corporate best interest to have obligations beyond respect for human rights, asserting that human rights duties are not neatly separable and therefore corporate stagnation on respect for human rights is conceptually illogical. The final section of the chapter contends that the clarification of human rights limitations is rather what is required to meaningfully ascribe human rights obligations to businesses.

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[93] John Ruggie expressed this view in his composition of the *Framework* (n 2). It was noted also in a related analysis by Bilchitz (n 6) 198-233.

2.2 The Conceptual Basis of the Human Rights Obligations of Businesses

Probably the most enduring debate in the business and human rights discourse is whether businesses should have binding obligations or voluntary responsibilities for human rights.[94] From a positivist legal perspective, it could be argued that Article 26 of the *Vienna Convention on the Law of Treaties* conveniently precludes corporations from binding legal obligations for human rights, given that they are not direct parties to human rights treaties.[95] However, this is less than conclusive. In a forceful articulation of the human rights obligations of non-state actors, Andrew Clapham famously argues that the realisation of human rights requires non-state actors to have obligations that are complimentary to State obligations.[96] This suggests that should treaties prove to be insufficient sources to de-limit the scope of entities that bear human rights obligations, other sources would be required to contribute insight into the legal commitment of businesses to human rights. Interestingly the *Framework* and *Guiding Principles* as well as supporting instruments such as the *OECD Guidelines for Multinational Enterprises*[97] implicitly suggest that human rights law could be extrapolated to businesses as non-state actors. These instruments however veered off the imposition of binding obligations on businesses, as shown below. There is therefore a need for a solid explanation of the basis for imposing human rights obligations on businesses.

Historically, efforts to assign human rights obligations to businesses have attracted mixed reactions and therefore innovative approaches are required to fortify our understanding of the nature of obligations that businesses should have for human rights. One such innovation may be to look back into the concept of human rights itself as a means to deduce the nature of obligations that it imposes on concerned entities. This thesis proposes that the concept of human rights itself identifies businesses as legitimate bearers of human rights obligations, but in doing so it is important foremost to engage the question of whether businesses have international legal personality or are subjects of international law. Without the need to rehearse the depth of analyses that have already gone into the 'subjectivity' and 'personality' status of non-state actors in international law, it is important to note that entities other than States could also acquire international legal personality as a result of their capacity to

[94] This debate is discussed in section 5.2 below.
[95] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).
[96] Clapham (n 65) 565-566.
[97] OECD, 'Guidelines for Multinational Enterprises' (2011) 31-34.

influence matters of international legal concern. Thus, one way to deduce the kind of obligations that businesses must have for human rights is to ask whether they have capacity to influence the main basis or logic behind the need to establish international human rights law in the first place and whether, as a result, they also attract international legal concern.[98]

The starting point to understand the theoretical basis for imposing human rights obligations on businesses is to grasp the main logic behind the concept of human rights that identifies States as legitimate bearers of duties and what it suggests about transposing human rights obligations to businesses. In other words, how does the concept of human rights itself engage the responsibility of States and may also identify corporations as legitimate bearers of obligations? This study posits that scholarly insight into the concept of human rights can address this issue. Basically, the concept of human right is complex and does not lend itself to agreements among analysts. However, scholars de-limit the main features of human rights by asking the question of what is human right or what constitutes a human right?

Charles Beitz suggests that this question is not adequately descriptive of the issue because it may be taken variously to suggest an inquiry into the nature and ontology of human rights, the list of issues codified as human rights or the values protected by human rights.[99] He submits that these indicate that the concept of human rights itself is not clear.[100] In spite of its lack of clarity, it is noteworthy that from the onset of the development of modern human rights law, the international community was able to negotiate the conception of human rights as enshrined in the preamble to the Universal Declaration of Human Rights.[101] In its preamble, the UDHR states that all members of the human family have inherent dignity, equal worth and inalienable human rights.[102] Article 1 fortifies this further, noting that all human beings are born free, equal in dignity and endowed with conscience that entitles them to humane treatments.[103] Article 2 therefore declares that every human being is entitled to the rights and freedoms without distinctions based on, inter alia sex, race and social origin.[104]

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[98] Clapham (n 65) 70-73.
[99] Charles Beitz, *The Idea of Human Rights* (OUP 2009) 48.
[100] ibid.
[101] UDHR (n 23).
[102] ibid, Preamble.
[103] ibid, Article 1.
[104] ibid, Article 2.

The UDHR thus postulates a naturalistic theory of human rights as inherent entitlements that accrue to all human beings by virtue of being born as human beings. However, due to the terse textual formulation of the UDHR itself, its conceptualisation of human rights is quite vague and does not give sufficient indications of the qualities that any social priorities must possess in order to be classified as human rights. In spite of this shortcoming in the UDHR, the international community managed to negotiate a list of social priorities, labelled them as human rights and embarked upon a negotiation process that culminated into the UDHR; a process that forms an acceptable source for the interpretation of the rights embodied in it.[105] Rather than a pre-delineated project, the list of human rights recognised in the UDHR is dynamic in the sense that it sets out key principles, with the precise dimensions to be determined dynamically and in response to particular challenges that undermine human worth and dignity. Therefore, the key to understanding what human rights actually entail rests with the UDHR. The onus of providing further heft to clarifying the human rights resting with courts of law, activists, scholars and significant others, dwelling also on the documents that commence with the UDHR and have subsequently been developed.

Before proceeding to discuss the concept of human rights itself, it is important to note that human rights are not necessarily complex philosophical constructs as some suggest. Beitz observes that analysts tend to discuss human rights as if they were perfect philosophical constructs, and cautions that such a view is erroneous because it provides legitimate grounds to be sceptical of the scope, content and procedural dimensions of human rights.[106] In view of this, the task in this thesis is not to present a philosophical reconstruction of human rights. It is only to derive the central motive for the development of human rights and how the concept itself engages binding obligation on addressees rather than voluntary responsibility.

Beitz suggests that in view of its conceptual difficulties, the idea of human rights is best viewed in terms of the practical role that it plays in the discursive practice of the international community so that its discursive function explains its conceptual meaning.[107] From this position, Beitz construes human rights as "requirements whose object is to protect urgent individual interests against certain predictable dangers".[108] Beitz's use of the phrase

[105] Sterner, Alston and Goodman (n 38) 146-148.
[106] Beitz (n 99) 3.
[107] ibid, 102.
[108] ibid, 109.

"protections against predictable dangers" is noteworthy for understanding how the idea of human rights engages the obligations of businesses. A similar descriptive phrase was used by Henry Shue to depict the notion of human rights as a rational basis for justified demand for 'social guarantees against standard threats'.[109] He noted that a human right thus provides rational basis for a justified demand for protection against standard threats.[110]

Shue's 'standard threats', like Beitz's 'predictable dangers' if read in conjunction with the description of human rights in the UDHR, highlight threats to human worth and dignity as the main conceptual basis of human rights and the development of law to protect it. This conceptual link between threat to human dignity and the development of human rights law is outlined by Micheline Ishay in her historical account of how the threats of wars and human misery caused by State power have been the main historical prelude that led to a series of efforts that culminated into modern human rights laws.[111] Ishay therefore suggests that there is a significant agreement among scholars that human rights are priorities that are especially negotiated to inhibit significant threats to the inherent worth and dignity of human beings. The challenge is that some analysts still tend to focus on certain manifest inconsistencies in this conception to denounce the concept of human rights itself. For instance, some do not view all human rights as human rights and thereby argue for a narrower scope of priorities recognised as human rights. This is especially noted of Henry Shue who holds that threats to basic rights, composed of security and subsistence rights, constitute the only standard threats that evoke the logic of protection.[112] In light of Shue's position, threats to other rights apart from security and subsistence rights would not constitute standard threats that require special provisions to protect against. Even though this is narrowly applied, Shue's 'standard threat' indicates that the idea of human right is to protect against threat to human worth and dignity.

Other analysts are concerned with the failures of the international community to take measures that befit the essence of human rights and eventually denounce the thrust of the concept itself. For instance, Ignatieff draws attention to certain absurdities in the implementation of human rights as indicators that challenge the idea of human rights. He notes that even States that have been key to the formulation of human rights law are

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[109] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S Foreign Policy* (PUP 1996) 13
[110] ibid.
[111] Micheline Ishay, *The History of Human Rights*, 2nd Edn (UCP 2008) 174-243.
[112] Shue (n 109).

reluctant to be constrained by it, that domestic freedoms are disrupted by military interventions under the pretence of human rights, that human rights are applied unequally to all classes of humans beings and that human rights conflict with important principles such as self-determination and state-sovereignty.[113] On the basis of these, he argues that human rights are not necessarily trumps that constrain threats to human worth and dignity but rather they are matters of international politics and idolatry.[114]

In sharp contrast to Ignatieff, Morsink defends the idea of human rights as a protection for the intrinsic worth and dignity of human beings[115] He argues that political and legal inconsistencies in implementation of human rights do not minimise the conceptual essence of human rights, noting that the view of human rights as political or legal constructs is an anomaly that deviates from the original idea of human rights as protections of the inherent worth of the human person.[116] He suggests that the original conception of human rights as espoused in the UDHR must be preserved as such.[117] This study also suggests that the conceptual essence of human rights should maintain its original postulation in the UDHR, as the works of other scholars help to set human rights apart from ordinary priorities.

One important work in this respect is that of James Nickel who substantiates the key features that qualify any social priorities as human rights. He defines human rights as high priority and mandatory norms that, although may not necessarily be absolute entitlements, are most likely to win in competition with other interests.[118] Thus, human rights should normally trump competing interests. This is an important feature of the idea of human rights. It shows that if human rights are viewed as specially negotiated priorities, framed into legislations concerning specific problems and further prioritised at the international level, they are not ordinary social priorities. Further, Nickel argues that human rights have scope and right-holders that lay claims to specific rights and addressees that are duty-bound to take certain measures or refrain from others so as to give effect to the 'claiming' of rights.[119] In this postulation, the idea of human rights as non-ordinary priorities is central and that they

[113] Michael Ignatieff, *Human Rights as Politics and Idolatry* (PUP 2001).
[114] ibid, 20-22; 48
[115] Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (UPP 2009).
[116] ibid, 18.
[117] ibid.
[118]James Nickel, *Making Sense of Human Rights* (Blackwell 2007) 35.
[119] ibid.

impose duties on addressees rather than voluntary obligations. Most importantly, human rights are entitlements whose existence does not depend on recognition by the State or, by analogy, the corporation, because all humans have claim to rights just for being humans.[120]

The above sample of conceptual views on human rights sufficiently pinpoints what human rights entail for the purpose of this thesis but a working definition is appropriate at this point. The thesis construes human rights as high priority norms that are internationally negotiated and locally clarified by a range of actors to inhibit significant threats to the inherent worth and dignity of humans. Therefore, the key indicator for considering a particular social priority as human right is whether such a priority is necessitated to inhibit a perceived 'threat' to the worth and dignity of human beings. In this view, specific enactments that are formulated to inhibit such threats constitute human rights to which all human beings have claim. Jack Donnelly noted that the idea of human rights as protections against perceived threats to human worth and dignity preserves the authority of the International Bill of Rights[121] as the primary source of human rights law. [122] This also makes the scope of human rights sufficiently elastic to include new human rights standards apart from the list of human rights that have already been codified in the various treaties.[123]

From the above discourse, it is logical to suggest that the disposition of an entity to pose significant threat to the worth and dignity of humans is what identifies it as a legitimate bearer of human rights duties. States have been identified as legitimate bearers of human rights duties due to the observation that the State machinery creates significant threats to the worth and dignity of human beings. This has historically been the basis for imposing duties on States and the predominant focus of human rights law on States as duty-bearers. [124] This is the result of international recognition and law-making, framed by States coming together with a purpose, and agreeing to norms that would be binding upon themselves. Thus the centrality of States' roles in the framing of human rights, and as a consequence their position of pre-eminence in terms of being duty-bearers, is arguably a historic relic that says more about the process of international norm creation rather than the content of human rights.

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[120] ibid.
[121] This comprises of the Universal Declaration of Human Rights and the two core Covenants on Human Rights that have been negotiated directly on the basis of the UDHR..
[122] Jack Donnelly, *International Human Rights* (Westview 2007) 24.
[123] ibid.
[124] Ishay (n 111) 174-243.

One factor that led to this dominance is the doctrine of parliamentary supremacy which posits that it is only the parliament of a legitimate government that can create binding law for its constituency, indicating that States exercise monopoly on law making and to that extent it is only States that can create laws on issues of public good.[125] If viewed from this perspective, less credence can be given to the failure to articulate corporations as duty-bearers of human rights. But this tradition is not sustainable as it is now clear that it is no longer reasonable to focus solely on States to protect human rights. The idea of human rights practically engages the responsibility of corporate entities so long as such entities also pose significant threats to human dignity.

To deduce the rightful obligations of businesses for human rights, one needs to discern whether businesses pose significant threat to human worth and dignity. In his early studies of the impact of businesses on human rights that set bases for formulating the *Guiding Principles,* John Ruggie found that business activities affect virtually the entire spectrum of human rights norms.[126] The general recognition of the power of business to pose significant threats to worth and dignity of human beings is demonstrated by the overwhelming support that the international community has given to the *Guiding Principles* to ensure that human rights as effectively embedded into business. Thus, corporate threats to human rights have effectively engaged the attention of the international community and prods global conscience to create robust protection against such threats. In this regard, the business machinery, recognised as a significant source of threat to the inherent worth and dignity of humans, has become a legitimate target of international law-making to contain its power. Therefore, unless it is proven that businesses do not pose threat to the worth of human beings, the concept of human right itself identifies them as duty-bearers.

As noted earlier, international law-making has not yet captured this in full vigour but the lack of legal reach to that effect does not necessarily negate the facts. The existing lack of binding obligations on businesses is a failure of international law-making rather than because of any special immunity of businesses that make it impossible for them to assume human rights duties. Beitz puts it clearly that protection of the essence of human rights requires that in the event that the State fails to observe required duties, the onus rests on

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[125] For discussions around parliamentary sovereignty see Pavlos Eleftheriadis, 'Parliamentary Sovereignty and the Constitution (2009) 22:2 CJLJ 1-24.

[126] Framework (n 2) Add.2, para. 2

"second level" agents, including businesses, to assume duties towards human rights.[127] From a legal perspective, this position brings businesses into focus as subjects of international law on the basis that they possess certain qualities that bring them into global recognition as bearers of international legal personality; the quality of not only being significant economic pushers of the world, but also the quality of being sources of threats to human dignity.[128]

It is important to note that the formulation of law to inhibit threats to human worth and dignity has historical relevance. It is observed that modern human rights law as stated in 1945 with the promulgation of the UDHR consists of a harmonisation of historical ideas, legal doctrines, institutions, cultures and religious views designed to inhibit threats to human worth and dignity.[129] A classic example is the English Magna Carta, which in Articles 39 and 40 provides due process rights that are reflected significantly in modern human rights law.[130] Also, the abolition of slavery and slave trade is a classic reflection of historical motivation of the international community to end threats that business activities could pose to humans.

To sum up this section, it is worth reiterating that even though international law does not explicitly identify corporations as human rights duty-bearers, the disposition of corporations as sources of significant threats to the inherent worth and dignity of humans effectively identifies them as legitimate bearers of human rights obligations. The State has come into focus as human rights duty-bearer to constrain its powers that pose threats to the worth and dignity of the human person. By analogy, human rights law ought to constrain the power of business to harm the inherent worth and dignity of human beings. Interestingly, the current state of affairs is that the obligations of businesses towards human rights are predominantly in the realm of voluntary acceptances of responsibility as noted below with regards to the UN *Guiding Principles*. This study suggests that the concept of human rights does not rest on voluntary responsibility of the duty-bearer and therefore the nature of responsibility that human rights impose on businesses ought to be mandatory. This in turn would engage the need to follow the various legal modalities that exist within the framework of human rights

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[127] Beitz (n 99) 109.

[128] Antonio Cassese, *International Law* (OUP 2005) 371-73. See also the views expressed in by Andrew Clapham in his *Human Rights Obligations of Non-State Actors* (OUP 2006) 24-82.

[129] Asbjørn Eide and Alfredsson Gudmundur, 'Introduction' in Eide and Gudmundur (Eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (MNP 1999) xxv.

[130] Nancy Troutman, 'The Magna Carta of 1215', at www.constitution.org/eng/magnacar.pdf, accessed 3/11/11.

law as the means to implement corporate responsibility for human rights and to assess their liabilities for human rights violations in line with the framework for human right limitations.

Two factors coincide in the context of businesses that ought to support binding obligations on them. First, corporations have enormous powers that threaten human rights and have actually exercised those powers to an extent that has begun to impinge on the conscience of the international community. Secondly, most States, whether due to competition for foreign investment, lack of resources, know-how or even political will, are unable or unwilling to constrain the harm that business activities pose to human rights. With these in mind, it is important to understand the nature and extent of human rights responsibility that should be required of businesses. Should, for instance, businesses adhere to the whole range of duties as known in human rights law or should limits be imposed on the nature of obligations they have for human rights? Should their obligations be legally binding or voluntary? The next section reviews disagreements on these issues, notes the gaps and gives suggestions for ascribing human rights obligations to businesses as the essence of human rights requires.

2.3 Contemporary Notion of Corporate Responsibility for Human Rights

Having argued that the concept of human rights itself identifies businesses as bearers of human rights obligations and that such obligations should normally be legally binding, the question arises as to what the contemporary postulation of corporate responsibility for human rights is and what critiques and supports exist for such postulation. The preceding sections suggested that innovative thinking is required to move beyond the classical view of States as sole bearers of human rights duties and to assign human rights obligations to businesses. This section assembles previous thoughts around the issue, how the United Nations construes the issue and debates around its postulation.

Prior to the promulgation of the *Framework* and *Guiding Principles*, writers dwelt predominantly on the preamble to the UDHR, which stated that every organ of society shall endeavour to protect and promote human rights, as a means to extend human rights

obligations to businesses.[131] Some analysts opined that this clause in the UDHR effectively engages corporations with human rights duties since they are 'organs' of society.[132] Other authors explicitly include human rights in the list of issues that businesses have obligations to deal with.[133] Businesses themselves have voluntarily made loose commitments to human rights as issues they must address, albeit in some instances, as voluntary engagements as shown in the Global Compact.[134] These cumulatively indicate that there has already been a certain level of progress in academic thinking and practice for recognition of businesses as bearers of human rights responsibilities, construed variously as voluntary.[135] The most contemporary and authoritative conceptualisation of corporate responsibility for human rights is embedded in the *Framework* and *Guiding Principles*. In view of the current predominant influence that the *Guiding Principles* have on the conception of corporate responsibility for human rights, it is imperative for purposes of this study to present how they project the human rights responsibility of businesses and the discussions around them.

2.3.1 Corporate Responsibility for Human Rights in the Guiding Principles

The United Nations conception of corporate responsibility for human rights is embodied in the outcome of the work completed by Professor John Ruggie in his erstwhile mandate as Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises. Ruggie was appointed in July 2005 with the mandate to clarify the role of business enterprises towards human rights. In a report submitted in 2008 to the Human Rights Council, he outlined a three-pillar *Framework* that partitioned the duties of Sates and responsibility of businesses in respect of human rights and emphasised that the *Framework* embodied the pragmatic and most appropriate means to address human rights issues in business contexts.[136] Ruggie then issued a set of *Guiding Principles*[137] to substantiate the claims in the *Framework* and the Human Rights Council unanimously adopted the *Guiding Principles* and sets up a Working Group to

[131] UDHR (n 23).
[132] Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets', (1999) Brook J. Intl L, Vol. XXV: 1) 24-25; Clapham (n 65) 24-82.
[133] Blowfield and Murray (n 44) 3.
[134] See principles 1&2 at www.unglobalcompact.org/aboutthegc/thetenprinciples/index , accessed 10/2/2011.
[135] Černič (n 7) 1264-80.
[136] Framework (n 2) para 10.
[137] Guiding Principles (n 3).

implement them.[138] By this, the UN adopted both the *Framework* and *Guiding Principles* and therefore the conception of corporate responsibility for human rights as espoused in these twin instruments represent the UN conceptualisation of the issue. It is also the contemporary authoritative definition and focal point on corporate responsibility for human rights. Henceforth, the *Framework* and the *Guiding Principles* are referred to as UN documents and their contents are taken as UN postulation of the responsibility of businesses.

Section II of the *Framework* asserts that States have a primary duty to protect human rights and outlines important steps that States have to take to comply with this duty.[139] Section III of the *Framework* postulates that "the baseline responsibility of companies is to respect human rights", which essentially means to refrain from interference with human rights.[140] This section contemplates the nature of punishment that businesses could face for failure to respect human rights, stating that failure to meet their responsibility to respect human rights may subject businesses to the court of public opinion and to actual courts of law.[141]

The *Framework* thus posits a 'differentiated but complimentary responsibilities' for businesses and States, such that businesses are expected to 'respect' human rights while States have obligations to 'protect' human rights. It notes further that corporate responsibility to respect human rights is not necessarily voluntary and may subject businesses to judicial proceedings. However the overall nature of the *Framework* is not legally binding, making it a predominantly voluntary assignment of human rights responsibilities to businesses. Most importantly, the *Framework* insists that the responsibility to respect human rights exists independently of the duty of States to protect such rights, indicating that the responsibility to respect human rights as ascribed to businesses is aided by States but largely exists on its own merits and must be seen as such.[142]

Thus the *Framework* entreats businesses to manage human rights and to report on their performances even in contexts where States do not provide the necessary and conducive structures and environments required for their compliance with the duty to protect human rights. This position taken by the *Framework* is laudable and socially desirable but has

[138] Res/17/4 (n 4).
[139] Framework (n 2) paras. 27-50.
[140] ibid, para.54.
[141] ibid.
[142] ibid, para.55.

important implications on the essence of human rights limitations on the corporate discharge of human rights responsibilities which the *Framework* failed to capture. This issue was noted in the preceding chapter of this thesis and will be expanded in later sections of this chapter. As a prelude, it is essential to note that this premise of the *Framework* leaves a gap in knowledge as to how to determine instances where business measures that deviate from respect for human rights are justified or otherwise, especially in contexts where State involvement is dormant in corporate engagement with human rights. In such instances, could the established legal tests for assessing human rights infractions, as outlined in chapter one above, be directly applicable for assessment of corporate infringement on human rights?

The present study does not endorse the restriction of corporate responsibility to respect human rights and considers the expression 'respect human rights' as a duty or obligation rather than a voluntary engagement. It suggests that whatever responsibility may be expected of businesses in respect of human rights must be tailored to the established frame of human rights law and its modalities for determination of human rights violations. It considers this as the avenue to improve the *Guiding Principle*. Before moving to this in later sections[143], it is imperative at this juncture to note some other claims of the *Framework* and *Guiding Principles* with regard to the definition of corporate responsibility for human rights. The *Framework* advances two related concepts in relation to corporate respect for human rights, viz. due diligence and complicity. It defines due diligence as the set of "steps a company must take to become aware of, prevent and address adverse human rights impacts", including the formulation of policies, impact assessments, integration and performance tracking.[144] Complicity on the other hand, requires the company to resolve not to acquiesce or help State's and other third-party measures that lead to human rights infractions.[145] Putting it more succinctly, the *Framework* makes it mandatory for companies to avoid causing harm to human rights or not to interfere with human rights, and fortifies that with the concept of due diligence, showing that a company must ensure effectively that it does not cause harm. However, as Sabine Michalowski has pointed out, the relationship between these concepts is not very clear and needs further clarification to be effective.[146]

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[143] This is discussed in sub-sections 2.3.4 and elaborated in section 5.3 below.
[144] Framework (n 2) paras. 56-64.
[145] ibid, paras. 73-81.
[146] Sabine Michalowski, 'Due Diligence and Complicity: a Relationship in need of Clarification', in Surya Deva and David Bilchitz (Ed), *Human Rights Obligations of Business: beyond the Corporate Responsibility to Respect?* (CUP 2013) 218-242.

This shows that *Guiding Principles* entreat businesses to avoid infringing on human rights, and to make sure they do so effectively without condoning human rights aberrations caused by States. However, a lot needs to be done to clarify the contours of this responsibility. Realising the chances that businesses would nonetheless take measures that interfere with human rights, the *Guiding Principles* added a joint responsibility for States and businesses to provide access to remedies, both judicial and non-judicial, to address and remedy human rights aberrations that may occur. However, the *Framework* and *Guiding Principles* do not spell out which remedies ought to apply to given human rights violations and whether some human rights allow permissible interferences while others require absolute protection.[147] At best, they consider all human rights on equal footing with regards to corporate avoidance of interference or harm and remedies when infractions occur. The present study takes this lack of differentiation as an important missing link that needs to be remedied, given that some human rights are absolute norms while others are not and subject to permissible limitations. Before getting into these issues, it is also essential to look at some supports and criticisms of the *Guiding Principles* and to show where the present study fits into the discourse.

2.3.2 Support for the UN Framework and Guiding Principles

As noted earlier, the most important support given to the *Guiding Principles* was its unanimous endorsement by the Human Rights Council by means of Resolution 17/4.[148] The research methodology used in the formulation of *Guiding Principles* as outlined in the *Framework*, included an extensive consultation with significant stakeholders, syntheses of specific case studies and a diverse range of research strategies. This gives the *Framework* and *Guiding Principles* a remarkable academic outlook that serves as basis for academic enquiries, criticisms and supports as any other academic material. Much of the support garnered by the *Framework* comes from non-academic actors including business enterprises, States, non-governmental organisations and significant others. Most States have initially expressed strong support for the *Framework*.[149] For instance, a statement issued by the

[147] Framework (n 2) paras 82-103.
[148] Resolution 17/4 (n 4).
[149] For increasing support by States, see generally:
www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2011#75016,

Norwegian government on behalf of five sponsoring countries notes that due to the complex history of business and human rights within the UN system, the results achieved under the 'Ruggie mandate' cannot be underestimated and urged the continuation of the fact-based and incremental approach outlined by the *Framework*.[150] Similarly, the UK government issued a general comment endorsing what the Ruggie mandate has achieved but cautions that the Principles do not completely reflect the current state of international law.[151]

Civil society organisations have also given support to the *Framework*.[152] A statement issued on 30th may 2011 by the Joint Civil Society (JCS) to the 17th Session of the Human Rights Council urged the Council to take note of the progress achieved under the mandate of the Special Representative and expresses recognition of the *Framework*.[153] In a letter dated 25 May 2011, the International Bar Association (IBA) expressed full support to the outcome of the *Framework*.[154] Similarly, the International Trade Union Confederation (ITUC) strongly supported the *Framework* and stated that it was well-grounded in human rights law.[155] Perhaps the most vivid expression of business in support of the *Framework* is the joint statement by the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) of the OECD.[156] The business community thus expressed overwhelming support and commitment to the conception of corporate responsibility for human rights as outlined in the *Guiding Principles*. The key bases of this support, as indicated by the joint-statement, was that the *Framework* and *Guiding Principles* do not purport to create new international legal obligations or assign legal liability to businesses, cautioning that follow-up measures should

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accessed, November 16, 2011.

[150] Norwegian statement at: www.business-humanrights.org/media/documents/ruggie/statements-norway-uk-business-human-rights-16-jun-2011.pdf, accessed, November 16, 2011.

[151] UK Statement at: www.business-humanrights.org/media/documents/ruggie/statements-norway-uk-business-human-rights-16-jun-2011.pdf, accessed, November 16, 2011.

[152] For civil society supports, see also www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2011#75016, accessed, 16 Nov. 2011.

[153] JCS, 'Joint Civil Society Statement to the 17th Session of the Human Rights Committee', available at: www.hrw.org/en/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council. Accessed: 16 Nov. 2011.

[154] IBA, 'Letter to the UN Special Representative Ruggie', available at: www.business-humanrights.org/media/documents/ruggie/intl-bar-association-ltr-to-ruggie-25-may-2011.pdf, accessed 16 Nov. 2011.

[155] ITUC, 'Letter to the UN Special Representative Ruggie', available at: www.ituc-csi.org/IMG/pdf/Letter_to_Mr_John_G_Ruggie_.pdf, accessed 16 Nov. 2011.

[156] IOE, ICC &BIAC, 'Joint Statement on Business and Human Rights to Human Rights Council', available at: www.business-humanrights.org/media/documents/ioe-icc-biac-submission-to_the-un-hrc-may-2011.pdf. Accessed: 16 Nov. 2011.

not include complaints-receiving mandates.[157] Some individual companies have even gone beyond collective support and issued their own statements to welcome the UN postulation. For instance, on 26 May 2011, Coca Cola issued a letter to John Ruggie expressing strong endorsement for the *Guiding Principles*.[158] The 2011 updated version of OECD Guidelines for Multinational Enterprises endorsed the scope of human rights responsibilities outlined in the UN *Framework*, noting that corporations should have responsibility to respect human right.[159] In spite of these, some criticisms levels against *Framework* are worth-noting.

2.3.3 Critique of the UN Framework and Guiding Principles

Some academic analysts challenge the UN position that the responsibility required of business is to respect human rights. David Bilchitz for instance argues that the responsibility to respect human rights is an under-statement of the scope of duties required of businesses and suggests that businesses should contribute to the entire spectrum of human rights duties.[160] This issue has historically overwhelmed international legal discourse and therefore the suggestion that businesses must have obligations beyond respect for human rights may appear problematic. However, the present study supports this view as the most meaningful application of human rights in a business context. The thesis will argue that it is in the best interest of businesses that they contribute to the protection and fulfilment of human rights beyond the obligation to merely respect human rights.

It is not only in respect of the scope of responsibilities that the *Guiding Principles* are criticised. They are perceived also as lacking the perspective of victim orientation and reparation, which in essence is the core object of human rights protection.[161] A similar concern is expressed by the Joint Civil Society Statement of May 2011 which noted that the *Guiding Principles* do not adequately reflect or address some important issues that merit attention and suggests that more needs to be done for it to be consistent with human rights

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[157] Ibid, 2-3.
[158] Coca-Cola, Letter to UN Special Representative, found at: www.global-business-initiative.org/SRSGpage/files/Guiding%20Principles%20Endorsement%20from%20Coke.pdf, Accessed: 16 Nov. 2011.
[159] OECD, 'Guidelines for Multinational Corporations' (2011) para. 36.
[160] Bilchitz (n 6) 198-233.
[161] Černič (n 7) 1279-80.

law especially in reflecting victim sensitivity.[162] These indicate that in spite of their tremendous endorsement by States and significant actors, the *Guiding Principles* have not settled the debate on what really has to be the outlook of corporate responsibility for human rights. The strength of the *Framework* and *Guiding Principles* lies in the bold indication that a certain level of quality performance is legitimately required of businesses towards human rights. However, the limitation or fixation of the scope of corporate responsibility to respect for human rights, even though polished with the concept of due diligence, remains problematic in diverse ways. The following sections of this thesis elucidate on these shortcomings of the *Guiding Principles* and propose additional points of thought that might help to extend corporate responsibility beyond respect for human rights.

2.4 Corporate Responsibility beyond Respect for Human Rights

This chapter argued in section 2.1 above that the concept of human rights itself identifies businesses as legitimate bearers of human rights duties in view of their disposition to pose threats to human worth and dignity. On the basis of this, the chapter argued that if there are any bases to assign human rights responsibilities to businesses, these should ideally be legally binding. However, as noted in section 2.3, the contemporary postulation of corporate responsibility for human rights as espoused by the *Guiding Principles* is largely non-binding, leading to an enduring debate on the human rights responsibility ascribed to businesses. In essence, the limited scope and non-binding nature of corporate responsibility for human rights has more to do with the failure of international law-making rather than an inherent immunity of businesses against bearing binding obligations for human rights. In order to enter into this debate, the starting point is to re-visit the nature and scope of obligations that the concept of human rights fundamentally engages and are known as required to effectively give meaning to human rights as protection for inalienable worth and dignity of human beings. By means of this analysis, it is possible to identify what is missing in the postulation of corporate responsibility as espoused in the *Guiding Principles*.

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[162] JCS, 'Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises', online at www.fidh.org/IMG/pdf/Joint-civil-society-statement-on-business-and-human-rights-May-2011.pdf, Accessed: 25 Nov. 2011.

Doctrinally, the idea of human rights imposes three main dimensions of duties on addressees. These include the duty to respect, the duty to protect and the duty to fulfil human rights.[163] Each of these dimensions of human rights duties entails specific implications and may have variants but this three-tied typology of human rights obligations is required to give meaning and effect to the concept itself.[164] The duty to respect human rights is mainly conceived of as a negative type of obligation that fundamentally requires addressees to refrain from infringing on human rights.[165] The term 'respect' may also involve taking positive steps to ensure that no harm is caused to particular human rights but in essence, such positive steps embedded in respect for human rights are steps that are meant to ensure non-interference with human rights. For instance, in order to avoid infringements on privacy, an institution may need to take steps to identify specific measures that infringe on the privacy of others and to avoid such measures. The 'duty to protect human rights' requires addressees to take active measures to prevent third parties from infringing on the rights of individuals.[166] The duty to fulfil is two-pronged, requiring addressees to promote and facilitate the enjoyment of rights or to directly provide for the enjoyment of human rights if so needed in specific contexts.[167]

Viewed on its own merit, each of these dimensions of human rights duties entails specific technical implications for the claiming of specific rights. Some writers previously had the view that the civil and political rights were cheaper to protect than economic, social and cultural rights because the former simply engages the duty to respect human rights, that is, to refrain from interference with human rights, whereas the latter was thought to require active provisions for the enjoyment of human rights.[168] However, closer analysis suggests that these dimensions of human rights obligations are not necessarily mutually exclusive. Asbjørn Eide for instance argues succinctly that the different dimensions of human rights duties are mutually supportive for the realisation of human rights and whichever dimension may be relevant for the enforcement and realisation of specific rights depends on the context.[169]

[163] Eide (n 56) 9-28.
[164] ibid, 23.
[165] ibid.
[166] ibid.
[167] ibid.
[168] ibid.
[169] Ibid, 24-28.

Similarly, General Comment 3 of the Committee on Economic, Social and Cultural Rights suggests that there are stark similarities between the duties required to give effect to civil and political rights on one hand and social and economic rights on the other.[170] Therefore, there is the need to take closer look at the distinctions between the dimensions of human rights duties within the specific context of corporations so as to see if the expression 'respect for human rights' at the exclusion of the 'protect' and 'fulfil' dimensions of the duty typology has any practical relevance in the context of businesses. This section presents three arguments that militate against the restriction of corporate responsibility to respect for human rights in exclusion of the 'protect and fulfil' dimensions of obligations. These include arguments suggesting that the respect dimension of obligation is not sufficient to enhance corporate management of reputation, that the various dimensions of human rights duties are not mutually exclusive and that restricting corporate responsibility to respect for human rights would leave a grey-zone in the protection of human rights in business contexts.

2.4.1 Respect for Human Rights as a Strategy for Reputation Management

The UN *Framework* states that failure to meet the responsibility to respect human rights can subject businesses to the courts of public opinion and to actual courts of law.[171] By this statement, the *Framework* acknowledges that one key incentive for businesses to address human is to build and maintain corporate image and reputation. This thesis argues that 'respect for human rights' alone is not a sufficient strategy to enhance corporate reputation.

Corporate reputation management is one of the main reasons why businesses engage with non-economic social demands. Some analysts believe that managerial consideration of corporate reputation is as important as operational, legal and financial matters.[172] Research shows that corporate reputation is a strategic asset that contributes to persistent profitability of firms.[173] What then is corporate reputation and how do companies attract and retain favourable reputation? In simple form, corporate reputation is stakeholders' overall

[170] CESCR, 'the Nature of States Parties Obligations, General Comment 3 (14 Dec 1990).
[171] Framework (n 2) para 54.
[172] Gianfranco Walsh and others, 'Examining the Antecedents and Consequences of Corporate Reputation: A Customer Perspective' (2009) 20 BJM 187
[173] Peter Roberts and Grahame Dowling, 'Corporate Reputation and Superior Financial Performance' (2002) 23 SMJ 1091.

evaluation of a firm over time, based on their direct experiences and any forms of communication that provide information about the firm in comparison with competitors.[174] The Chartered Institute of Management Accountants affirms that corporate reputation embodies the image and values of the company and as such it is intricately linked to the concept of corporate responsibility.[175] Thus, corporate reputation is about the perception that stakeholders, including investors, buyers, suppliers, creditors, governments, employees and others may have about the company. An insight into the means by which businesses attract and maintain reputation is essential to throw light on the weakness of respect for human rights, in exclusion of duties to protect' and 'fulfil', as a strategy for reputation management.

Corporate reputation is a product of the firm's actions; a set of attributes ascribed to a firm, inferred from its past actions.[176] This means that visible action is the principal means by which firms attract and influence the perceptions of stakeholders. It is the overt and manifest behaviours of the firm that are most likely to attract and retain favourable reputation or even damage corporate reputation. Fombrun and Rindova found that communication is the most significant overt action of the firm because it makes the firm more transparent to stakeholders and enables them to better appreciate the firm's operations and it facilitates the firm's ability to attract favourable reputation.[177] Relatedly, Fombrun finds that standard-setting initiatives that induce companies to adopt visible and action-oriented policies provide potentially more useful benchmark for strengthening corporate reputation than forms of policies that are dormant and not action-oriented.[178] If corporate reputation is enhanced by action-oriented, transparent and visible actions rather than passive measures, how does the term 'respect' as a dimension of human rights engagement, relate to corporate reputation?

The UN *Framework* defines the responsibility to respect human rights as the obligation for companies to refrain from taking actions that impair human rights.[179] Coupled with the concept of due diligence, respect for human rights essentially requires businesses to take

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[174] Manto Gotsi and Alan Wilson, 'Corporate Reputation: Seeking a Definition' (2001) 6 IJCC 29.
[175] CIMA, 'Corporate Reputation: Perspectives of Measuring and Managing a Principal Risk' (2007)6.
[176] Keith Weigelt and Colin Camerer, 'Reputation and Corporate Strategy: A Review of Recent Theory and Applications' (1998) 9 SMJ 443.
[177] Charles Fombrun and Violina Rindova, 'Reputation Management in Global Firms: A Benchmark Study' (1998) 1CRR 205-212.
[178] Charles Fombrun, 'Building Corporate Reputation through CSR Initiatives: Evolving Standards' (2005) 8 CRR 7.
[179] Framework (n 2) 24

steps necessary to ensure that they cause no harm to human rights.[180] In other words, businesses are entreated not to send negative signals by interfering with human rights. This is strategically significant in terms of retention of reputation because corporate actions that infringe on human rights could constitute overt actions that send negative signals to their stakeholders. The manner in which stakeholders interpret and perceive these negative signals could directly impact on the kind of reputation they attribute to the company. The *Framework* is thus strong on the side of preventing corporate reputation damage. However, respect being essentially a passive dimension of human rights engagement, it does not foster the attraction of favourable corporate reputation because it does not involve positive or active engagement as the 'protect' and 'fulfil' dimensions of human rights engagements.

As noted earlier, the attraction of favourable reputation requires the firm to take visible actions that send favourable signals to stakeholders. Even though the *Framework* explains that causing no harm is not merely passive activity because it involves taking positive steps, the description of positive steps as embedded in the concept of due diligence are essentially measures that are meant to facilitate non-interference in the enjoyment of human rights. Thus, they are to fortify the passive feature of causing no harm and are unlike the positive actions embedded in the 'protect' and 'fulfil' dimensions of human rights engagement. An intricate difference thus exists between respect being the predominantly dormant or negative dimension of human rights engagement, and protect and fulfil, being the positive dimensions of obligations, in terms of their potential to attract favourable reputations to businesses.

In order to grasp this connection more clearly, one needs to ask the following question: how do companies show that they respect human rights? As Ruggie has noted, respect for human rights is the baseline responsibility. This suggests that respect is first level of the duty typology in the sense that a firm must first have respect for particular human rights before it can commit to taking steps to protect or fulfil them. In this sense, respect for human rights is inherent in any instances where measures are taken to protect or fulfil human rights and therefore it is not neatly isolated from the other dimensions of human rights obligations. However, respect is vague and undeterminable term, hence many companies claim to respect human rights but are unable to prove and communicate that they respect human rights.[181]

[180] ibid, para56.
[181] ibid, para 25.

From the short analysis above, it could be argued that many companies endorsed the UN *Framework* largely because it does not add extra legal burdens in the area of corporate engagement with human rights. This view is reflected clearly in the joint statement issued by the International Organisation of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee of the OECD in support of the *Framework* in which the group cautioned that any follow-up to the *Framework* should not include complaint mechanisms.[182] What is less considered by businesses is the strategic relevance of this flexibility embedded in the *Framework* for achievement of important corporate motives, including the need to attract and maintain reputation. This is not to say that businesses should address human rights simply as a reputation add-on. It is to say that attraction and retention of favourable reputation is an essential business strategy and if corporate engagement with human rights has any chance to enhance this strategic tool, there is a business case for engaging with human rights. Relatedly, if the respect dimension of human rights engagement helps to retain reputation but the protect and fulfil dimensions help to attract favourable reputation, then businesses have strategic interest in seeking to contribute to the entire spectrum of human rights duties instead of fixating on the respect dimension.

This study is of the view that for a business entity to send signals to stakeholders so as to induce favourable perceptions and enhance favourable reputation, it must admittedly refrain from causing harm to human rights, but it is also in its strategic interests to take positive and visible measures that contribute to the protection, promotion, facilitation and provision of human rights. It is therefore how businesses could contribute to the broad spectrum of human rights responsibilities that should occupy academic thought. Although the UN *Framework* does not dissuade corporations from taking measures that protect and fulfil human rights, it views these as purely matters of corporate discretion and thereby increases the chances that businesses may limit themselves to the respect dimension of obligations. The *Framework* therefore ascribes socially desirable concept of responsibility to businesses but offers little incentive for them to advance their interests, including positive reputation.

[182]IOE, ICC &BIAC, 'Joint Statement on Business and Human Rights to the United Nations Human Rights Council', available at: www.business-humanrights.org/media/documents/ioe-icc-biac-submission-to_the-un-hrc-may-2011.pdf. Accessed: 16 Nov. 2011.

2.4.2 The Mutuality of Human Rights Obligations

The UN *Framework* states further that the conceptualisation of corporate responsibility for human rights rests on differentiated but complementary responsibilities.[183] Yet, it is not clear how the *Framework* actually combines these opposing descriptive words. In reality, the *Framework* depicts differentiated responsibilities, setting boundaries between the duties of the State and the responsibilities of businesses, except where the remediation aspect connotes complementary duties. In this regards, the *Framework*'s requirement that businesses respect human rights with due diligence assumes that the firm should take it as a duty not to interfere in human rights and should make sure it does not, suggesting that the firm can isolate the 'respect' dimension from the 'protect' and 'fulfil' dimensions of human rights engagement. But is this differentiation really practical within the context of business?

To determine whether the various dimensions of human rights duties are neatly separable as the *Framework* suggests, we could draw on the notion of inter-dependence between the substantive human rights provisions themselves. During the World Conference on Human Rights in Vienna in June 1993, the international community articulated the view that human rights are indivisible, mutually dependent and inter-related.[184] Following this, much effort, both scholarly and otherwise, has gone into bridging the formative gap between civil and political rights on one hand and economic, social and cultural rights on the other, seeking to establish that what is required to give effect to both sets of rights is not necessarily different in practical terms. Regarding this, General Comment 3 of the Committee on Economic, Social and Cultural Rights notes that there are significant similarities in the nature of the obligations required to give effect to all human rights.[185] This principle of indivisibility of human rights is therefore entrenched in the interpretation of human rights provisions and obviates the initial notion that civil and political rights are cheaper to respect because they only require basic obligations of conduct of non-interference or to cause no harm, whereas economic, social and cultural rights are resources expensive because they require taking positive steps.[186] To a large extent therefore, it has come to be understood that the realisation

[183] Framework (n 2) para 4.
[184] UNGA, 'Vienna Declaration and Programme of Action' (12 July 1993), A/CONF.157/23, Art 5
[185] CESCR, General Comment 3 'The Nature of States Parties Obligations' (14 Dec. 1990) para.1.
[186] Asbjørn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge in A Eide, C Krause and A Rosas (ed) *Economic, Social and Cultural Rights: a Textbook* (2nd ed, Kluwer 2001)3-7.

of civil and political rights or the lack of realisation thereof may be as costly in real terms as economic and social rights.

However well understood this principle may be applied to link the various human rights, it has not been applied to the various dimensions of human rights duties in terms of how they may also be inter-dependent. Therefore an analysis of this in business context is worthwhile. John Ruggie's notion of differentiated but complementary responsibilities indicates a certain level of concession that the various dimensions of human rights duties are linked to some extent, but framing of corporate responsibility at the basic level of 'respect for human rights', leaving the 'protect' and 'fulfil' dimensions outside the range of responsibilities required of corporations, suggests that these dimensions of responsibilities are neatly separable in practical terms.[187] In hindsight, human rights responsibilities may be more often than not complimentary rather than separable within the corporate contexts and a deviation from or compliance with one aspect may engage other dimensions of obligation.

For illustration, the pattern of reasoning in contemporary lawsuits against companies for human rights violations could throw light on how corporate behaviours could involve multiple dimensions of human rights responsibility. The following case provides a telling example. In *Hoffmann v South African Airways*, henceforth the *South African Airways* case, the applicant was an HIV positive person who applied to South African Airways for a job as a cabin attendant.[188] Although he passed all stages of the selection process, he was denied employment due to his HIV status. The court of first instance found this decision to reflect a legitimate balance of human rights with corporate interests. However, on appeal to the Constitutional Court of South Africa (CCSA), the company was found to have acted irresponsibly. The court ruled that "...the denial of employment to the appellant because he was living with HIV impaired his human dignity and constituted unfair discrimination..."[189] In its reasoning the court argues that people who are HIV positive must be protected against public prejudice and stereotype and based its judgement on the failure of the company to 'protect' the individual from prejudices and stereotypes in society, which essentially means failure to take the duty to protect his rights.[190]

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[187] Framework (n 2) para.9
[188] *Hoffmann* v *South African Airways* (2000) CCSA [CCT17/00] 146.
[189] ibid, para 40.
[190] ibid, paras 34-35

Here the various dimensions of the duty typology are engaged simultaneously. First, given that the applicant passed all the selection tests for the job, he had a legitimate claim to his right to employment. If the company had employed him, that would have demonstrated respect for his right to non-discrimination in employment. It would also have demonstrated fulfilment of his right to economic sustenance out of gainful employment. Further, his right to be protected from prejudice in society would also have been engaged simultaneously. Conversely, the company's refusal to employ him impaired all these rights simultaneously, illustrating that with a single action, the company demonstrated lack of respect for his right to non-discrimination in employment, impaired the fulfilment of his economic rights and failed to protect the person from prejudice and stereotype in society. As noted, the court ruled against the company mainly because it failed to protect the applicant from public prejudice and impaired his economic fulfilment.[191] In the instance of this case, the duties to respect, protect and fulfil were simultaneously engaged in a single action.

In the instant case the State was able to perform its oversight of the company to reinstate the applicant, thereby showing respect for his rights, preventing others from infringing on his dignity by means of prejudice and at the same time, fulfilling his economic interests. However, in situations where the State lacks capability to oversee the behaviour of the company, respect, protect and fulfil dimensions of the applicants rights could be impaired. Seeking to resolve such matters through use of the courts also creates burdens on potential plaintiffs, many of whom may be hindered by impediments in access to justice. It would clearly be preferable in instances such as these for the nature of the obligation placed upon corporations to be more all-encompassing. How then, in a case such as this, could the corporate duty to respect be isolated from the duties to protect and fulfil? Failure to demonstrate respect for human rights effectively engages the other dimensions of human rights responsibility: protect and fulfil. Several cases may be required to clarify the inter-dependence of the dimensions of human rights responsibilities within the corporate context but this may be of interest for further research. However, it needs mention that it is not only the possibility that a single human rights issue may require corporate performance across the various dimensions of human rights responsibilities that challenges the segregation of responsibilities advanced by the *Framework.* Another significant observation is that it is not practical to assume that all businesses should not interfere with human rights and must take

[191] ibid, paras 35-38.

all measures to ensure that they effectively refrain from interfering with human rights. This is because certain types of businesses essentially require some level of interference with human rights to proceed. This is particularly notable of extractive industries, illustrative of the emerging bio-fuel businesses.

In August 2007, a High-level Bio-fuel seminar at the African Union Headquarters in Addis Ababa brought together 250 experts from the UN, the scientific community, the African Union, the private sector and NGOs who gave overwhelming support for bio-fuel production in Africa, resulting in the Addis Ababa Declaration on Bio-Fuels for large scale commercial production in Africa.[192] However, bio-fuel production is such that it will have to use arable land that local communities depend on for living. In Ghana for instance, Boxborough noted in the EnergyBoom magazine, that firms from the United Kingdom, Germany, Italy, Belgium, the Netherlands, Norway, Sweden, Hungary, China, India and Brazil were competing nationwide to acquire fertile farmland for bio-fuel production, and it is estimated that by 2010 they have cultivated 136,000 acres of such land.[193] The report noted that the country's agricultural workers union expressed concern that bio-fuel production was taking land from local farmers and threatening food production, but the Ministry of Agriculture dismissed such claims and urged increased investment in bio-fuels.[194] A look at the actions of interest groups on the issue indicates that although the nature of biofuel production begins with interference in the subsistence of local communities, the focus has not been to stop bio-fuel investment but rather to set modalities of investment to balance the interest of business with the interests of the local communities.

A report prepared by the erstwhile UN Special Rapporteur on the Right to Food, Oliver De Schutter, and submitted to the Human Rights Council on 28 December 2009 noted that development that involves large scale acquisition and use of land and related resources must comply with a set of minimum human rights principles to be acceptable.[195] These include that such an investment must ensure that negotiations for large scale land acquisition must

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[192] The Report at: www.iisd.ca/africa/pdf/arc0901e.pdf, accessed; 25 Nov 2011.

[193] Energy Boom presents news on renewable worldwide, see web pages at: www.energyboom.com/biofuels/ and Ghana report at www.energyboom.com/biofuels/ghana-set-make-biofuel-push, accessed 25 Nov. 2011.

[194] ibid.

[195] Olivier De Schutter, 'Agri-business and the Right to Food', Report of the Special Representative on the Right to Food (2009) UN [A/HRC/13/33].

be transparent, prior consent must have been obtained from the local people, the local people must be active participants and beneficiaries and legal provisions against forced evictions, guaranteed food security and non-discrimination must be respected.[196] This indicates that it is not the requirement that business should not interfere with human rights that matters, but how such interference is constructed and conducted. The UN *Guiding Principles* should have clarified what permissible interference implied to corporate responsibility to respect human rights, especially when it comes to the development of businesses that are not formulated with the objective to conduct activities that are harmful to human rights.

As illustrated by biofuel businesses, some businesses, especially extractive industries, require some level of direct interference with human rights in order to be undertaken. For instance, gold mining will always involve the construction of roads that pass through the lands of local communities. In a deeper sense, therefore, a certain level of human rights harm is intrinsic and forms an intricate part of certain types of businesses. The UN *Guiding Principles* partially got this issue right when it stated that "even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent".[197] Many cases against businesses for human rights abuses do not necessary rest on taking measures that infringe or interfere with human rights. It is how this interference is conducted that matters and even within the context of States, the practice of human rights adjudicating institutions is such that for assessing human rights violations, it is first decided whether there has been an interference with human rights but the mere presence of interference does not necessarily amount to human rights violations unless it is not objectively justified.[198] From this perspective, it could be argued that the *Framework*'s prohibition of corporate interference with human rights is socially desirable but does not fully capture corporate wrongdoing in respect of human rights. Thus, the *Framework* does not fully help potential victims of corporate violation of human rights. The next section takes this issue further by noting that the *Framework* leaves a wide 'grey-zone' when it comes to the protection of human rights within the context of business operations.

[196] ibid.
[197] *Guiding Principles* (n 3) para 22.
[198] Barak (n 30) 1.

2.4.3 The Grey-Zone in the Scope of Obligations Required of Businesses

It is not only the above issues that challenge the practicality of the *Guiding Principles*; they have left too wide a 'grey-zone' in the scope of obligations required for full realisation of human rights within the context of business operations.[199] This is because there is no guarantee that States will fulfil the obligations to protect as assigned to them and also no specific actor is assigned the responsibility to take measures required to fulfil human rights.

Ruggie correctly noted that both host States and home States of major corporate investment are constrained in one way or the other to actually regulate corporate behaviours towards human rights.[200] This failure of States to actually oversee corporate compliance with human rights has led to the need to focus attention directly on businesses to address human rights.[201] Research suggests that changing the conduct of States towards human rights is difficult and requires complex processes.[202] Further, the forces of globalisation that make it difficult for States to constrain and control businesses and thereby created the governance gaps in the incorporation of human rights into corporate operations are still present and increasing.[203] For instance, the economic challenges facing States and businesses make it difficult for them to take appropriate steps for the realisation of human rights. As shown in the global economic downturn, when businesses face challenges that threaten their profit margins, they normally shed jobs in large numbers. Such situations create conditions for employment related problems such as discrimination and unfair wage practices, which in turn have human rights implications, but States do not normally have control over the choices that businesses make to address such issues. Coupled with the fact that States are competing in the 'race to the bottom' and relaxing regulatory grips on businesses so as to attract and retain foreign investments, there is no guarantee that they can always fulfil their protective duties.

Apart from this weakness in the duty of States to protect human rights, the *Guiding Principles* have clearly not identified any actor, business or State, that has the duty to take

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[199] The grey-zone metaphor as used here simply represents a gap in the obligations required of businesses.
[200] Framework (n 2) paras 14-16.
[201] Griseri and Seppala (n 1) 177.
[202] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practice: Introduction' in edn Risse, Ropp and Sikkink, *The Power of Human Rights: international Norms and Domestic Challenges* (CUP 2004) 1-38.
[203] Framework (n 2) para 3.

measures that fulfil human rights. Thus, even if businesses respect human rights with due diligence, which, as noted above is less practical, and States fulfil their protective role, which as noted earlier, cannot always be relied upon, there is still a gap in respect of who has responsibility to fulfil human rights as the need may arise in the context of business operations. On the basis of these, there is a significant gap in the scope of obligations required of businesses for full realisation of human rights in business contexts. This is because the 'protect' dimension of human rights engagement still rests on States who are but not always capable of fulfilling their obligations and no identifiable actor is obliged to fulfil human rights as the need may arise in business contexts. How then could corporate responsibility for human rights be reconfigured to bridge this gap? The next section offers that the framework of human rights limitations is an alternative means to close this gap.[204]

2.4.4 Human Rights Limitations as Supplement to the UN Guiding Principles

The UN *Framework* and *Guiding Principles* have obviously achieved a lot in terms of the operationalisation of human rights law within the context of businesses and prompted wide acceptance that a certain level of quality performance is legitimately required of businesses towards human rights. However, their construction of non-legally binding responsibility for businesses apparently aimed at minimising burdens on businesses to advance core business objectives. This marks a stark difference between the *Guiding Principles* and the 2003 UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regards to Human Rights,[205] which sought to assign essentially the whole range of known human rights duties to companies but for a limited list of human rights.[206]

Ruggie contends that for businesses to bear the full range of human rights responsibilities but for a limited list of human rights as proposed by the UN Norms was misguided because as economic actors, they have unique responsibilities which if entangled with human rights

[204] Section 2.5 provides additional reflections on why the due diligence responsibilities of businesses is still not sufficient to close the gap in the scope of obligations identified in this chapter.

[205] HRC, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regards to Human Rights' (2003) UN Doc. E/CN4/Sub.2/2003/12/Rev.2.

[206] Douglass Cassel and Sean O'Brien, 'Transnational Corporate Accountability and the Rule of Law' in O Williams (Eds) *Peace through Commerce: Responsible Corporate Citizenship and the Ideals of the Global Compact* (Notre Dame 2008) 77.

duties as required of States could lead to role confusion.[207] He therefore proposed differentiated but complimentary responsibilities for States and businesses, noting that while the State should protect human rights, businesses should respect human rights, and both should make remedies available in cases of human rights aberrations. The present study posits that neither of these approaches- a full range of duties for selected human rights as proposed by the Norms, nor limited responsibility for all human rights as proposed by the *Guiding Principles*, is sufficient for full and appropriate application of human rights within the context of corporations. As the *Framework* has noted, businesses affect virtually all human rights and therefore engaging corporations with a limited range of rights clearly leaves out some rights. Similarly, a limited range of responsibility for businesses is also unsatisfactory because as noted above, it leaves a gap when it comes to the protection and fulfilment of human rights. By limiting corporate responsibility to respect human rights, the *Guiding Principles* created the impression that businesses do not impair the fulfilment and protection of human rights. As noted in *Hoffmann* v *South African Airways* above, a single instance of business impact on human rights may simultaneously involve failures to respect, protect and fulfil human rights and thereby cut across all dimensions of obligations.

It is also important to emphasise that an instance of interference with human rights does not necessarily mean human rights violation. The case of *Nikolai Kungurov* v *Uzbekistan* illustrates this differentiation.[208] In this case, Uzbekistan refused to register the applicants' NGO based on technical impediments and the Human Rights Committee found that this refusal constituted interference in the right to freedom of association. The Committee however did not establish human rights violation at this stage. It rather proceeded to assess the justification of this restriction in light of its consequences on the author.[209] The outcomes of such further analyses determine whether human rights violation occurs in specific cases. This practice is universal in human rights adjudications; it is evident in the case law of the European Court of Human Rights and other institutions as well. Based on this practice, it could be argued that the responsibility to respect human rights, which Ruggie acknowledges as a duty to not interfere with, infringe on, or cause harm to human rights, is incomplete to determine corporate wrong-doing with regards to human rights. This is because instances in which businesses interfere with human rights would not necessarily translate into human

[207] Framework (n 2) para 6.
[208] *Kungurov* v *Uzbekistan* (2011) HRC [1478/2006] 8:3.
[209] ibid

rights violations unless they are assessed in line with the modalities for limitations. This shows that the legal content of respect for human rights espoused in the *Guiding Principles* needs clarification in terms of how to establish corporate liability for human right violations.

Thus, the *Guiding Principles* have asked businesses to adopt a bare minimum and socially desirable approach to human rights but without establishing modalities to detect liability. The key motivation for this is to make it flexible for businesses to operate without extra burden with human rights. However, considering the criticisms of the *Guiding Principles* it is clear that they do not represent the best option to address human rights in the corporate context. They leave grey-zone for full protection of human rights, do not adequately reflect the victim's perspective and lack avenues for effective remediation. Ruggie noted that the outcome of his mandate is the first step and does not preclude other developments. This study focuses on one of these, namely the considerations, within a corporate context, of the modalities for human rights limitations as enshrined in human rights law. The value that this proposition adds to the conceptualisation of the human rights obligations of businesses is in relation to the incorporation of permissible flexibilities into their human rights obligations.

As noted from the onset, limitation clauses make it possible for the duty-bearer to balance human rights with legitimate interests and be assessed judicially. This implies that if the corporation is faced with a situation that requires fulfilment or protection of human rights, and if it can reasonably justify its inability to fulfil or protect that right, it would not offend human rights law and not impair human rights. If stakeholders of the company are also made to understand that most rights are subject to legitimate limitations and the company could take measures that may affect their rights, attention would be on establishing justifications of specific instances of interference with human rights. This will reduce reputation risks for the companies that may result from 'impulse judgement' of *de facto* interference with human rights. The grey-zone will be eliminated because in situations where the State is unable to respect, protect and fulfil human rights, the corporation could supplement or provide justified deviations. This thesis will show how human rights limitation could work within the corporate context. Given that the *Guiding Principles* have also espoused the concept of due diligence, the next section provides further reflections on why the due diligence responsibilities of businesses are not enough to eliminate the gap in obligations noted above.

2.5 Reflections in relation to the Due Diligence Responsibility of Businesses

In section 2.4.3 above, this study has taken the position that the *Guiding Principles* have left a grey-zone[210] or a gap, in the scope of obligations required for comprehensive realisation of human rights in business contexts. Section 2.4.4 suggested that the concept of human rights limitations is required to close the gap in the scope of responsibilities required of businesses. Given that the *Guiding Principles* have enunciated the concept of due diligence, which places further responsibility on businesses to take measures to ensure that they do not infringe on human rights, one may wonder whether a clarification of the 'due diligence' responsibilities of businesses may not serve the purpose of closing this gap, rather than relying on the framework for human rights limitations. In order words, what does the framework of human rights limitations offer for full realisation of human rights in business contexts that the *Guiding Principles* do not offer through the concept of due diligence? This section provides further clarifications, in addition to inputs covered in various aspects of chapter five below, to show the value that the framework for human rights limitations offers beyond the *Guiding Principles* to close the gaps in the obligations required of businesses.

To enhance the clarification of this issue, it is essential to revisit the grey-zone argument presented above. The grey-zone argument posits that since the *Guiding Principles* have assigned duties to States to protect human rights, assigned responsibilities to businesses to respect human rights, but tasked no identifiable actor with the duty to fulfil human rights, they have left a significant gap in the scope of obligations required to comprehensively deal with human rights issues in business contexts. Coupled with the demonstrable failure of States to comply with their human rights duties, the scope of duties needed to comprehensively address the full range of human rights challenges that may arise in the business contexts is not covered by the *Guiding Principles.* A 'grey-zone' therefore persists in the scope of obligations required to remedy human rights challenges in business contexts. This thesis maintains that relying on a further clarification of the concept of due diligence would be insufficient in eliminating the grey-zone because, firstly, the concept of due diligence as espoused in the *Guiding Principles* centres on corporate respect for human rights, which is only one dimension of human rights obligations and secondly, human rights limitations and due diligence are arguably different concepts that serve different purposes.

[210] As stated above, the grey-zone metaphor represents a gap in the scope of obligations required of businesses.

The definition of due diligence as espoused in the *Guiding Principles* indicates that the concept is intended to fortify rather than extend the responsibility of businesses to respect human rights. The *Framework* defines due diligence as "the steps that a company must take to become aware of, prevent and address adverse human rights impacts".[211] It states that as part of their due diligence responsibility, businesses must adopt human rights policy, undertake impact assessment to proactively understand how existing and proposed activities may affect human rights, integrate human rights policies into the body corporate and track their human rights performances.[212] Corporate due diligence thus embraces a forward-looking and proactive set of measures, and involves taking positive steps to avoid the risk of interfering with human rights and the risk of being complicit in third party interferences with human rights. The *Framework* indicates further that corporate due diligence is limited to the responsibility to respect human rights[213] and the *Guiding Principles* clarifies this further, noting that due diligence places responsibility on businesses to identify, prevent, mitigate and account for their adverse human rights impacts.[214] These are steps that the company itself must take to address human rights and do not include the steps that judicial institutions must take to adjudge the justification of the decisions and actions taken by the company.

The list of positive measures that form part of the due diligence responsibility of businesses has led scholars to wonder whether the *Guiding Principles* have imposed obligations on businesses beyond the realm of the duty to respect human rights. Some have concluded that even though the definition of the concept of due diligence embraces positive measures, it does not go beyond the "respect" type of human rights obligations; it is meant to fortify the responsibility of businesses to respect human rights.[215] Sabine Michalowski made a closely related and noteworthy observation in her analyses of the relationship between the concepts of corporate due diligence and complicity. Due to the fact that the concept of due diligence involves taking positive measures that resemble activities within the realm of the "protect" type of human rights obligation, she noted that at first sight, one could think that corporate due diligence to avoid complicity surpasses the responsibility to respect.[216] After a strenuous analysis, she maintained that this is not the case, noting that "the responsibility to avoid

[211] *Framework* (n 2) para 56.
[212] ibid, paras 60-63.
[213] ibid.
[214] *Guiding Principles* (n 3) para 17.
[215] Bilchitz (n 6) 204-5; Michalowski (n 146) 221.
[216] Michalowski (n 146) 221.

complicity refers to the avoidance of harm through one's own complicit behaviour" and therefore to "prevent harm caused by others is limited to that harm whose occurrence is facilitated or exacerbated by the acts of the company itself".[217] Thus, corporate due diligence is limited to the respect type of human rights obligations and intended to avoid and address human rights risks that pertain to this realm of obligations, including the need to avoid complicit behaviours. David Bilchitz also pointed out that the fact that the *Guiding Principles* require businesses to take positive steps does not necessarily mean that they obligate businesses to protect and fulfil human rights, which, in essence, would require a different set of positive measures beyond those espoused in the concept of due diligence.[218]

Viewed in this sense, the concept of due diligence, even if clarified in more details than is currently constructed by the *Guiding Principles*, does not extend corporate obligations beyond respect for human rights, and would only serve the purpose of preventing actual and potential interferences with human rights, all within the domain of "respect" as one dimension of human rights obligations. As Henry Shue has pointed out, the fulfilment of any particular human right may involve the performance of multiple kinds of duties.[219] Since due diligence does not place further obligations on businesses to protect and fulfil human rights within their domains, the 'grey-zone' or gap in obligations identified above, still remains, even if the concept of due diligence is clarified and stretched in more details. It therefore follows that in respect of the *Guiding Principles,* there is a strong possibility that necessary actions that may be needed to protect and fulfil human rights in business contexts, may be left untaken, due to the restricted nature of responsibility assigned to businesses, and the fact that States may not meet their human rights obligations. This shows a lack of comprehensive coverage of the risk of human rights violations that may arise in business operations and raises significant implications for victims of corporate interference with human rights.

To address this gap, businesses need to accept obligations to take proactive steps that contribute to the protection and fulfilment of human rights, if and when the need arises. Without such an expanded range of obligations, businesses are unlikely to take such stances especially where the concerned States either fail to, or actively avoid honouring their obligations. The 'grey-zone' metaphor suggests that the risk of human rights violations

[217] ibid,221-222.
[218] Bilchitz (n 6) 207.
[219] Shue (n 109) 52.

within business contexts does not arise solely in terms of interference with human rights as covered by the 'respect' dimension of human rights obligations. Human rights violations may arise as a result of the lack of fulfilment or protection of human rights. Given that the due diligence responsibility of businesses hinges on the 'respect' dimension of obligations, it does not adequately cover risks emanating from the lack of protection and fulfilment of human rights within the context of businesses. Since such risks may also result in human rights violations, they ought to have been covered by the responsibilities of businesses.

The concept of human rights limitations provides the avenue for businesses to contribute to the full scope of obligations in their contexts while maintaining permissible flexibilities in the obligations required of them. If the logic of limitations is factored into the business obligations, it would avoid the need to restrict the scope of duties that businesses may have for human rights, because it rests on the logic of permissible balance of interests.[220] It is worth considering a situation where the framework for human rights limitations and its modalities for permissible balance of interests were effectively incorporated into the human rights obligations of businesses. In such circumstances, businesses faced with situations where steps were necessary to respect, protect or fulfil human rights would have a clear understanding of their need to take positive actions accordingly. If they were genuinely not in position to meet such obligations, they would be able to renege on their obligations along predetermined formalities and their actions would be judicially assessed along predetermined modalities for permissible limitations of human rights. The outcome of these would determine whether their actions or inactions were justified on the basis of the suitability or appropriateness of the balance of interests involved.

This brings forth a fundamental difference between the *Guiding Principles* and the framework for human rights limitations; the former provides pragmatic flexibilities by limiting the scope of responsibilities required of businesses while the latter advances pragmatic flexibilities in the obligations of businesses by means of limitations on human rights without the need to limit the scope of obligations of businesses. In this sense, the framework for human rights limitations offers more, beyond the *Guiding Principles*, in terms of the steps that businesses may take to respect, protect and fulfil human rights and be adjudged accordingly without minimising the significance of theirs and victims' interests.

[220] Recalling the clarification provided in section 1.1 of this thesis.

From the above, it is clear that the concepts of due diligence and human rights limitations are different in conceptual terms and do not necessarily serve the same purpose. Whereas due diligence concerns the steps that businesses may take to avoid interfering with human rights, the concept of human rights limitation is engaged in consideration of the merits of whether specific interferences that have occurred in respect of human rights are justified or amount to human rights violations. The concept of due diligence as espoused in the *Guiding Principles* is meant to guide the company itself in terms of the steps it has to take to prevent and address human rights impacts, whereas the modalities for assessing human rights limitation go beyond these and are primarily meant to be the factors that judicial institutions would have to consider to adjudge the justification of the outcome of the company's actions.

This difference can be clarified through an example. Consider a situation where a company is expected to ensure that it does not infringe on the privacy of its customers. For the company to meet this obligation, it has to take steps to clearly know the identities of its customers and actions that if taken, may harm the privacy of its customers. For instance, it may have to avoid tapping the conversations of its customers. These measures come within the concept of due diligence. If the company listens to the conversation of some customers to gather intelligence on perceptions of its brands and products in order to make adjustments and innovations that may attract and retain customers, it commits an invasion into the privacy of its customers in pursuit of a specific corporate interest. Whether that interference with privacy is justified or not depends on the consideration of the tests or modalities for balance of interests embedded in the framework for human rights limitations. These include whether the measure was prescribed by appropriate law, pursues legitimate aims and depicts proportionality between the aims pursued and the means deployed to achieve them. There are technical meanings attached to these which the *Guiding Principles* have not clarified.

Thus, even though the tenets for human rights limitations form part of what companies ought to consider in due diligence processes, they are primarily engaged after interference with human rights occurs, and used in adjudicatory processes to determine the justification of interferences beyond what the company itself considers in due diligence processes. Due diligence, on the other hand, is primarily engaged before interference occurs and even though it helps the company to avoid infringing on human rights, it does not specify the procedures to determine the justification of specific interferences with human rights.

2. 6 Chapter Conclusion

This chapter considered the theoretical frame of corporate responsibility for human rights, dwelling on its description in the UN *Framework* and *Guiding Principles.* It addressed the question of whether businesses should have obligations for human rights in the first place and if so the nature and scope that such obligations should take. The chapter addressed this issue by first reviewing the concept of human rights. From this review, it found that human rights law was developed primarily to inhibit significant threats to the inherent worth and dignity of humans and as such, threat to human worth and dignity has historically been the factor that identified States as human rights duty-bearers. Given the realisation that businesses also have the capacity to harm human rights and the significant threat that they pose to human worth and dignity, it is argued that the concept of human rights itself identifies businesses as bearers of human rights duties. Regarding the range of duties required of businesses, the chapter suggested that businesses are in a better position to contribute to the whole range of human rights performances because there is a business case, through reputation management, that they respect, protect and fulfil human rights.

In conclusion, this chapter submits that the nature of contemporary postulation of corporate responsibility for human rights as authoritatively espoused in the UN *Framework* and *Guiding Principles* does not fully reflect and protect the essence of human rights in business contexts due to its limited scope and its embrace of non-binding responsibilities assigned to businesses. The chapter observes that the overt steps taken by the *Guiding Principles* to minimise liability on businesses is another way of trying to protect the interests and growth of businesses while they deal with human rights. However, noting that the limited and non-binding range of responsibility of business is not in consonance with the idea of human rights and has therefore attracted many criticisms from various actors, this chapter argues that something more has to be done in terms of reconstructing corporate responsibility for human rights. Reconstructing corporate responsibility must be in a way that captures the essence of human rights and also fosters business growth and development. This study is of the view that human rights limitations law already has the tenets that could be harnessed to balance business interests and human rights. An examination of the applicability of the tenets of limitation is thus required. This study proceeds in the next two chapters to evaluate how the two core requirements for human rights limitations apply in business contexts.

3

The Rule-Making Capacity of Businesses

3.1 Chapter Introduction

This study considers whether as part of ascribing human rights obligations to businesses, they could equally subject human rights to permissible limitations. To answer this question, the study examines two of the requirements for permissible limitation of human rights, one of which is that any measures that interfere with human rights must be prescribed by law.[221] This chapter examines what this requirement entails from a corporate perspective. It asks whether and how businesses are in position to generate rules that conform to the requirement of law for permissible limitations of human rights without undermining State authority.

This task is based on two premises. Firstly, it takes note that businesses are not exclusively regulated by States, and as such some of their measures that interfere with human rights are based on rules that are generated by themselves and not rooted directly in public authority.[222] Secondly, it observes that the concept of law as required for permissible limitations of human rights primarily refers to domestic law.[223] On the bases of these, the chapter takes the position that in respect of contexts where States do not directly regulate businesses, there is a necessity to examine whether and how businesses are in position to generate operational rules that validly set permissible bases for human rights limitations. In response, this chapter deploys the doctrine of private delegation as the means to examine the capacity of businesses to make rules under State authority for human rights limitations.[224]

Deploying the doctrine of private delegation in this context implies that if the rule-making capacity of businesses could be construed as a delegated function, then in principle, rules so generated by them are tacitly authorised by concerned States and thus acquire relevance

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[221] This requirement is problematised in section 1.3 as one of issues that need to be examined from a corporate perspective to make sense of the applicability of human rights limitations in business contexts.

[222] Nicola Jägers, 'Will Transnational Private Regulation Close the Governance Gap?' in S Deva and D Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (CUP 2013) 301.

[223] See for instance the explanation given by the European Court of Human Rights in *Leyla Şahin* v *Turkey*, (2005) ECHR [44774/98] para 84.

[224] Private delegation is the doctrine of delegation that deals with State delegating rule-making capacity to private actors. See David Lawrence, 'Private Exercise of Governmental Power (1986) 61Ind LJ 694.

under State authority to serve as permissible bases for human rights limitations. To test this proposition, the chapter examines whether and how human rights law accommodates State delegating rule-making to private actors and whether businesses are in position for such role.

The backdrop to this task, as hinted earlier, is that even though States have the monopoly of power to make laws and to regulate businesses in respect of human rights, they do not, and are encouraged not to command and control all aspects of business operations.[225] The Organisation for Economic Co-operation and Development (OECD), has noted that State's attempt to regulate all aspects of businesses, a phenomenon referred to as over-regulation, is a risk that must be avoided.[226] A study conducted by the RiskMetrics Group has found that European countries in general, emulated widely, have moved away from the 'rule-based' to 'comply-or-explain' approach to corporate governance, giving room for businesses to adopt extra-legal rules to govern their operations.[227] This is orchestrated by the relentless tendency of businesses to 'capture' regulators so as to avoid the risk of rigid external regulations.[228]

As a result of the move by States to accord flexibilities to businesses, the situation arises in which the entire framework for regulating the modern business involves, as Smith calls it, a 'spectrum of laws' in which laws that are directly authored by States and 'law-like' instruments that are generated by businesses and other non-state actors, play significant roles in the determination of business decision-making.[229] The International Commission of Jurists described this phenomenon more succinctly when it noted that "business conducts are constrained not only by publicly enacted laws and regulations but also by a plethora of written and unwritten rules that govern economic interactions".[230] This 'regulatory mix' is orchestrated by diverse factors, including the fact that some States are generally not willing or unable to make laws that constrain business mal-practices.[231] Also, some States are still

[225] Cronstedt (n 70) 450.
[226] OECD, 'Principles of Corporate Governance' (2004) 29.
[227] RiskMetrics Group, 'Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States' (23 September 2009) 11.
[228] Brendan O'Dwyer, 'Conceptions of Corporate Social Responsibility: the Nature of Managerial Capture' (2003) 16:4 AAAJ 523-557.
[229] Smith (n 70) 386.
[230] ICJ, 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (June 2014, Geneva) 8.
[231] Griseri and Seppala (n 1) 177

gripped in the 'race to the bottom' metaphor and relax their regulatory grips on businesses in order to attract foreign direct investments to be domiciled in their respective territories.[232]

On the one hand, this 'regulatory mix' may have strategic importance for the advancement of business operations since it can help businesses to make swift and precise rules to address issues that are not regulated by States. In situations where State laws are too rigid or detached from business needs, business leaders are in a position to generate operational rules to achieve strategic ends. On the other hand, it poses a unique challenge to the protection of human rights in business contexts due to the chances that businesses may deploy self-regulatory instruments as bases for taking measures that interfere with human rights. The risk is that such instruments may be considered voluntary, and are not automatically enforceable in courts to scrutinise corporate violations of human rights. Deploying such instruments as bases for measures that interfere with human rights may thus lead to arbitrary restrictions on human rights and even lead to uncertain and unclear judicial decisions.[233]

The proposition of this study is that since businesses also use self-regulatory instruments to deal with their interests in circumstances where State regulations are absent or discouraged, assessment of corporate violations of human rights solely on the bases of laws that are directly prescribed by States is insufficient to account for all instances where businesses violate human rights. There is therefore a conceivable gap[234] in accountability that needs to be bridged for the application of human rights limitations as part of corporate responsibility for human rights to be meaningful. Thus, there is the need to meet all the requirements needed to account for human rights interferences that occur in all contexts of business operations, whether such operations are regulated directly by States or by businesses.

The concern arises in respect of circumstances where States do not directly make laws to regulate specific businesses activities. In such instances, there remains a need to clarify whether and how rules generated by businesses themselves could come under State authority

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[232] William Olney, 'A Race to the Bottom? Employment Protection and Foreign Direct Investment' (2013) 91 JIE 191.

[233] Section 3.2 below discusses cases showing that businesses use self-regulatory instruments as bases for human rights restrictions and courts of law simply have difficulties to explain the legitimacy of such instruments.

[234] John Ruggie describes this as the 'governance gap', representing instances where State regulatory mechanisms do not cover corporate interference with human rights, see UN Doc. A/HRC/8/5 (2008), para 3.

and thereby acquire relevance, that is, to be enforceable and be scrutinised directly in judicial proceedings, to ascertain the justification of corporate measures that interfere with human rights. This is notwithstanding the earlier point made in the previous chapter concerning access to justice and the extent to which applicants can seek judicial scrutiny for potential human rights violations within mechanisms created by States for such purposes.

Ayres and Braithwaite have already provided some insight into how corporate self-regulatory instruments could be enforced by concerned States.[235] This chapter draws on their contribution to provide further heft to understanding how, through the doctrine of private delegation, rules that are generated by businesses to regulate their activities may become enforceable by States and thereby attain relevance for purposes of human rights limitations and to hold them accountable for human rights violations in contexts where domestic laws are not directly applicable for such purposes.[236] It needs emphasis, as noted earlier, that the rule-making capacity of businesses as being examined in this chapter does not necessarily mean that they must make rules to regulate human rights. Rather, it is about understanding the conditions in which the operational rules generated by businesses may conform to human rights norms, so that in the event that operations on the bases of such rules result in human rights restrictions, their rules may be considered as grounded in domestic law.

The chapter takes some specific steps to address the issue. Section 3.2 presents reasons why it is necessary to incorporate the rule-making capacity of businesses into the conception of law for the application and assessment of human rights restrictions in business contexts. Sections 3.3 draws on relevant human rights materials to make sense of whether and how human rights law accommodates non-state rules as permissible bases for human rights limitations and Section 3.4 draws on corporate governance and self-regulation to examine the disposition of businesses to exercise delegated rule-making in respect of human rights. Section 3.5 discusses the practicality and further reflections on State supervision of private rule-making and section 3.6 concludes this chapter with a summary of observations.

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[235] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) 101.

[236] The doctrine of private delegation will be derived from jurisprudence of the European Court of Human Rights which characterises the concept of law as substantive rather than formal, and includes lower ranking laws enacted by means of State delegating rule-making powers to significant actors, public or private. See for instance *Leyla Sahin* v. *Turkey*, (10 Nov. 2005) ECHR, [44774/98] 84 and *Barthold* v *Germany* (25 March 1985) ECHR [8734/79]. For explanation, see Svensson-McCarthy (n 61) 52.

3.2 The Necessity to Recognise the Rule-Making Capacity of Businesses

In his introduction to the *Framework* on Business and Human Rights, John Ruggie noted:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[237]

Part of the plan of this chapter aimed at examining whether rules generated by businesses could attain relevance as bases for permissible limitations of human rights, concerns the question of whether there is a recognised necessity for them to make such rules. This section therefore brings forward theoretical and practical indications showing that the State-centric regulation of businesses remains insufficient to cover the full range of human rights issues in business contexts, and there is therefore a necessity to recognise the rule-making capacity of businesses as a supplement to State law-making for purposes of human rights limitations.

One basic fact about businesses is that they have 'monopoly of knowledge' in relation to the choices they make, their spheres of operations and the strategies that they deploy to achieve their business objectives than may be open to external regulators. Max Weber alluded to this fact in his work on 'Law in Economy and Society' when he noted:

> …those who continually participate in the market intercourse with their own economic interests have a far greater rational knowledge of the market and interest situations than the legislators and enforcement officers whose interest is only ideal. In an economy based on all-embracing interdependence in the market, the possible and unintended repercussions of legal measure must to a large extent escape the foresight of the legislator simply because they depend on private interested parties.

[237] Framework (n 2) para3.

> It is those private interested parties who are in a position to distort the intended meaning of a legal norm to the point of turning it into its very opposite.[238]

By this notation Weber drew attention to the need to recognise that businesses have the disposition to condense State laws and to adjust laws in ways that fit their own interests and operations. In the process of doing so, they may generate rules beyond State legislation because they know better of what is involved in business operations than may be known by outsiders. Following Weber, other scholars have acknowledged the potential of businesses to make rules to govern their activities. Sally Falk Moore famously characterised businesses as "semi-autonomous social fields" that have the capability to make operational rules and to take measures that affect society.[239] In essence, these scholars indicate that businesses possess the monopoly of knowledge in their operations and this fact needs to be factored into regulating their activities that affect society.

This fact about businesses and the need to pay attention to their rule making capabilities was reflected in John Ruggie's commentary on the *Guiding Principles* when he noted that laws and policies that actually govern the practical operation of businesses and directly shape their behaviours are poorly understood in terms of their significance for human rights protection.[240] By this, Ruggie suggests that there is more to the causes of business conducts than may be known to outsiders. Arthur Robinson noted in a preliminary research conducted for the 'Ruggie mandate' that much of what companies do in respect of human rights depends on their internal culture, comprising of their own internal policies, rules and codes of conducts referred to as corporate culture.[241] All these variously give support to previous researchers such as Smith, who observed that in the business contexts, law is in a 'spectrum' comprising of State laws that are directly handed down to businesses and rules made by non-state actors[242]; a spectrum that may also be attributed to the legal licence to operate.[243]

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[238] Max Rheinstein and Edward Shils, *Weber on Law in Economy and Society*, (HUP 1954) 38.
[239] Moore (n 73) 720.
[240] See Ruggie's commentary on Guiding Principle 3 the *Guiding Principles* (n 3). See also the study conducted by the Corporate Law Project for the Ruggie mandate towards the promulgation of the UN Guiding Principles, 'Trends and Observations from a Cross-Sectional Study Conducted by the Special Representative' (23 May 2011) A/HRC/17/31/Add.2; 1.
[241] Arthur Robinson, 'Corporate Culture as a Basis for the Criminal Liability of Corporations' (Feb. 2008) 1.
[242] Smith (n 70) 378-380.
[243] Christine Parker, *the Open Corporation: Effective Self-Regulation and Democracy* (CUP 2002)3.

Another compelling reason why it is necessary to recognise the supplementary rule-making capacity of businesses is that States have demonstrably failed to govern businesses in respect of human rights. The UN *Guiding Principles* made it clear that States have the duty to make regulatory frameworks for businesses to manage their activities in ways as to avoid infringements on human rights.[244] However, the *Framework* that preceded the *Guiding Principles* alluded to the inadequacy of State regulation of businesses in respect of human rights, and cited this as the main reason why businesses must have responsibilities for human rights,[245] over and above compliance with national laws and regulations.[246] In view of this, businesses are expected to respect the principles of international human rights law even in contexts where domestic laws are absent, deficient or poorly implemented.[247] This signifies that even though businesses are subject to domestic laws and regulations, they may sometimes have to adopt non-state rules to deal with their business interests, which in turn may result in interferences with human rights issues.[248]

Related to this, researchers have observed that there is an emerging trend within the international legal order that encourages businesses to adopt private regulatory mechanisms to implement human rights.[249] These emerging regulatory regimes are increasingly getting independent of States.[250] In this changing context of regulating modern businesses, there is a necessity for businesses to fill the gaps that the lack of effective State regulations may create in accounting for human rights violations within their contexts. This implies that in areas where States fail to adopt measures to protect human rights, it becomes expedient businesses may step in as long as the measures they adopt do not contradict existing laws. Lawrence for instance is of the view that delegating rule-making powers to private actors, including businesses, is an acceptable practice to deal with regulatory gaps,[251] and more so in contexts where domestic laws are either not formulated or enforced to protect human rights.[252]

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[244] Guiding Principles (n3) para 3.
[245] Framework (n 2) para 3.
[246] Guiding Principles (n 3) para. 11.
[247] Framework (n 2) para.23.
[248] ibid, para. 50.
[249] Jägers (n 222) 328.
[250] Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38:1 JLS 20.
[251] Lawrence (n 224) 648.
[252] Griseri and Seppala (n 1) 177.

Apart from the unwillingness or inability of States to regulate businesses, one may also mention the 'race-to-the-bottom' phenomenon which is still active in the competition among States to attract foreign direct investments.[253] This means that as States compete to attract investments, they lower their regulatory standards in order to attract firms to invest and domicile in their territories.[254] Such lowering of regulatory standards is expected to continue to occur, especially in emerging economies with weaker compliance and governance standards.[255] This has inevitable repercussions on States' ability to regulate businesses. Even in contexts where States were willing and able to regulate corporate conducts, it may be practically impossible and even counter-productive for them to directly prescribe all the operational rules necessary to command and control every aspect of business operations. For strategic reasons, businesses sometimes have to resort to self-regulatory mechanisms to manage their operations, which in turn, may interfere with human rights.[256] This need is behind the tendency of businesses to adopt strategies to actively lobby and capture external regulators so as to relax the risk of stringent State regulation and to allow them to generate and deploy their own self-regulatory instruments as the bases to take their strategic business measures.[257] These factors ultimately weaken the regulatory grips of States on businesses.

Apart from the above, there is also the tendency of multinational enterprises to standardise their operational norms so as to maintain regulatory uniformity across subsidiaries in many different countries. Due to disparities in national laws with regards to human rights issues, transnational corporations sometimes have to make policies for their subsidiaries across different countries. One noteworthy example of such transnational standardisation of corporate regulation is JCDecaux's International Charter of Fundamental Social Values.[258]

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[253] The race to the bottom metaphor was first coined by Justice Louis Brandeis to describe a phenomenon of competition in which States deregulate business in order to attract or retain economic activity in their jurisdictions, resulting in poor wages, working conditions and environmental protections, see Nicola Meisel, 'Governance Culture and Development: A Different Perspective on Corporate Governance (2004) OECD 41.

[254] Olney (n 232) 191.

[255] Ronald Davies and Krishna Vadlamannati, 'A Race to the Bottom in Labour Standards? An Empirical Investigation' (2013) 103 JED 1.

[256] Margot Priest, 'Privatisation of Regulation: Five Models of Self-Regulation' (1997-98) 29 OLRev.237.

[257] See for instance Jennifer Mindell, et al., 'All in this Together: the Corporate Capture of Public health' (2012) BMJ 345; David Miller and Claire Harkins, 'Corporate Strategy, Corporate Culture: Food and Alcohol Industry Lobbying and Public Health' (2010) 30:4 CSP 564; Brendan O'Dwyer, 'Conceptions of Corporate Social Responsibility: the Nature of Managerial Capture' (2003) 16:4 AA&AJ 523-557.

[258] JCDecaux is a major advertising company with origins in France and operates in over fifty-five countries. In 2013, the company issued this Charter to guide all of its subsidiaries to deal with social values and human rights.

In the opening address to this Charter, the leadership of JCDecaux states that:

> …we recognise the existence of differing business practices and business cultures. Nevertheless, it is important to share a common level of ambition as regards fundamental social values, to hold them as our standards and to keep progressing everywhere towards their implementation.[259]

The company then requires its subsidiaries to implement the Charter to the extent possible in areas where domestic laws do not allow full compliance with some of its values but it gives no guidance in areas where domestic laws are silent on particular values.[260] Given that States differ in their commitments to the protection of human rights, a uniform application of standards across the subsidiaries is not entirely dependent on domestic laws, suggesting that some of the measures that the subsidiaries must take to apply this set of values are likely to be based on the corporate Charter *in lieu of* domestic law.

The above indicate that even though businesses are private actors, they are not passive subjects of domestic laws and regulations. They sometimes develop their own rules and exercise powers that extend beyond their contractual relations in direct corporate settings and such rules also affect persons in their subsidiaries, supply chain relations and external stakeholders including indigenous peoples.[261] The UN *Guiding Principles* echoed this fact in business operations, acknowledging that companies sometimes have to govern themselves to comply with human rights in contexts where domestic laws are not suitable to protect human rights.[262] This is necessary to ensure that companies do not use the absence or weakness of domestic laws as excuses for human rights abuses. It also allows them to adopt norms other than those directly prescribed by domestic laws in order to remain in line with human rights standards. But the question remains as to whether such operational rules should be taken into consideration for the purposes of justifying corporate measures that restrict human rights. This thesis contends that if businesses must have binding obligations for human rights with the right to apply limitations on human rights, then their rule-making capacity needs to be factored into the framework for permissible grounds for human rights limitations in their

[259] Jean-François and Jean-Charles Decaux, *JCDecaux International Charter of Fundamental Social Values* (2013) JCDecaux.
[260] ibid, 5.
[261] Parker (n 243) 4.
[262] Guiding Principles (n 3) para 5.

contexts, especially considering that it is not only in the contexts of weak States that businesses use their own rules and policies to take decisions that infringe on human rights.

From the forgoing, there is significant indication that State regulation of business is not sufficient to ensure that businesses comply fully with human rights in their contexts. Even though businesses must comply with domestic laws, there is a lacuna with regards to the extent to which directly applicable domestic laws may guide their conducts in respect of human rights. This makes it necessary to find ways to incorporate the rule-making capacity of businesses into assessing their potential infringements on human rights. Apart from the foregoing theoretical expositions that support the necessity to incorporate the rule-making capacity of businesses into assessment of their potential interferences with human rights, there are also practical evidences backing this necessity. The sections that follow present a number of cases which indicate instances where businesses have generated their own 'extra-legal' rules and used such rules to take measures that interfered with human rights without being prescribed by States. These cases also suggest that when a legal dispute arises from the implementation of such instruments, courts of law tend to accept them as legitimate bases for corporate interference with human rights and sometimes it is difficult for them to clearly explain why such self-regulatory instruments are acceptable for such purposes.

3.2.1 The European Court of Human Rights and the *British Airways* Case

In January 2013, the European Court of Human Rights decided upon a joinder of cases, *Eweida and others* v *the United Kingdom*, which addressed the United Kingdom as respondent State but partly originated from a regulation made by British Airways as private entity, to take measures that interfered with human rights.[263] The facts of this case, henceforth the *British Airways* case, were such that one of the complainants, Ms Eweida, was an employee of British Airways who worked for many years as a check-in staff member. She was then a practising Christian and in order to display her Christian values, she openly wore the Christian symbol of the Cross at the workplace. In 2004 British Airways sought to regulate dressing of its employees at the workplace and introduced a uniform code

[263] *Eweida* v *The United Kingdom* (2013) ECHR [48420/10; ...]. Henceforth, this case is referred to in this thesis as the *British Airways* case.

for employees who worked in direct contact with the public.[264] The dress code required employees to conceal all religious symbols while at work. This affected Ms Eweida as she openly displayed the Cross while at the workplace. Initially, she respected the dress code and concealed her cross while at work but she later declined respect for the code and began wearing the Cross openly at work. Consequently, she was cautioned by superiors to desist from this conduct in contravention of the code. After repeated failures to comply with the norms, she was asked to proceed on leave without pay.[265] In October 2006, Eweida was offered an administrative position in the company that neither required her to wear the uniform nor to conceal the Cross while at work, but she refused to accept this offer and remained at home without pay.[266] Later, some newspapers criticised British Airways and as a result, it repealed the dress code and re-instated Ms Eweida to her former position.[267] Eweida later filed lawsuits in British courts, claiming compensation for indirect discrimination and infraction on her freedom of religion.[268]

After successive failures in attempts to seek redress in British courts, Eweida filed the case in the European Court of Human Rights, contending that the uniform code upon which British Airways based its decision to take measures that affected her freedom of religion, was authored by corporate executives as private actors and not prescribed by the United Kingdom and therefore could not serve as legitimate legal bases for the restrictions on her rights. The Court was therefore asked to assess whether the impugned measure was unlawful because it was based on a private regulation. In its assessment, the Court learned that in deed, the instrument in question was authored by the company itself and that the United Kingdom did not have any legal provisions that specifically regulated dress codes and religious symbols at workplaces.[269] The Court adopted a comparative approach to the issue by studying other jurisdictions. It found that the lack of regulation of dressing at workplaces was in common with the majority of European States and not unique to the United Kingdom.[270] It noted that most States had no regulation on the wearing of religious symbols and clothing at workplaces, some States had partial regulations for public employees only,

[264] ibid, paras 10, 90.
[265] ibid, para 10.
[266] ibid, para 12.
[267] ibid, para 13.
[268] ibid, paras 13-17.
[269] ibid, para 92.
[270] ibid.

while others permitted employers to impose restrictions on the wearing of religious symbols without specific laws that prescribed how employers may do so.[271] The Court found that in the United States, there were no constitutional limitations on the ability of private employers to restrict the wearing of religious symbols and clothing at work[272] and in Canada, private employers had the right to adjust workplace regulations in respect of religious dresses.[273]

In effect, this case shows dressing at workplace as one of the issues for which companies are generally not regulated by States, allowing companies the leeway to make their own rules to regulate the dressing of their employees. The case shows further that such non-state rules could also have substantive effects of restricting human rights and could call for judicial assessments. In this case, British Airways, as a private company authored a dress code, backed by sanctions and thereby exercised a rule-making function that restricted human rights without State prescription. It was left to the Court to determine whether such a private regulation was legitimate. In its assessment, the Court noted that ‘‘the lack of specific legal protection under British law in itself did not mean that the applicant's right to manifest her religion by wearing religious symbols was insufficiently protected" and noted that the code was valid according to how the domestic authorities considered it.[274] By this, the Court only endorsed how domestic courts viewed the legal significance of the said code to establish its legitimacy as basis for human rights limitations but it was unable to explain why a private code that was not prescribed by the State was legitimate basis for human rights limitations.

The United Kingdom's explanation that the court relied upon was that the code authored by the company was legitimate as a matter of contractual right, stating that Eweida was employed by a private company and that the company had the right to regulate the uniform of employees to maintain professional image and recognition of the company brand.[275] By this the United Kingdom suggested that even though there were no direct laws to regulate dress code at work places, the company had the right to regulate itself in this context. The reference to contractual rights could be seen in two ways. First, it may refer to the contractual relation between the applicant and the company, suggesting that as an employee, Eweida had the contractual obligation to respect the regulations made by the company.

[271] ibid, para 47.
[272] ibid, para 48.
[273] ibid, para 49.
[274] ibid. para 92.
[275] ibid, para 61.

Arguably, this line of reasoning does not sufficiently explain the legitimacy of the company to make the rules under dispute here, otherwise it would imply that the mere fact that an employee has a contract with a company empowers that company to make rules to restrict the rights of the employee and the employee would just have to comply because s/he is an employee. Such an explanation is inconsistent with effective protection of human rights in the sense that companies cannot make arbitrary rules that trump human rights and refer to contracts with employees as the source of power to do so. The applicant clearly did not take the issues as a contractual matter and sought reparations for the infractions on her rights because the State had no laws that regulated the matter.[276]

The code which formed the direct substantive basis of the impugned measure was simply approved by the Court but was not scrutinised to determine its qualities as required of instruments that interfere with human rights. Rather, other remote and vaguely related laws were applied by the Court in this case, making it an instance where the law delivered an unclear and unpredictable outcome. This is not acceptable from a legal perspective since it fails to operate within the doctrine of legal certainty.[277] It also defeats human rights (and more specifically provisions of employment law) since it reduces a question of the inherent dignity and worth of an individual to the vagrancies of a contract which could not be considered negotiated by parties at equal arms. In such scenarios an individual is always likely to be in a vulnerable position to 'negotiate' with the employer.

An alternative and perhaps better explanation of the source of the power of the company to issue regulations beyond the employment contract is that it derived its power from the State or that it had a *de facto* delegated power to regulate dressing in the workplace. This power could be said to derive from the licence to operate which signifies a privilege granted by the State for a company to govern its operations.[278] In this sense, the expression 'contractual rights' as used to by the United Kingdom in this case could be seen as delegated function that the company exercised in order to regulate itself *in lieu of* applicable domestic law. The essential lesson to draw from this case is that the European Court of Human Rights affirmed a private regulation made by the company as legitimate bases for restricting human rights in

[276] ibid, para 66.
[277] For general reading and the application of the doctrine of legal certainty in a European context see Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Ashgate 2013).
[278] Parker (n 243) 3-4.

the context where direct State regulation was not applicable. Given that this Court is an authoritative interpreter of human rights law, the conclusions it arrived at in respect of interpreting the legitimacy of a private rule as bases for human rights limitations is a source of knowledge on the issue. However, as noted, its consideration of the legitimacy of the said code was quite unclear because it simply referred to how the State considered the codes. Similar scenarios were encountered by the European Court of Justice in the following cases.

3.2.2 The European Court of Justice and the *Viking* and *Laval* Cases

The European Court of Justice also accepted private regulations authored by companies as legitimate bases of measures that affect specific rights at work. Two of such cases that are noteworthy for this study include the *Viking* and the *Laval* cases. The *Viking* case was brought in this court by Viking, a large ferry company incorporated under Finnish law, alleging that certain actions taken by the International Transport Workers Union and the Finnish Seamen's Union, infringed upon its freedom of establishment guaranteed under Article 43 of the European Economic Treaty.[279] Viking operated several vessels including the *Rosella* which plied between Estonia and Finland.[280] The crew of the *Rosella* were members of the Finnish Union of Seamen (FSU), a trade union affiliated to the International Federation of Transport Workers Union (ITF).[281] The ITF operated under its own policies, one of which was the Flag of Convenience (FOC) policy. The objective of the FOC policy was to establish the link of the flag of the vessel to the nationality of the owner and to protect the condition of seafarers registered under this policy.

The FOC policy considered a vessel as registered under convenience if the beneficial ownership and control of the vessel was in a country other than the State of the Flag. In accordance with the ITF policy, only unions established in the State of the owner had the right to collective agreements, enforced by solidarity actions and boycotts.[282] This meant that so long as the *Rosella* was under Finnish law, Viking was under an obligation to pay the Estonian crew salary levels as applicable in Finland which were far higher than the salary

[279] *International Transport Workers' Union* v *Viking Line ABP* (2007) ECJ [C-438/05].
[280] ibid, para 6.
[281] ibid, para 7.
[282] ibid, para 8.

levels in Estonia.[283] This arrangement became expensive for the running of the *Rosella* and it consequently began operating at a loss as a result of competition with Estonian vessels plying the same route with lower wage costs. Instead of selling off the *Rosella*, the Viking decided to re-flag the vessel in either Estonia or Norway in order to enter into new collective agreements with the trade unions in those countries.[284] Dissatisfied with the decision of the company, the ITF, following a request by FSU, issued a circular to members in the countries to which the Viking intended to re-flag the *Rosella*, asking them not to accept it.

This action was intended to force the Viking to stop re-flagging the *Rosella* or in the event of re-flagging, it would maintain the employment conditions as pertained in Finland. This made it pointless for the Viking to re-flag the *Rosella* and to enable the Unions to commit to a series of solidarity actions, including strikes, if the Viking failed to comply with the terms.[285] Dissatisfied with the actions of the trade union, the Viking initiated court actions which were later referred to the European Court of Justice. Some important points that provide insight into the rule-making power of the company came from the court's response to a question of whether the European Community treaty conferred rights on private entities and may be relied upon by private entities. Specifically, the court was moved to decide whether a trade union had the right to use its own policy to take strike actions against a private business entity so as to stop that entity from re-flagging its vessel to another country. A related question was whether the policy of the trade union constituted a restriction on the right of Viking as a private entity to establish and provide services, whether such a restriction provided a fair balance between the right to take collective actions and the freedom to establish and provide services and was objectively justified and proportionate.[286]

In response the ECJ noted that collective actions by trade unions must be regarded as part of the exercise of the legal autonomy enjoyed by organisations that are not public law entities, pursuant to rights conferred on them, inter alia, by national laws.[287] The ECJ reasoned that working conditions in different countries were governed sometimes by provisions laid down by law or by regulations adopted by private persons and therefore, the prohibitions laid down by the treaty are not limited to public actors, noting that excluding private actors from

[283] ibid, para 9.
[284] ibid.
[285] ibid, paras 11-15
[286] ibid, para 27.
[287] ibid, para 35.

the coverage of the treaty would create inequality in its application.[288] The phrase "Private actors", in this case, did not apply only to the trade unions but also to the Viking as a private business entity. The ECJ noted this in a further response to the question of whether the treaty conferred rights on private entities which may be relied on against a trade union or an association of trade unions. To this, it stated that its case-law makes it clear that "the abolition, as between Member States, of obstacles to freedom of movement of persons and to provide services would be compromised if the abolition of State measures could be neutralised by obstacles resulting from the exercise, by associations and organisations not governed by public law, of their legal autonomy".[289] Here again, the ECJ considered the private actors in the case, including the Viking, as having 'legal autonomy' granted by law. Consequently, the ECJ ruled that Article 43 of the EU treaty must be interpreted to mean that it may be relied upon by private enterprises against a trade union.[290] It added further that its case-law on free movement of goods showed that restrictions may result from the actions of individuals or groups of individuals, hence, legal autonomy as described above does not apply only to quasi-public organisations or regulators but also applies to private actors.[291]

In this case, the decision of the company to relocate its operations in order to save costs affected rights at work but it was based on its own internal policies and contrary to collective bargaining agreements. The ECJ acknowledged the importance for private businesses to regulate their operations, showing the influence of private regulations on business conducts. Thus, even though the re-routing of the *Rosella* was not directed by domestic law or by means of collective bargaining, it was considered as legitimate. The fact that the measure was considered legitimate indicates that the company involved enjoyed legitimate powers to author operational rules to deal with technical issues that are not explicitly regulated by law. This case indicates further that business decisions are not completely amenable to State regulation and therefore businesses device strategies to regulate themselves on such matters.

A related case that throws further light on the extension of legal autonomy to private entities was *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, et al.*[292] Laval, a company incorporated under Latvian law, initiated legal proceedings against the Swedish building and

[288] ibid, para 34.
[289] ibid, paras 56, 57.
[290] ibid, para 62.
[291] ibid, paras 62-65.
[292] *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbunde* (2007) ECJ [C-341/05].

public works union known as 'Byggnads' and others, seeking to obtain declaration from the ECJ that collective action taken against it by the respondents was unlawful.[293] The facts of the case were such that Laval posted workers from Latvia to work in Sweden on building projects for a subsidiary company registered under Swedish law. Laval had entered into collective agreements with the Latvian building sector trade union and as such, its Latvian workers were not members of the trade unions in Sweden. After negotiations to get Laval sign up to collective agreements under Swedish trade unions had failed, Byggnads authorised collective actions against Laval, including blockade of all supplies, boycotts of Laval's worksites and an embargo on electrical services to all of Laval's operational sites.[294]

The ECJ was asked to determine if it was compatible with the European Community treaty provisions on freedom to provide services and the prohibition of discrimination, that trade unions should take collective action to force a foreign provider of services to sign collective agreement in the host State in respect of terms and conditions of employment that were not expressly provided for by law in the host State.[295] Thus, the question was whether it was illegal for the Union to apply its own policy to take action against the company if national law did not explicitly provide grounds for such action and whether the company could also pursue its policy not to register foreign employees in the host State.

In response, the ECJ noted that the terms and conditions of employment covering the matters in such cases were established either by law, regulations or administrative provisions or by collective agreements and arbitration awards which are universally applicable, adding that the case showed evidence that the Swedish authorities have entrusted management and labour with the tasks of setting, by way of collective negotiations, the wage rates which companies must pay to employees.[296] The ECJ therefore recognised that the collective action initiated by the Union was one of the fundamental rights guaranteed by the treaty and it constituted a restriction on the freedom of the company to provide services, and thus qualified to be justified in accordance with the principle of proportionality as embedded in the treaty.[297] It added that compliance with the Treaty was also required in the case of rules which were not public in nature but were issued by private entities exercising their legal

[293] ibid, para 2.
[294] ibid, para 27-38.
[295] ibid, paras 40(1); 51.
[296] ibid, para 68-69.
[297] ibid, para 94-97.

autonomy.[298] Here again, the ECJ included the private company among private actors that have legal autonomy to make rules to govern their interests that are not regulated by law.

The ECJ reasoned that it is important to uphold both private and public related regulations to ensure that the abolition of obstacles to the right to freedom to provide services which applied to rules prescribed by States was not compromised by actions taken by private entities that were not governed by public law. Here, the ECJ reiterated that private entities can exercise autonomy and have the legitimacy to make rules to govern their conducts. In this case, the ECJ identified both the trade union and the company as having permission in law to make rules that govern their interests which resulted in restrictions on rights at work.

From *British Airways*, *Viking* and *Laval* cases described above, it is apparent that within the European system, business entities may author operational rules to regulate their specific interests that are not regulated by States. From these cases we find that certain issues such as dressing at workplaces, relocating business to favourable location and transnational registration of employees are some of business issues that are not explicitly regulated by States and require businesses to self-regulate. Companies often make their own rules to deal with such issues which, in turn, may result in substantive restrictions of human rights and if such restrictions occur, it is less likely that these courts will quash the measures as illegal if they were not in conflict with domestic law. These in effect indicate that businesses and other private actors possess some intrinsic legitimacy to makes rules to bridge gaps in domestic regulation of business activities. Given that the cases provided above are drawn from Europe, it is important to provide some examples from other jurisdictions to show how private rules made by businesses are considered in *lieu* of applicable domestic laws.

3.2.3 Some other Examples from Domestic Courts

Two domestic judicial decisions that also provide important clues about the judicial relevance of private regulations made by businesses are the *South African Airways* and the *Wal-Mart* cases adjudicated respectively in South Africa and the United States. These

[298] ibid, para 98.

domestic cases are meant to indicate that the influence of private regulations on business operations or the lack of domestic laws covering all business operations is beyond Europe.

The South African Airways case

In the *South African Airways* case[299] the Constitutional Court of South Africa heard that the rule upon which South African Airways based its decision to deny employment to a qualified but HIV positive applicant was its own employment policy which required that all persons living with HIV/AIDS must be excluded from employment as cabin crew.[300] At the material time, there was no law in South Africa that explicitly provided grounds for restrictions on employment of persons living with HIV/AIDS. The High Court that dealt with the case in first instance noted that the employment policy of the company constituted a legitimate legal basis for restricting the employment of persons with HIV/AIDS as cabin crew and that it pursued legitimate business concerns of the company.[301] The Constitutional Court did not dispute this view; neither did it argue that the company acted illegally for developing its own rules that restricted human rights without bases in existing laws of the State. Rather, it observed that the measure of exclusion practiced by the company was based on unfounded prejudices and stereotypes against persons living with HIV/Aids and on the basis of this, it queried the lower court for up-holding the policy.[302]

This means that the only reason why the Constitutional Court reversed the decision of the High Court was that the reasons offered by the company to justify restrictions on employment of HIV positive applicants were prejudicial. The Court did not believe that employing HIV positive applicants would conflict with the core motives of the company in a free market system such as to compete, ensure effective performance, save costs, profits and to attract customer.[303] The case therefore did not challenge the fact that the company made its own rules to govern the restrictions at issue even though the rules were not based on existing law. This illustrates that in South Africa, companies could enact policies to pursue interests that are not explicitly governed by the State if not in conflict with existing law.

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[299] *South African Airways* (n 188).
[300] ibid, para 7.
[301] ibid, para 34
[302] ibid.
[303] ibid.

The Wal-Mart case

A similar observation could be drawn from the *Wal-Mart* case, decided upon by the Supreme Court of the United States. The case originated from a lawsuit filed by a class of about 1.5 million present and former female employees of Wal-Mart, seeking judgement against the company for injunctive and declaratory relief, punitive damages and back-pay, claiming that the company pursued a policy that gave local managers discretion over pay and promotions in favour of men, resulting in unlawful discrimination against women.[304] In its opinion, the Supreme Court acknowledged that the company indeed pursued its own policy of giving local managers discretion over employment matters.[305] However, the court noted that whereas this policy could indeed set bases for disparate impact claims, it was a reasonable way of doing business and should raise no inferences of discrimination.[306] It argued that companies may use various devices to pursue hiring and promotion interests and may even choose to pursue policies that reward certain characteristics such as aptitude and educational achievements and such practices vary among companies but they do not constitute disparate treatments of persons in similar classes.[307]

In this sense, the Supreme Court sought to indicate that Wal-Mart was justified to pursue its own policy of giving discretion to local managers over hiring, pay and promotion, suggesting that matters such as these are some of the nitty-gritties of business management for which companies are not regulated and allowed for self-regulation. For the purposes of this chapter, the point of interest is the rule-making capacity of the company. The centre of enquiry pursued by the Court was whether the company's policy was discriminatory, not whether the company was justified to author the policy to regulate itself. In fact, the Court noted that the company was right to enact and pursue its policy of decentralised governance of pay and promotion.[308] Thus, the United States, as any other democratic State, does not prescribe all operational rules for employment and promotions and companies could device various strategies to pursue such objectives if they are not discriminatory or against law.

[304] *Wal-Mart Stores Inc.* v *Dukes* (2011) US [10-277] para 1.
[305] ibid, paras 2; 14.
[306] ibid, para 15.
[307] ibid.
[308] ibid.

3.2.4 Remarks on the Rule-Making Capacity of Businesses

The preceding discussions indicate that there are limits to the extent to which States make laws and regulate business activities. Businesses therefore make supplementary rules to deal with issues that are not regulated by States and this is well recognised in theory and practice. Some examples of business interests found to be normally unregulated by States include dressing at work, relocation of operations, promotions, transfer of personnel and control of operational efficiency. The cases above are few but significant indications that businesses decisions that are based on their self-generated instruments may also conflict with human rights and call for judicial analyses. The problem that this raises is that if such self-regulated measures conflict with human rights and are challenged in courts, the courts tend to accept them as valid bases for human rights restriction but without sufficient explanation.

It is not readily clear from the cases why such rules generated by the businesses were accepted as legitimate bases for human rights limitations. In the case of *British Airways* for instances, such a private rule was accepted as legitimate as domestic authorities consider it to be and in the *Laval* and *Viking* cases, the legitimacy of the disputed instrument was based on the autonomy enjoyed by businesses. From a human rights point of view, instruments that form the direct bases for interference with human rights are the instruments that must be subjected to judicial scrutiny as law so as to avoid arbitrary and unpredictable restrictions on human rights. This lack of clear understanding of how such instruments acquire significance for human rights limitations is problematic but the cases did show that businesses make rules for themselves and apply those rules, apart from laws that are prescribed by States, to take measures that affect human rights.

From the above, there are significant theoretical and practical evidences supporting the necessity to recognise the rule-making capacity of businesses as part of the conceptualisation of law for human rights limitations in their contexts. Apart from laws directly prescribed by States, operational rules generated by businesses must also be incorporated into judicial assessments of their infringements on human rights. The challenge is whether and how human rights law accommodates rules authored by non-state actors such as businesses for purposes of human rights limitations. The next section begins addressing this question by reviewing how human rights law defines the concept of law for such purposes.

3.3 The Concept of Law as Operationalised for Human Rights Limitations

The core argument of this chapter has been that within the specific context of businesses, the concept of law as required for permissible limitation of human rights ought to embrace operational rules authored by businesses. This raises a need to make sense of whether human rights law would permit such instruments (codes or rules) as permissible bases for human rights limitations. This requires a closer examination of the concept of law as operationalised for purposes of human rights limitations so as to make sense of whether and how rules that are generated by private actors as businesses could be accommodated for such purposes.

Law is a universal requirement for human rights limitations, recognised under the European and United Nations systems,[309] the Inter-American human rights systems[310] and the African human rights system.[311] It thus pervades the entire spectrum of human rights law, subject only to some linguistic variations and the details with which it is interpreted.[312] In view of this, this study does not need to review the concept of law under the various systems for human rights protection. Rather, it draws on how the concept of law was conceived of in the *travaux préparatoires* of the Universal Declaration of Human Rights because it is the apex of the development of human rights law, and how it is portrayed in subsequent development of human rights law, using the core human rights treaties, cases, commentaries, advisory opinions and scholarly works. The objective of this section is twofold. Firstly, it aims to find out whether there are any strong indications in human rights law that the concept of law is construed rigidly as to preclude the recognition of non-state entities such as businesses from generating rules that may serve as valid bases for human rights limitations. Secondly, it aims to make sense of whether if any future development of business and human rights regime recognises the capacity of businesses to generate rules to supplement State laws for purposes of human rights limitations, as this study suggests, it would not contradict the original conception of human rights law. This section is therefore partitioned into sub-sections to embark on analyses to address these issues, beginning in the next section with how the concept of law is portrayed in the drafting history and the final texts of the UDHR.

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[309] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 292.
[310] Burgorgue-Larsen and de Torres (n 29) 600.
[311] Muna Ndulo, 'The Commission and the Court under the African Human Rights System' in (Ed) A Gudmundur et al, *International Human Rights Monitoring Mechanisms* (MNP 2009) 635.
[312] Badar (n 76) 63-92.

3.3.1 The Concept of Law in the Universal Declaration of Human Rights

The Universal Declaration provides in Article 29 (2) that in the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law.[313] This statement in the Declaration shows that from the initial development of human rights law itself, it was noted that the realisation of human rights must be based on the rule of law in order to balance human rights with other legitimate interests of society.[314] Given that the Universal Declaration is the 'parent' document on human rights, the historical discussions that led to the adoption of law in this documents as basis for permissible limitations of human rights offers an important source to deduce whether rules made by private actors could be considered as law, within the meaning of the term, for permissible limitations of human rights or that the term is strictly limited to laws that are directly prescribed by States.

In the initial stages of drafting the Declaration, then known as the Draft International Declaration of Human Rights, the concept of law was not included.[315] The idea that law should serve as the basis for human rights limitations was suggested by the representative of Uruguay during deliberations on the Draft in the 153rd meeting of the Third Committee of the Commission on Human Rights, held on 23 November 1948 in Paris.[316] Subsequent debates on this suggestion reflected the role that the international community intended law to play with regards to the application of limitations on human rights, because such deliberations brought together representatives from various countries into a unified debate.

During the above mentioned meeting of the Third Committee, the representative of Uruguay suggested that a statement should be inserted into the Draft Declaration to the effect that "fundamental human rights could only be limited by law in order to prevent arbitrary interferences with human rights".[317] This statement brought forth the main purpose that law was intended to serve for human rights limitations, namely, to avoid arbitrary restrictions on

[313] UDHR (n 23).
[314] Mary Ann Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2 NWJIHR 1.
[315] For a general reading on the framing and themes of the Universal Declaration of Human Rights, see William A Schabas, ed. *The Universal Declaration of Human Rights: The Travaux Préparatoires* (3 vols. CUP 2013).
[316] UN Doc. A/C.3/SR.153, 643.
[317] ibid.

human rights, and it was unanimously supported as such by the various States. In spite of this, there were disagreements on the choice of words to represent the concept of law.

In a bid to clarify this issue, the representative of France noted that it was not any kind of law that constitutes law for protection of human rights and therefore the term law must be qualified and restricted to legitimate laws.[318] The representative for United Kingdom also remarked that it was dangerous to say that human rights could be limited only by law because tyrannical laws also exist and perfectly justifiable limitations may be placed through other means than formal laws.[319] These notations were generally agreed upon in the development of the Draft, indicating that right from the start of human rights law there were conscious efforts to extend the concept of law beyond that prescribed by the State. Also, the suggestion that society may use means other than laws formally prescribed by States to place justifiable limitations on human rights also conveyed the thought that normative instruments made by legitimate organs of society, such as businesses, may also have relevance for human rights limitations, but that was not developed further in drafting the Declaration. Thus, the representatives sought to differentiate between legitimate and illegitimate laws and effectively eliminated tyrannical laws from the notion of law intended to set bases for human rights limitations. In that sense, the concept of law was not strictly based on the State per se.

The need to factor some flexibility into the concept of law for human rights limitations reflected further in deliberations on the choice of expression that should represent law and what it should really entail for human rights limitations. Prior to the 177th meeting of Sub-Committee 4 of the Third Committee held on 6th December 1948 in Paris, Article 27 of the Draft already contained a general limitation clause reading that limitations on human rights must be 'prescribed by law'.[320] This clause was challenged especially by the representative of the United Kingdom who noted that the word 'prescribed' as used in this clause corresponded with the word *établies* in French and gave the impression that law must only be in the form of a written order.[321] The word 'prescribed' was thus considered inappropriate to reflect the notion of law intended for human rights limitations and must be replaced with

[318] ibid.
[319] ibid, 647.
[320] UN Doc. E/800, 'Draft Universal Declaration of Human Rights: Report of Sub-Committee 4 (A/C.3/400 and A/C.3/400/Rev.1), 6 Dec.1948, p. 871.
[321] ibid, see also Schabas (n 315) 2989.

the word 'determined'.[322] The representative of France confirmed this opinion and supported that it should be changed. Consequently, Article 27 of the Draft was unanimously amended and the phrase 'prescribed by law' was replaced by the phrase 'determined by law'.[323] This change was maintained and the provision of law as contained in the final text of Article 29(2) of the Universal Declaration permits limitations as 'determined by law'.[324]

The replacement of 'prescribed by law' with the expression 'determined by law' suggests that the choice of expression to represent law was considered as having important implications in the initial development of human rights law. The phrase 'prescribed by law' was considered inappropriate because it gave an impression of written order and was too restrictive than the phrase 'determined by law'. This suggests that law for the purposes of human rights limitations was not intended to be overly restrictive or prescriptive as of formally written legislations; neither was it intended to be arbitrary. Some of the representatives made it clear that they supported the idea that law should form the basis for human rights limitations because it was not limited to formal legislations but embraced other legitimate instruments. The representative of the United Kingdom added that limitations were imposed not only by legislation but also by convention and judgements related to individual cases, adding that it would be destructive to the role of convention and judge-made laws if only written texts were adhered to in the quest to avoid arbitrary actions.[325] The Representative for the Netherlands noted that it was obvious from the discussions that the guarantees intended in the notion of law would be applicable only in democratic societies.[326] Thus, the bottom-line for considering an instrument as law for the purposes of human rights limitations was whether it served the legitimate and just interests in democratic societies and not necessarily based on whether it was just directly prescribed by State.[327] Before relating the implications of this observation to businesses, it is essential to look at how the concept of law is portrayed in subsequent development of human rights law, including the core Covenants and the regional treaties on human rights, to find out if there is anything that strictly precludes businesses from generating rules that set bases for human rights limitation.

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[322] ibid.
[323] ibid.
[324] Article 29(2) of the UDHR now reads, "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law ……..."
[325] UN Doc A/C.3/SR.155, p 653.
[326] UN Doc. A/C.3/SR.154, p 656.
[327] Svensson-McCarthy (n 72) 59.

3.3.2 The Concept of Law in the Core Covenants and Regional Treaties

Following the UDHR, subsequent development of human rights law firmly established that human rights limitations must be based on law. Considering the unanimous agreement among representatives of various countries during deliberations on the Declaration that the phrase 'prescribed by law' was not appropriate to represent the notion of law required for human rights limitations, one would expect uniformity in the choice of expressions used to represent law in subsequent human rights instruments. On the contrary, various human rights treaties have used different linguistic expressions to represent the concept of law for such purposes. Some typical expressions used to represent law in human rights instruments include 'prescribed by law', 'provided by law' and 'in accordance with the law'.[328]

The differences in linguistic expressions of the concept of law reflect in two ways; there are differences in the expressions used in formulation of limitations on similar types of human rights provisions in different human rights treaties and also in the formulation of limitations on different types of human rights in same human rights treaties. For instance, Article 18(3) of the International Covenant on Civil and Political Rights states that restrictions on freedom of thought, conscience and religion must be 'prescribed by law'[329] and Article 22(2) states that restrictions on freedom of association must be 'prescribed by law'.[330] The Covenant however uses a different expression to refer to law in Article 19(3), stating that restrictions on freedom of opinion and expression must be 'provided by law' and in Article 21, it states that restrictions on the right to peaceful assembly must be 'in conformity with the law'.[331] Thus, in its final text, this single Covenant refers to law by using different expressions such as 'prescribed by law', 'provided by law' and 'in accordance with the law'.

The International Covenant on Economic, Social and Cultural Rights also uses an expression similar to that in the Universal Declaration of Human Rights to provide a general limitation clause on all the rights embodied in it. This is contained in article 4 which states that restrictions on all the rights in the Covenant must be 'determined by law'.[332] It is only in

[328] These expressions are shown below in the texts of limitation clauses on specific human rights.
[329] ICCPR (n 25) Art 18(3) and 21.
[330] ibid, Art. 22 (2).
[331] ibid, Art. 19, 21.
[332] UN Doc. A/6316 Art 4, 8.

Article 8 where this Covenant places a specific limitation on the right to form and join trade union, in which case, it uses a different expression which states that limitations on these rights must be 'prescribed by law'. There is therefore a difference within this same human rights instrument regarding the choice of expressions referring to law as a requirement for human rights restrictions. The differences in expressions reflect in the regional instruments.

Articles 8-11 of the European Convention on Human Rights permit limitations on the rights to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly.[333] Like the other instruments discussed above, this treaty also uses different expressions to refer to law as bases for human rights limitations. In Article 8(2), the Convention requires that restrictions on the right to private and family life must be 'in accordance with the law'.[334] It uses a different expression in the formulation of restrictions on the rights to freedom of thought, conscience and religion in Article 9(2), freedom of expression in Article 10(2) and freedom of assembly and association in Article 11(2), stating in each instance that limitations must be 'prescribed by law'.[335] The corresponding European Social Charter which deals with economic, social and cultural rights also provides in Article 31 that effective realisation and exercise of the rights set forth in the Charter shall only be subject to restrictions that are 'prescribed by law'.[336]

The Inter-American Convention on Human Rights refers to restrictions 'established by law', as e.g. in Article 16, on the right to freedom of association, and restrictions imposed 'in conformity with the law' as in Article 15 on the right to freedom of assembly.[337] Article 30 places a general restriction on all the rights enshrined in this treaty, using the expression 'in accordance with laws'.[338] Similarly, the African Charter on Human and Peoples' Rights also requires that restrictions must be based on law but, like the other instruments, it also contains different expressions.[339] In Article 8, the Charter stipulates that enjoyment of the right to freely profess and practice religion is 'subject to law and order' and Article 9(2) requires that the exercise of the right to express and disseminate opinion must be 'within the

[333] European Convention (n 27) Art 8-11.
[334] ibid, Art 8(2).
[335] ibid, Art 9(2), 10(2) and 11(2).
[336] CoE, 'European Social Charter' (adopted 18 October 1961, in force 26 February 1965) Art 31.
[337] OAS, 'American Convention on Human Rights' (adopted 22 November 1969, in force 18 July 1978).
[338] ibid, Art. 30.
[339] AU, 'African Charter on Human and Peoples' Rights' (adopted, 17 June 1981, in force 21 October 1986); CAB/LEG/67/3 rev.5, 21 ILM 58 (1982).

law'.[340] Article 10(1) requires that a person must 'abide by the law' in order to exercise the right to freedom of association.[341] Articles 11 and 12 provide that restrictions on the right to freedom of assembly and freedom of movement may be subject to restrictions 'provided for by law'.[342] Thus, in the African Charter, the expressions 'subject to law and order', 'within the law, 'abide by law' and 'provided for by law' are used to represent the concept of law.

Apart from the main human rights instruments, the ILO Conventions also have direct relevance for businesses but unlike the main human rights treaties, the ILO conventions do not clearly formulate limitation clauses on labour rights, and its instruments do not contain precise expressions of the requirement of law as basis for human rights limitations. The closest expression of human rights restrictions explicitly enshrined under the ILO is contained in Article 8 of the 1948 Convention on Freedom of Expression and Protection of the Right to Organize, which requires that in exercising the rights provided for in this Convention, workers and employers 'shall respect the law of the land'.[343] It however adds that the law of the land shall not be such as to impair the rights guaranteed.[344] These show that the ILO respects the essence of limitations on rights and requires law as prerequisite for such limitations but its provisions are terse with regards to limitations. The lack of explicit limitation clauses in the ILO conventions could partly be attributed to the historical reluctance of the ILO to formulate labour rights as human rights, but in recent years there are significant observations that the ILO moves towards recognition of labour rights as human rights.[345] The lack of elaborate reference to limitations in the ILO instruments does not necessarily mean that the ILO does not apply limitation clauses to balance competing claims. In an assessment of the right to strike under ILO laws, Bob Hepple found that the ILO mechanisms to protect the rights of workers to strike actions and the rights of employers to dismiss employees actually reflects a balance of interest approach. He argued that the ILO mechanism maintains equilibrium between competing claims which is central to the justification of the right to strike, based on the rule of law.[346]

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[340] ibid, Articles 8 and 9(2).
[341] ibid, Art. 10.
[342] ibid, Art 11 and 12(2).
[343] ILO, 'Freedom of Association and Protection of the Right to Organize Convention' (adopted 9 July 1948, in force 4 July 1950); Article 8.
[344] ibid, Article (2).
[345] Zoé Hutchinson, 'The Right to Freedom of Association in the Workplace: Australia's Compliance with International Human Rights Law (2009-2010) 27 UCLA LJ 129-131.
[346] Bob Hepple, 'The Right to Strike in an International Context' (2010) 15 CL&ELJ 139-140.

From the above, it is notable that in the course of their operations, businesses will have to deal with human rights that are not only subject to limitations but that the concept of law as required to form permissible bases for such restrictions is worded variously. It is therefore important to be certain as to whether the different expressions referring to law actually imply any material differences in the meaning ascribed to the concept for dealing with human rights. Analysts have thought of this linguistic diversity in human rights limitations. Some claim that it has no judicial relevance for adjudication of human rights cases but they go no further to substantiate this claim.[347] Others are unsure about this, noting that the different expressions seem to have the same meaning.[348] As a further contribution to the clarification of this issue, this study takes two steps, first by looking at how the concept of law was construed in the drafting history of the International Covenant on Civil and Political Rights as it reflects in the choice of expressions used to represent it, and second how the European Court of Human Rights, as renowned interpreter of human rights law, construes its meaning.

When the Draft International Covenant on Human Rights, henceforth the Draft Covenant, was tabled for deliberations in the Fifth Session of the Commission on Human Rights, limitations on freedom of thought, belief, conscience and religion were formulated in Article 16(4) and contained the expression that the limitations on these rights must be 'prescribed by law'.[349] This raises important concerns when one considers that 'prescribed by law' was particularly rejected as inappropriate description of law during the deliberations on the Universal Declaration because it created the impression that law must be in the form of written order and that was thought to be too restrictive for the protection of human rights. This probably moved representatives of some countries to submit amendments during deliberations on the Covenant to replace the phrase 'prescribed by law'. For instance, the representative for the Soviet Union sought to replace 'prescribed by law' with the expression 'in accordance with laws'[350] and the representative for the United States proposed to replace it with the phrase 'pursuant to law'.[351] The representative of France proposed to maintain the original text.[352] As noted earlier, during the deliberations on the Draft Declaration, France

[347] Taylor (n 309) 292.
[348] Dalia Vitkauskaité-Meurice, The Scope and Limits of the Freedom of Religion in International Human Rights Law (2011) 18:3 Jurisprudence 847.
[349] UN Doc. E/CN.4/272 [26 May 1949] 1.
[350] ibid,
[351] ibid.
[352] ibid para 2.

confirmed the suggestion by the United Kingdom that the expression 'prescribed by law' was too prescriptive and unsuitable to represent law for human rights limitations and therefore it is unclear why France proposed to maintain the same phrase for limitations in this Article. This creates the impression that the choice of expression does not matter much.

However, before the Sixth Session of the Commission, the representatives of the various countries were divided on the choice of expressions to represent law in the formulations of limitations clauses in the other articles of the Covenant. This was reflected in a memorandum issued by the Secretary General on 22 March 1950 which detailed the different comments of State representatives on the Draft Covenant.[353] The memorandum indicated that limitations on freedom of thought, conscience and religion as contained in Article 16(2) of the Draft originally had the phrase 'pursuant to law' as suggested by the United States and endorsed by the Sub-committee on Prevention of Discrimination and the Protection of Minorities.[354] This expression remained unchanged in respect of this right. However, as concerns the right to freedom of expression as drafted in Article 17, the United States wanted the limitation clause to maintain the phrase 'pursuant to law',[355] the United Kingdom, in line with France,[356] wanted to use 'provided by law'.[357] The original text of Article 18 stated that limitations on freedom of peaceful assembly must be 'prescribed by law'.[358] The United States endorsed 'prescribed by law' for this Article[359] but France wanted 'in pursuance of the law'.[360] Restriction on freedom of association in Article 19(2) originally had 'pursuant to law'[361] but United Kingdom wanted it 'prescribed by law'[362] but overall, there were not clear indications of why they were so divided on the choice of expressions.

This account shows that the various countries were not consistent with their suggestions of the appropriate expressions to represent law for purposes of human rights limitations. Even though the United Kingdom originally suggested during debates on the Draft Declaration that 'prescribed by law' was too restrictive, it later opted to use the same expression for

[353] UN Doc. E/CN.4/365.
[354] ibid para 43.
[355] ibid, para 49
[356] ibid, para 51.
[357] ibid, para50.
[358] ibid, para52.
[359] ibid.
[360] ibid.
[361] ibid, para53
[362] ibid.

formulating limitations on freedom of association. Similarly, the United States on many occasions asserted that limitations must be 'pursuant to law' but with regards to freedom of assembly in the Draft Covenant it preferred 'prescribed by law'. France also showed similar inconsistency in the choice of expressions. For instance, France suggested that restrictions on freedom of expression must be 'provided by law' but restrictions on freedom of assembly must be 'in pursuance with the law'. Here again, nothing specific has be found to explain why the same representatives preferred different expressions of law for limitation of different rights or whether they view law differently for limitation on different human rights.

In view of these diversities among representatives of the various countries, a compromise text was drafted by the United States and discussed during the 162nd meeting of the Commission held in New York on 20 April 1950.[363] In that meeting, the legal connotations of the different expressions of law were further debated. The United States stated that it was unable to support the phrase 'respect for law' as suggested by France because that might serve as basis for arbitrary measures because it was too loose to set bases for human rights limitations.[364] In his comments, the representative for France noted that limitations provided by law were appropriately stipulated to protect human rights, adding that "the United States' phrase 'pursuant to law' gave the individual much less protection than the French text did, as legislators were not always the best judges of the extent to which freedoms might be safely limited" and suggested that authority would decide upon the limitations contemplated.[365]

For the purpose of this study, the relevant point to note here is that during deliberations on the Draft Covenant, the different phrases were perceived to have different meanings or legal connotations. The representatives of the various States were however unable to pinpoint any major differences between the phrases except the idea that some phrases were too restrictive and prescriptive and some phrases were too loose and would make it possible to resort to arbitrary measures for human rights limitations. It may however be inferred from the drafting history of the Covenant and the Declaration, that law for purposes of human rights limitations was neither intended to be restricted to written legislations nor was it envisaged as being so loose as to allow for arbitrary measures. Also, for an instrument to be considered as law for permissible limitations of human rights, it was required to be based on democratic

[363] These are contained in UN Doc. E/CN.4/SR.162 (n 293) (28 April 1950).
[364] ibid, 5.
[365] UN Doc. E/CN.4/SR.162.

principles and not just because it emanates from States. Further, the different expressions used in the development of the concept of law do not make any significant difference in the meaning attached to the term. The European Court of Human Rights as renowned interpreter of human rights law also confirmed that the different expressions used to represent law do not necessary alter the meaning attached to it. For instance, in *Leyla Şahin* v *Turkey,* the Court stated that the expressions 'in accordance with the law' and 'prescribed by law' was used in reference to law are synonymous in meaning.[366]

From the above analyses, the following points may be drawn. The concept of law that may serve as permissible limitations of human rights, according to the drafting history of the International Bill of Rights, is not necessarily restricted to hard and prescriptive laws such as in the form of written orders, and embraces lower ranking norms or customs adopted by regional, municipal and other organs of society that have recognition in law to govern themselves.[367] Also, it could be stated that human rights limitations are designed for democratically governed societies and their legitimate institutions and nothing explicitly excludes businesses as legitimate organs of societies from the list of actors that may have the capacity to generate rules that serve as valid bases for permissible limitations of human rights, unlike autocratic regimes who were are explicitly excluded. Rather, the reliance on democratic societies as the basis for identifying actors that have legitimacy to validly make rules for human rights limitations would make a case in support of businesses to be recognised for such purpose, given the significance attached to their roles as also serving the just interests of democratic societies apart from their unique interest of profit-seeking.

This point was forcefully argued by Chief Judge Jacobs in his opinion on *Kiobel* v *Royal Dutch petroleum CO,* decided upon by the United States Court of Appeals for the Second Circuit.[368] He noted that the life and death of corporations are of supreme consequences in States that created them because they are engines of economies, sustaining employees, pensions, creditors and taxes.[369] He further opined that this explains why no international consensus has arisen or likely to arise in support of extra-territorial adjudication of corporate

[366] *Şahin,* (n 223) 88.
[367] Svensson-McCarthy (n 72) 58-89.
[368] *Kiobel* v *Royal Dutch Petroleum* (2011) USCA 2nd Cir.[06-4800-cv, 06-4876-cv].
[369] ibid, 4.

liability for infringements on human rights.[370] This opinion does not necessarily suggest that companies must go unpunished for human rights violations due to their importance in societies. However, it does indicate that companies are generally considered as serving legitimate interests of societies and this partly explains why courts recognise their self-regulatory measures as valid restrictions on human rights. As shown in the cases in section 3.2, corporate measures that were based on their operational rules were not considered by courts as unlawful bases of restrictions on human rights even though they were not directly prescribed by the concerned States. If the stance of the courts in those cases could be seen as conventional practice, it would suggest, in light of the drafting history of the UDHR that businesses as legitimate organs of society may have the standing to make rules that come within the realm of law for valid limitations on human rights.

The finding that the drafting history and text of human rights instruments do not explicitly exclude businesses from generating rules that may serve as valid bases for permissible limitation of human rights is significant to indicate that if future development of human rights law should explicitly recognise the capacity of businesses as legitimate organs of democratic societies to generate rules that supplement State law-making to regulate their activities that interfere with human rights, it would not contradict the original conceptualisation of human rights law. This, though, does not sufficiently indicate that human rights law fully accommodates private rules for such purposes. Therefore, the next section takes further steps to examine whether and how further development of human rights law throws light unto the standing of non-state actors such as businesses to generate rules that set valid bases for permissible limitations of human rights in their specific realms.

3.3.3 Recognising Non-Sate Rules as bases for Human Rights Limitations

One of the main arguments underlying this study is that for human rights limitations to be meaningful part of corporate responsibility, the concept of law required for permissible limitation of human rights in business contexts would have to incorporate the rule-making capacity of businesses, i.e. their standing to make valid rules for such purposes. The

[370] ibid, 5-6.

preceding sections concluded that from the drafting history of the main human rights documents, nothing explicitly precludes businesses, as organs of societies, from generating rules that may serve as valid bases for permissible limitations of human rights. However, non-state actors do not have automatic power to make laws for such purposes. This section therefore proceeds to find out whether and how the legal doctrine of private delegation connects the rule-making capacity of private actors to the law-making authority of States for purposes of generating rules that may serve as valid bases for human rights limitations. This activity is guided by jurisprudence of the European Court of Human Rights due to this Court's checked history in the interpretation of human rights law and adjudication of cases.

The Court often makes it clear that the provision of law in human rights instruments, as required for justified interference with human rights, has specific connotations. The law primarily refers to domestic law, that is, law that is made by a concerned State. This is emphasised in *Leyla Şahin* v *Turkey* where the Court states that "the expression prescribed by law, as appears in the formulation of human rights limitation clauses, requires firstly that an impugned measure must have basis in domestic law".[371] This means that for any measure that affects human rights to be justifiable, there is a need that a domestic law must exist prior to its commencement. This is where the challenge lies for businesses as they sometimes operate in contexts where domestic laws do not exist upon which to base required business operations. Nevertheless, if businesses have 'law-like' rules that pre-date specific activities and are clear and accessible to affected stakeholders, the question is whether and how such rules could also have significance as law for dealing with human rights in their operations.

States have the power to make laws that have automatic judicial significance by means of regular law-making institutions such as legislatures and courts, and they may delegate such powers to other public and infra-state institutions. Businesses may influence law-making at the State level and its regulatory systems. State law-making is, for reasons already pointed out, not enough to regulate all aspects of business operations. Businesses therefore generate 'supplementary' operational rules within their domains to govern operations and to comply with standards but as they do not have capacity to make laws as States, such operational rules are by their nature of lower-ranking status. Therefore, the starting point to examine whether the rule-making capacity of businesses could be incorporated into the conception of

[371] *Şahin* (n 223) para 84.

law for human rights limitations is to look into whether and how lower-ranking instruments are positioned within the conception of law.

The European Court of Human Rights explains this connection by noting that the term law as appears in expressions such as 'prescribed by law' or 'in accordance with the law' is understood in its substantive sense and not the formal one, and includes both written laws encompassing lower ranking statutes and regulatory measures taken by professional bodies under independent rule-making powers delegated to them in law, and unwritten laws.[372] From this statement, two important factors are identified that have relevance for analyses of the rule-making capacity of businesses. First, the term law includes both higher-ranking and lower-ranking laws including regulatory measures. In this sense, lower-ranking regulatory instruments in the context of businesses could also be captured into the conception of law. The second factor concerns the nature of actors that can take regulatory measures that are acceptable in the lower-ranking category and by what means they can take such measures. The court uses the expression 'independent rule-making powers' that are 'delegated' in law as the means by which entities other than the main law-making institutions of the State may also make rules that come in conformity with the concept of law as permissible for human rights limitations. Emphasis is also on the expression 'granted in law' which indicates that there must be an element of State approval for the delegated rule-making to be acceptable.

The description of actors and methods within the law-making framework need further elaboration in order to find the place of businesses within the framework. For this purpose, cases are presented below in which the law-making capacities of actors that have taken measures that interfered with human rights have been challenged, giving opportunity to the Court to substantiate what constitutes law for permissible interference with human rights. *Leyla Şahin* v *Turkey*, as presented above is clearly one of such cases.[373] The case originated from a circular issued by the office of the Vice Chancellor of Istanbul University which banned students from wearing religious headscarf and beard on university campus and authorised offending students to be excluded from all university activities.[374] The applicant, Leyla Şahin, who was then a student and a practicing Muslim, refused to stop wearing the *hijab* on university campus and on the basis of this circular she was restricted from attending

[372] ibid, para 88.
[373] *Şahin* (n 223).
[374] ibid, para 16

lectures and examinations. She challenged the capacity of the Vice Chancellor to issue the said legal instruments that had the effect of restricting her religious freedom, arguing that the measure was not prescribed by the State and therefore it was unlawful for interference with human rights. Her argument was based on the allegation that the Vice Chancellor had acted *ultra vires*, since there was no mandate that gave him power to make laws on the issue, and as a consequence that the circular had no statutory basis.[375]

In its assessment, the Court reiterated that its settled case-law makes it clear that for any restrictions on human rights to be considered lawful, it must have a basis in domestic law.[376] It added that universities have a certain degree of autonomy, subject to State control, and therefore they are governed by management with 'delegated statutory powers'.[377] Here, the Court introduced the expression 'delegated statutory powers'[378] as a mechanism through which an entity may make rules that conform to the concept of law as required for permissible limitation of human rights. In this sense, even though the instrument in dispute was just a circular, it was considered as law in this context. The Court clarified further that 'it has always understood the term 'law' in its substantive sense and not its formal one" and that law "includes both written law; encompassing lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by parliament" and "unwritten law".[379] It further simplified its conception of law by stating that the law is the provision in force as the competent courts have interpreted it.[380] Thus, the Court considered that the Vice Chancellor in his capacity as a person vested with decision-making powers and in charge of oversight and monitoring of the scientific and administrative functioning of the university, has the power to issue rules that come within the meaning of law for limitation of specific human rights in his domain.[381]

One important lesson to be drawn from this case is that the extension of delegated powers to an institution depends on whether that institution is considered as having notable autonomy for self-regulation. This autonomy does not have to be an absolute detachment from State

[375] ibid, paras 18-19
[376] ibid, para 18.
[377] ibid, para 52.
[378] 'Delegated statutory powers' and 'independent rule-making powers' were used interchangeable in this case.
[379] *Şahin* (n 223) para 88.
[380] ibid, 88.
[381] ibid, 98.

authority and control. Thus, the underlying factor for permissible delegated rule-making is a certain degree of autonomy of the actor but that autonomy is subject to State authority. This provides a significant lens to look at whether businesses as private actors could also have the disposition to exercise delegated rule-making in their domains. Given that the case presented above involves a public institution, another case that illustrates how delegating rule-making powers extends to private actors is *Barthold* v *Germany*, adjudicated by the Court.[382]

This case concerned whether a Rule of Professional Conduct issued by a private association, the Hamburg Veterinary Surgeons' Council, constituted law within the meaning of term. It arose from a complaint submitted by Doctor Barthold, a veterinary surgeon, challenging certain injunctions placed on him by the Veterinary Surgeons' Council for engaging in alleged unfair competition against rules set out in the Code of Professional Conduct.[383] In his submissions, Barthold argued that the Rules of Professional Conduct could not serve as law because they were not linked to an explicit statutory provision made by the State but were created solely by the Council itself. In its assessment, the Court admitted that unlike other materials cited in the case, the Rules of Professional Conduct were not directly prescribed by Parliament but they nonetheless constituted law within the meaning of the term as required for restricting his conducts and should be considered as law.[384] By this, the Court indicated that the Rules of Professional Conduct could be scrutinised in the absence of any other laws, to determine the legality of the restrictions in question. It explained further that the competence of the Veterinary Surgeons' Council in the sphere of professional conduct derives from the independent rule-making powers that the veterinary profession, as any other liberal profession, traditionally enjoys by parliamentary delegation.[385] Here, again, the Court used the expression 'independent rule-making' delegated in law to characterise as law the rules issued by the Veterinary Surgeons' Council, a private group of commercial actors.

By virtue of the Council having notable autonomy in society to govern its own interests, it acquired recognised rule-making capabilities with the disposition to exercise delegated rule-making functions, but on condition that this must be subjected to State control. The Court emphasised this condition by noting that the competence of the Council to make rules was

[382] *Barthold* v *Germany* (1985) ECHR [8734/79].
[383] ibid, paras 10-23.
[384] ibid, 46.
[385] ibid.

under the control of the State, in which case, the Council was obliged to submit its rules of professional conduct to the State for approval.[386] Thus, an important caveat in the exercise of delegated rule-making functions is that they must go in tandem with State supervision. Delegation therefore does not take away the primacy of States and its supervisory role but simply allows the delegate to initiate and generate specific rules to govern its decisions without the State having to be the initiator, but it must be subject to State supervision. Diverse methods may be used to subject a delegated rule to State control but one method suggested by the Court in *Barthold* is physical submission for approval as it required the Veterinary Surgeons Council to submit its rules to the State for approval. By implication, the case indicates that a delegated rule that could be said to have been subjected to State approval is a rule of the State and enforceable for purposes of human rights limitations.

From the cases presented above, the following points can be drawn in respect of the concept of law as required for permissible limitation of human rights. First, the law can be realised in two ways (i) direct law-making through the law-making institutions of the State or (ii) by the State delegating rule-making. Secondly, rules that are generated through delegation must be subjected to State control before they acquire judicial significance for permissible limitation of human rights. Thirdly, even though rules generated through delegated functions may be of lower-ranking order, they are nonetheless viable for permissible limitation of human rights so long as they are subject to State control. Lastly, the bottom-line for an entity to enjoy such delegated rule-making function is whether it has a certain degree of recognised autonomy to govern itself and this applies to both public and private entities. From these, two strands of the doctrine of delegation are manifest, namely, public delegation and private delegation,[387] and both strands are viable means for generating lower-ranking rules that have judicial significance for purposes of human rights limitations.

For the purposes of this study, the private dimension of the doctrine of delegation will be explored further to examine the disposition of businesses to generate rules that have judicial significance for permissible limitations on human rights. Before proceeding with that, there is another dimension of what constitutes law for purposes of human rights limitations that must be noted. This relates to the requirement that law must have certain qualities to be

[386] ibid.
[387] Adopted from David Lawrence (n 224) 647.

acceptable as valid basis for limitations on human rights. For instance, in *S. and Marper* v *the United Kingdom*, the European Court of Human Rights emphasised that for an impugned measure to be considered as "prescribed by law", it must not only have basis in domestic law but must have qualities that are compatible with the rule of law.[388] Analysts point out that this means apart from the domestic certification of an instrument as law, it must display legal certainty and accessibility to be acceptable.[389] The Human Rights Committee has noted that in order for human rights restrictions not to jeopardise the essence of human rights, there is the need to maintain the relationship between right and restriction and between norm and exception,[390] hence law must be formulated with sufficient precision and accessible to enable affected persons to regulate their conducts.[391] Similarly, the African Court of Human Rights emphasised that law involves more than merely national legislation because it must conform to international standards[392] and the Inter-American Court of Human Rights also insists that law must have precision and foreseeability for restrictions on human rights.[393]

This means that for an instrument to be acceptable as basis for human rights limitations, it must be able to provide legal certainty by being precise, accessible and foreseeable. The European Court of Human Rights provides explanation of what these qualities entail. Before going into details, the significance of legal certainty for dealing with human rights needs to be emphasised. In *Schönbrod* v *Germany*, the Court noted that legal certainty is important to ensure that human rights restrictions are compatible with the rule of law, emphasising that the rule of law is the bed-rock for human rights protection.[394] In *Creangă* v *Romania*, the Court showed that failure to demonstrate that a particular law has met the qualities of legal precision could automatically amount to human rights violations without the need for further assessment of the aims pursued and the proportionality between the means and ends.[395] In *Kruslin* v *France*, for instance, the Court enumerated and clarified the qualities expected of law in order to be considered as certain and not arbitrary; namely, that the law must be precise, accessible and foreseeable.[396] These qualities are somewhat inter-related in the sense

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[388] *Marper* v *the United Kingdom* (2008) ECHR, [30562/04; 30566/04] para 95.
[389] Yutaka (n 40) 336-7.
[390] HRC, 'General Comment 34: Freedom of Opinion and Expression' (21 July 2011) CCPR/C/GC 34, para 21.
[391] ibid, paras 25-26.
[392] Frans Viljeon, *International Human Rights in Africa*, 2nd Edn. (OUP 2012) 329.
[393] Burgorgue-Larsen and de Torres (n 29) 478-480; 600.
[394] *Schönbrod* v *Germany* (2011) ECHR [48038/06] para 83.
[395] *Creangă* v *Romania* (2012) ECHR [29226/03] para 120.
[396] *Kruslin v France* (1990) ECHR [11801/85].

that in *Gillan and Quinton* v *the United Kingdom*, the Court noted that the qualities of precision, accessibility and foreseeability are meant to enable persons affected by laws to be able to, if need be and with appropriate advice, to regulate their conducts.[397]

In *Kruslin* v *France*, the Court gave a simple definition of what constitutes precise law, describing such law as one that has clear and detailed rules on the subject matter.[398] Thus, normally, legal instruments are supposed to state the subject matter in clear terms and there should be no ambiguity as to whether a specific legal instrument gives sufficient details of the rules on a specific subject matter. The Court however acknowledged that it is not always easy for law to satisfy this requirement. *Kruslin* arose when an investigating judge issued warrants to a commanding officer to tap the telephone of a suspect in connection to a murder case and in the course of executing this measure, the telephone conversations of another person, Mr Kruslin, who was then residing in the house of the suspect, was also tapped. It happened that Mr Kruslin was overheard in a discussion of another murder case and was consequently arrested and charged. At the material time, there was no law in France that expressly empowered investigating judges to carry out telephone tapping, but rather the legal basis for telephone tapping was derived from remotely related cases through interpretation of legislations in favour of telephone tapping.[399] In view of this lack of directly applicable law, Kruslin challenged the tapping of his conversation as a violation of his right to privacy. In its assessment, the Court ruled that the measure had legal basis in French law because in its view, both case-law and written law constitute acceptable law.[400] The Court however noted that the law applied in this measure was not clear enough and gave rise to the exercise of discretion by the authorities and therefore not consistent with legal certainty.[401]

In *Gorzelik and others* v *Poland*, the precision requirement of the law was also disputed.[402] In that case, Poland refused to register an association called "Union of People of Silesian Nationality" that was established to promote the interests of a minority group in Poland known as the Silesians.[403] At that time, there was neither a clear legal definition of national

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[397] *Gillan* v *The United Kingdom* (2010) ECHR [4158/05] para 76.
[398] *Kruslin*, (n 396) para 33.
[399] ibid, para 15.
[400] ibid, para 29.
[401] ibid, para 36.
[402] *Gorzelik* v *Poland* (2004) ECHR [44158/98] para 54-71.
[403] ibid, para 3-5.

minorities nor specific procedures to establish national minority groups in Polish law. The applicants therefore argued that in the absence of any legal definition of the concept of national minority or criteria for determining what might qualify as national minority, the application by the authorities of indirect law to deny them registration as a minority group, deprived them of the ability to foresee what legal rules would be applied in their case and therefore they viewed the law as imprecise.[404] In response, the government argued that the combination of various applicable rules should have given the applicants sufficient guidance on the conditions for recognising national minority and registration of such an association.[405]

In its assessment, the Court reiterated that the law must state in clear terms what it intends to address but noted that as a logical consequence of the principle that law must be of general application, the wording of laws may not be completely precise.[406] Thus, even though the law is expected to be clear, the Court maintains that a logical consequence of this precision requires the law to be formulated with some vague terms so as to avoid excessive rigidity and to keep with changing circumstances and be open to judicial interpretation.[407] As such, the requirement that law must be clear and precise does not mean that the law must always be stated in explicitly clear terms.[408] Thus, from this case, it is notable that law must have clarity in scope and the manner in which discretion is used in its application must be clear in order to be considered as precise. Apart from discretion, law may be applied by analogy or drawn from related cases and this does not necessarily mean that the law is imprecise, so long as there is control on the exercise of discretion. Further to these, law must not only be precise; it must also be accessible to those affected in order that they may foresee the consequences of conducts and possibly avoid such consequences.[409] By implication, even if businesses are deemed to have the disposition to generate operational rules that have significance for human rights limitations, their instruments must satisfy the requirements of precision, accessibility and foreseeability for affected stakeholders to be certain of the rules.

It needs mention that the qualities of precision, accessibility and foreseeability are quality concerns that are required of any instrument that interferes with human rights, whether it is

[404] Ibid, para55-58.
[405] ibid, para 59-63.
[406] ibid, para 64.
[407] ibid.
[408] ibid, para 69.
[409] *Kruslin* (n 396).

made directly by States or through delegated actors. Whether or not these qualities are met in specific instances is determined on a case-by case basis and as such their realisation in specific business operations would have to be contextualised. In this sense, these qualities are not subjected for special analyses in this study as the main focus has to do with whether businesses have the disposition to generate rules for human rights limitations.

Before delving into further examination of the disposition of businesses to exercise delegated rule-making for purposes of human rights limitations, it is essential to note that delegating rule-making for purposes of human rights limitations is not unique to the European Court of Human Rights. The Inter-American Court of Human Rights generally requires that laws that prescribe general limitations on human rights must be duly authored by State legislatures.[410] It nonetheless recognises that subsidiary laws that are made through delegation could also form permissible bases for specific restrictions on human rights.[411] This second aspect is particularly important for this study because for businesses, it is the need to place specific restrictions on human rights in their operations that is relevant.

A general observation of the notion of law in the context of human rights limitations is that it is highly operationalised to fit that aspect of law. Svensson-McCarthy observes that "when analysing legal terms in the international law of human rights, it is to some extent necessary to modify juridical thinking, since the very specificity of this branch of law conditions the content and meaning of the notions used".[412] She finds that the concept of law in particular as applied in human rights law has evolved significantly and has acquired its own unique conception that is quite different from the meaning that law may have in other legal systems.[413] On the basis of this observation, she confirms that apart from State legislatures that have direct capacity to make overarching laws, other entities that have recognition in law to govern their objectives may be delegated to make rules under State supervision and these also constitute legitimate bases for the application of limitations on human rights.[414]

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[410] See for instance, the distinction in the Advisory Opinion issued by the Inter-American Court of Human Rights to Uruguay, OC-6/86 (9 May 1986) para 23.
[411] ibid, 32.
[412] Svensson-McCarthy (n 72) 52.
[413] ibid, 93-94.
[414] ibid, 72-78.

In conclusion to this section, two strands of power have been identified as legitimate means to generate instruments that satisfy the requirements of law permissible for human rights limitations. The first involves direct law-making by the primary law-making institutions of States as their legal systems permit them. Such institutions can make vague and broad laws for general application within their mandates. The second strand is by means of delegating rule-making powers.[415] Delegating rule-making powers is normally to State agencies and public institutions to make more precise and narrower laws to govern specific interests and decisions. Thus, the duty of the State to govern businesses could be achieved through direct legislations and by delegation to its agencies and public institutions.[416] In the context of this study, laws that are directly made by the State and its agencies and institutions are classified under the 'State laws', that is, under the 'State-centric' regulation of businesses, which, as argued earlier, has been found to be inadequate to govern corporate dealings with human in all circumstances. The focus of research has therefore been on whether businesses could also play supplementary functions that conform to the requirements of law for purposes of human rights limitations in contexts where State regulation is ether absent or discouraged.

As Lawrence rightly observed, the power to make law is an essential prerogative of States and therefore delegating law-making capacity to public institutions is not so controversial.[417] The challenge is when delegation involves private actors hence the value being created by this thesis is to explore and suggest how delegation applies to businesses as private actors. In response to the task posted in the introduction to this chapter, asking whether human rights law accommodates private exercise of delegated powers to make laws for permissible limitation of human rights, this section replies in the affirmative. Then, with the description of what is involved in exercising delegated rule-making, the challenge now is to examine the disposition of businesses to perform such function to answer the question of whether it is appropriate for States to delegate businesses for such purposes. The next section considers this issue by means of literature on private delegation with focus on businesses.

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[415] Stephen Breyer, et al., *Administrative Law and Regulatory Policy: Problems, Text and Cases* (7th edn, WK 2011) 3- 4, 38.
[416] ibid, 3.
[417] Lawrence (n 224) 647.

3.4 Delegating Rule-Making Capacity to Businesses

The main basis for the present chapter has been that States do not prescribe all operational rules for businesses and therefore businesses may sometimes use their operational rules to take measures that interfere with human rights. There is therefore a need to find out how operational rules generated by businesses may attain judicial significance for purposes of human rights limitations and accountability. Part of the efforts to deal with this issue has been to find out whether and how human rights law accommodates private rule-making as basis for human rights limitations. In the preceding sections, it is found that by means of the doctrine of delegation, States may ascribe rule-making powers to both public and private entities, subject to State control, to initiate and generate rules to govern their interests. Such rules attain significance to serve as legitimate bases for measures that interfere with human rights because they must be, as a rule, subjected to State approval and control. Thus, the doctrine of private delegation is the means through which human rights law accommodates private rule-making as basis for permissible limitations of human rights.

By implication, if businesses could be considered as having the disposition to exercise delegated rule-making capacity, then in essence, their tendency to make operational rules could attain judicial significance as an exercise of delegated function and may therefore serve as useful supplementary basis for human rights limitations and accountability. This raises the question of whether businesses as private actors are rightly placed for this function or whether it is appropriate for States to ascribe such function to businesses. To answer this question, this section first analyses the doctrine of private delegation with a specific focus on businesses and then examines the disposition of businesses to play this role.

3.4.1 The Doctrine of Private Delegation

The tendency of businesses to act as if they were delegated by States to generate rules that determine their decisions and operations that affect stakeholders is well-known to scholars. Fabrizio Cafaggi captures some reflections of this tendency in his analysis of an emerging trend in contemporary regulation of businesses that is highly dependent on transnational private regulation which "constitutes a new body of rules, practices, and processes, created

primarily by private actors, firms and NGOs, independent experts such as technical standard setters and epistemic communities, either exercising autonomous regulatory power or implementing delegated power, conferred by international or by national legislation".[418] Here, Cafaggi suggests that private actors, including businesses themselves, have taken a centre stage in regulating businesses, and are performing functions, including rule-making, which would otherwise be considered as the functions of governments. This suggests that within the context of regulating businesses, private actors are exercising *de facto* delegated powers to deal with issues that would otherwise require State regulation and therefore bear on the legal doctrine of delegating State functions to private actors; i.e. private delegation.[419]

The legal doctrine of delegating governmental powers to private actors is neither settled in legal practice nor proscribed. David Lawrence puts it this way: the legal doctrine respecting the delegation of essentially governmental powers to private actors is inconsistent and non-principled; inconsistent in the sense that it is upheld by courts in some instances and rejected in other instances, and unprincipled because there are no clear guidelines to determine when to delegate or when not to delegate powers to private actors.[420] This challenge is greater if the substance of delegation concerns law-making as an essential prerogative of States.[421]

The concept of delegation is not limited to law-making: it is a general concept that signifies the transfer of power or tasks from one entity to another. This is expressed more clearly in Terry Moe's description of the principal-agent model of the agency relationship, in which he notes that delegation occurs when one party, known as the principal, considers entering into a contractual agreement with another party known as the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal.[422]

From this idea, we observe that delegation is nothing more than a relationship in which a particular power or function that should normally be exercised by the principal actor is

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[418] Cafaggi (n 250) 20-21.

[419] Lawrence (n 224) 694. For general reading see Freeman J, Annual Regulation of Business Focus-Privatisation: Private Parties, Public Functions and the New Administrative Law' (2000) 52:3 ALR 813; Cafaggi F, 'New Foundations of Transnational Private Regulation' (2011) 38:1 JLS 20; Green J, 'Delegation and Accountability in the Clean Development Mechanism: The New Authority of Non-State Actors' (2008) 4:2 JIL & IR 29; Hollis Duncan B, 'Private Actors in Public International Law: Amicus Curiae and the case of the Retention of State Sovereignty (2002) 25 BCI&CLR 235; Metzger G, 'Privatisation as Delegation' (2003) 103 CLR 1370; Shapiro S, 'Matching Public Ends and Private Means: Insights from the New Institutional Economics' (2002) 6 JS&EBL 43.

[420] Lawrence (n 224) 694.

[421] ibid, 647.

[422] Terry M. Moe, 'The New Economics of Organisation' (1984) 28:4 AJPS 756.

transferred to another actor with the consent of the principal. In the context of this study, the core issue of interest is the exercise of rule-making powers. Therefore, the point of enquiry is whether some of the rule-making and regulatory functions that should normally be exercised by States and public institutions for businesses to deal with human rights could also be delegated to businesses where State regulation is not practical and rules so generated in that context may also have significance for human rights limitations and accountability.

Doctrinally, private delegation raises special legal concerns. Its main concern is whether the doctrinal separation of powers as embedded in the Constitutions of most States prohibit the transfer of certain governmental powers to private actors.[423] This becomes even more challenging when the substance of delegation involves law-making because certain powers such as law-making, adjudication, taxation, the seizure of properties and persons are considered essential prerogatives of governments because of the element of coercion embedded in them.[424] It is clear that States do not need consent in order to exercise these powers. Private entities, on the other hand, require consent, usually in the form of contracts, to exercise any such coercive powers that affect others but this does not mean that private exercise of coercive powers without contractual consent is entirely proscribed in law. In an effort to illustrate this, David Lawrence analyses situations in which private actors were allowed to exercise non-consensual powers that are primarily considered governmental in character.[425] He finds that almost any power or function such as law-making and seizure of persons and properties that are normally considered as governmental functions in character can equally be delegated to some clearly private actors.[426]

Lawrence cites instances in the United States where wage rates were determined by local unions, farmer groups, medical accreditation agencies and other private actors who were allowed to set rules to govern specific functions.[427] He finds that even though Article 1 of the United States Constitution maintains the non-delegation doctrine which proscribes the transfer of legislative powers to private actors, private delegation is no more a constitutional issue in federal and State courts and the US Supreme Court reacts inconsistently to private delegations, accepting it in some instances and rejecting it in other instances.[428] Thus, as

[423] Gillian Metzger, 'Privatisation as Delegation' (2003) 103 CLR 1370.
[424] Lawrence (n 224) 648.
[425] ibid.
[426] ibid.
[427] ibid, 648-649.
[428] ibid, 650.

shown under the United States Constitution, it is not the private character of an entity that determines if delegated powers could be conferred on it or not. Other scholars have been concerned with whether delegating legislative powers to private actors must be limited.[429]

Asmara Johnson wondered whether private delegation of governmental powers should also include the eminent domain of governmental functions, including law-making, adjudication of rights, seizure of persons or properties, licensing and taxation.[430] This question arises mainly due to accountability concerns that private actors are not elected, not appointed by public officials and are not employed by governments and therefore they are not directly constrained by mechanisms for public accountability.[431] In order to understand whether delegating powers to private actors could also include functions that are considered as mainly governmental in nature we need to draw on cases. A case from the United States is a good example because as noted earlier, the doctrine of non-delegation is established in the American Constitution and the US courts have interpreted this doctrine in relation to the exercise of eminent governmental functions by private actors and could throw more light for further analysis of this issue. The *Kelo* case, adjudicated in the US Supreme Court, provides useful insight into the issue.[432]

In 2000, the city of New London in the United States approved a development plan that was projected to create over 1,000 jobs, increase tax and other revenues, and to revitalize the city that was economically distressed. As an initiative to revitalise the city, the New London Development Corporation was created as a private organisation to plan and develop the community.[433] In order to assemble the land needed for the project, this Corporation had to purchase property from willing sellers and proposed to use the power of eminent domain to acquire the remainder of the land from unwilling owners in exchange for just compensation.[434] This raised the question of whether the city's proposed acquisition of property was permissible under the US Constitution.[435] Circumstances leading to the initiation of this development plan were such that for decades, the City of New London was

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[429] See for instance Asmara Johnson, 'Privatising Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations (2007) 56:3 AULR 457.
[430] ibid.
[431] ibid.
[432] *Kelo* v *The City of New London*, (2005) US [545: 04.108].
[433] ibid, 2.
[434] ibid, 1
[435] ibid, 1.

economically distressed and continued to register high unemployment rates, reduced population growth and other factors that made it very important for it to be revitalised. Therefore, the New London Development Corporation developed its own policies and operational rules, framed these into a development plan and got it approved by the City Council. The Council subsequently declared that it delegated this development task to the New London Development Corporation and mandated it to purchase or acquire properties by exercising the power of eminent domain in the name of the City and to initiate condemnation proceedings.[436] By means of this delegation, the Corporation was empowered to forcefully acquire properties for development. This raised legal concerns because forceful seizure of property is an essential prerogative of governmental power.[437]

In its assessment of the constitutionality of this instance of delegation, the Supreme Court made certain observations that are relevant for understanding the legitimacy of private entities to exercise powers that are considered the reserves of governments. The Court noted that the taking of land, even developed land, as part of an economic development project is in pursuance of public interest that is justifiable under Federal and State Constitutions.[438] The Court considered that the most important factor was to determine whether the takings of the particular properties in question in such situation were reasonably necessary to achieve a public interest and whether the takings were intended for reasonably foreseeable need.[439] It concluded that because the development plan unquestionably served public purposes, the takings of properties in this case satisfied public use requirement and therefore justified.[440]

Responding to the petitioners' objection that private economic development did not qualify as public interest because it entailed only purely economic benefits, the Court noted that no precedent nor logic supported this proposal because even though promoting economic development is a function of governments, there was no principled way of distinguishing economic development from other public purposes.[441] Further, in reaction to petitioner's contention that using eminent domain for economic development in this case impermissibly blurred the boundary between public and private takings, the Court noted that its case-law

[436] ibid, .4.
[437] Lawrence (n 224) 647.
[438] *Kelo* (432) 6.
[439] ibid.
[440] ibid, 13.
[441] ibid, 14.

foreclosed this objection because quite simply, government pursuit of a public purpose would often benefit individual private parties.[442] It therefore emphasised that public ends may as well or better be served through agency of private enterprise than through a department of government and that public ownership is not the sole method of promoting public purposes of community development.[443] By this, the Court endorsed the private exercise of coercive power as a constitutional delegation of powers to a private entity.

Hence, a private entity could exercise powers that are even considered governmental in character if such exercise of power is necessary in public interest and backed by government authority. Thus, the bottom line for delegating governmental power to private actors is not necessarily dependent on the private nature of the delegate but rather on the public importance of the substance of delegation. This is especially important in the business and human rights domain because it gives a clue as to how corporate self-regulation may be necessary and acceptable to implement important projects and tasks that are not governed by States. The observation that almost any power or function that is considered governmental in character can also be delegated to private actors is therefore an important drive for this chapter.[444] But from the description of delegation noted above, we observed that delegation is an expressed relationship between the agent and the principal which means that delegation of powers could be realised if governments express this in contracts with businesses. However, apart from explicit means to delegate businesses for specific functions, some scholars have found various ways in which the nature of business operations implicitly entails delegated powers or governmental recognition of their rule-making capabilities.

One way in which businesses attain permission to exercise rule-making powers is through privatisation. Gillian Metzger notes that recent expansions in privatisation of government programmes mean that the constitutional paradigm of a sharp divide between public and private is increasingly getting at odds with the blurred public-private character of modern governance.[445] The author posits that the doctrinal divide between public and private does not sufficiently capture the ways in which privatisation involves delegation of governmental powers to private actors, proposing that privatisation of State action must be seen rather as

[442] ibid, 15.
[443] ibid, 15-16.
[444] Lawrence (n 224) 648.
[445] Metzger (n 423) 1367.

private delegation.[446] Thus, even the private nature of businesses has some connotations of delegation and in principle means that by being private, businesses are delegated to make rules to govern their specific purposes of establishment. This implies that State delegation is intricately woven into privatisation hence the privatisation of a vast array of services makes it possible for businesses to perform activities that are normally seen as governmental, including powers to promulgate rules and to regulate third-party relationships.[447]

Apart from privatisation, the tendency of governments to outsource services to private actors also leads to delegation of powers to private actors. Sydney Shapiro assesses this phenomenon by focusing on outsourcing governmental regulation in the United States. He finds that "regulation is not just for bureaucrats anymore; the government has increasingly relied on private means to achieve public ends, not only involving services to the public, but the origination and implementation of regulatory policy as well".[448] As an evidence of this trend, he found that prior to the terrorist attacks on the World Trade Centre in New York on September 11th 2001 the United States Federal Aviation Administration had delegated airport security to airlines who in turn hired private firms to provide security services.[449] He found also that the accounting industry was writing accounting and auditing standards used in government mandated financial disclosures until the financial scandals involving Enron and others have prompted Congress to prohibit the accounting industry from exercising this authority.[450] In place of this, Congress passed the Sarbanes-Oxley Act of 2002.[451] This established the Public Company Accounting Oversight Board (PCAOB), a non-profit corporation, to oversee the audits of public companies, brokers and dealers, including compliance reports filed pursuant to federal securities laws, to promote investor protection and to subject previously self-regulated auditors of US public companies to external and independent oversight for first time in history.[452] The Securities and Exchange Commission supervises the Public Company Accounting Oversight Board and approves its rules.[453]

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[446] ibid.
[447] ibid, 1369.
[448] Sydney Shapiro, 'Outsourcing Government Regulation' (2003) 53 DLJ 389.
[449] ibid.
[450] ibid.
[451] 15 USC 7201.
[452] PCAOB, 'About the PCAOB' http://pcaobus.org/About/Pages/default.aspx, accessed: January 12, 2014.
[453] ibid.

The challenges to the private exercise of regulatory powers as illustrated in the above instances and similar occurrences in the New York Stock Exchange, rather point to the importance of understanding when and where delegation of governmental regulation to private actors could serve public interest and when it does not.[454] Shapiro proposes that transaction cost analyses are relevant to determine when to use public or private actors in regulation.[455] This, though, does not mean that delegation of regulatory power to private actors is proscribed, rather it points to the importance of caution, care and cost-benefit analyses, given that in practice, outsourcing government regulatory power to private actors will be less costly in some cases and more costly in others.[456]

Privatisation and outsourcing are not the only practices that inherently delegate powers to private actors. Jessica Green notes that contemporary international treaties are conferring governmental powers to private actors.[457] She notes that the powers granted to the Executive Board of the Clean Development Mechanism established by the Kyoto Protocol are evidences of delegating governmental powers to private actors to make and implement rules and that delegation may be direct or indirect; direct in cases where the principal delegates directly to the agent and indirect in cases where the agent delegates to third parties.[458] According to Green, the growth of transnational regulation has given rise to the situation where important regulatory powers are no longer exclusively domestic but rather a platform where both public and private actors play legislative and administrative roles.[459]

It has also been found that private delegation is easier for courts to accommodate if it occurs within specific economic contexts. Lawrence notes that in the United Sates most private delegation cases involve economic delegation but delegation in this category does not attract much concern in courts because the government generally withdraws from the specificity of framing economic regulations.[460] This indicates that the United States generally follows a rule-based system for the governance of businesses but there is still a large window of opportunity for businesses to regulate themselves in some instances; a freedom that explains

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[454] Shapiro (n 448) 389
[455] ibid, 390.
[456] ibid, 390; 433.
[457] Jessica Green, 'Delegation and Accountability in the Clean Development Mechanism: The New Authority of Non-State Actors' (2008) 4:2 JIL & IR 29.
[458] ibid, 30.
[459] ibid, 26.
[460] Lawrence (n 224) 673.

why corporate exercise of regulatory powers is rarely challenged in the courts of that country.[461] Lawrence is of the view that the situation is due to the fact that corporate regulations are readily justifiable due to the ends that they serve and on the basis of this he proposes that private delegation is justified as a matter of substantive due process.[462] Substantive due process is used here as a test of reasonableness that incorporates two analytical questions; (i) whether the end sought by a specific delegation is legitimate and (ii) whether the means used is rationally related to the achievement of the end.[463]

According to Lawrence, economic delegations often pass this test of reasonableness.[464] What Lawrence is suggesting at this point is that delegating rule-making powers to businesses is more likely to be justifiable in law because of the inherent worth in businesses for the common good. For instance, societies depend largely on business and therefore the need to encourage business success could be an inherent factor that readily justifies corporate exercise of discretion and regulatory powers. Thus, even though businesses are private actors, they are special entities whose power to self-regulate is easily justifiable.

In spite of these observations that make it reasonable to delegate rule-making powers to businesses, it is essential at this point to delve further into the doctrine of non-delegation which makes a case against delegating rule-making powers to entities other than the primary law-making institutions of a State.[465] This is to help make sense of the problems that militate against private delegations. In administrative law, delegation of governmental powers to private actors is challenged by the non-delegation doctrine as embedded in the constitutions of various States. This is because constitutions normally vest legislative powers in State legislatures and in common law jurisdictions, courts. As noted earlier, the non-delegation doctrine is readily notable in the Constitution of the United States which states in Article 1 that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representative.[466] Thus, constitutionally, a Congress of the United States must make laws. However, the United States Supreme Court interprets this doctrine in a way that permits Congress to determine the details with which it

[461] ibid, 678.
[462] ibid.
[463] ibid.
[464] ibid.
[465] Barbara Koremenos, 'When, What and Why Do States Choose to Delegate?' (2008) 71 LCP 151-192.
[466] Article 1, paragraph 1 of the Constitution of the United States vests legislative power solely in Congress.

makes laws and to delegate or authorise delegation of powers to entities including private actors.[467] Therefore, even though the Constitution vests legislative powers in Congress, this does not mean that Congress must make all laws. Rather, Congress is the 'hub' of laws and may delegate powers to non-legislative bodies. As such, the Supreme Court's interpretation of this doctrine favours the involvement of private actors in public decision-making.[468]

As noted in the *Şahin* and *Barthold* cases, the European Court of Human Rights implied that delegating rule-making powers to private entities is practiced in Europe and therefore private delegating or rule-making power is not limited to the United States; the factors that trigger private delegation may be relevant in any context. The challenge is that there are no clear principles governing when to delegate to private actors and when to stay delegation. This has led analysts to conclude that the constitutional limit on private delegation of legislative powers does not provide sufficient basis to restrict private delegations because courts have not yet been able to construct a consistent case-law against private delegation.[469] Lawrence then proceeds to examine some of the reasons why private delegation is resisted in some circumstances. He notes that private delegation is challenged by the fear that private actors may use delegated power to pursue selfish interests and society cannot vote them out as they could do to public officials but noting that not all private delegations have been rejected by courts, Lawrence suggests that what is needed is to find principled way to make delegation to private actors to satisfy due process requirements that challenge private delegation.[470]

One related theory that militates against private delegation is Constitutional Supremacy.[471] This holds that Constitutions are supreme and therefore any forms of delegations that are not provided for in Constitutions are not acceptable.[472] According to Lawrence, this suggests that even delegations to public agencies are unconstitutional because constitutions normally do not say anything directly about delegations in general; either to public or private actors, and they do not differentiate between the delegate as private and public.[473] How is this relevant to human rights law? As noted earlier, the concept of law as known in human rights

[467] Shapiro (n 448) 58.
[468] ibid.
[469] Lawrence (n 224) 651.
[470] ibid, 659-660.
[471] ibid.
[472] ibid, 664.
[473] ibid.

law in particular is not limited to written statutes and legislations. Rather, it embraces legitimate subsidiary rules that are made through the exercise of delegated powers by entities other than the primary law-making institutions of States. The theory of constitutional supremacy therefore does not preclude delegation as applicable for human rights limitations because human rights law recognises delegated rule-making as an acceptable basis for human rights limitations.

Further, Lawrence observes that vesting legislative power in State legislatures remains an unsatisfactory basis for judging private delegations because it does not deal satisfactorily with delegations by State agencies or local governments.[474] He observes that agencies and local governments may adopt codes from professional associations and there are instances where legislatures delegate powers to subordinate institutions who in turn delegate legislative powers to private actors, suggesting that even though private delegation may not be directly provided for, it permeates the rule-making systems of States, propelled by factors that make it contextually relevant.[475]

Some scholars remain concerned with the reasons why States would continue to delegate powers to private actors. Lorna Jorgensen observed that because the American Congress lacked the staff to write particular standards into legislation, it often put broad language into statutes and delegates authority to agencies to fill in the blanks and due to complex variables and changing information, it is even difficult for agencies to be as precise in writing legal texts as the courts may demand.[476] Thus, the need to write laws as precisely as possible to be practically useful is one of the reasons why rule-making may be delegated. Jessica Green also observes that States delegate powers to reduce transaction costs and to solve problems that allow for mutual benefits.[477] Thus, States delegate rule-making when they are unable to solve technical problems and the private delegates have the ability to find solutions.[478]

This is particularly important in the business and human rights discourse. The inability of some States to govern businesses and the fact that State command-and-control of businesses may be counter-productive to business development are some of the reasons why businesses,

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[474] ibid.
[475] ibid, 664-665.
[476] Lorna Jorgensen, 'An Appeals Court Breathes Life into the Non-Delegation Doctrine' (2000) 20 JLREL 113.
[477] Green (n 457) 25, 26.
[478] ibid, 26.

being actors with detailed expertise in the management of their specific economic affairs, are better placed to make operational rules than State actors.[479] Further, delegation makes it possible to get actors to accept rules and regulations that affect them. This point was made by David Lawrence when he noted that there is enhanced possibility that actors would accept rules that directly affect them if they participate in making the decision and they feel that it reflects or emerges from their own norms of behaviour rather than being imposed on them by outside actors.[480] Thus, participation as a strategy to enhance the acceptance of rules is an important factor for businesses to be able to deal with human rights. This might explain the failure of previous UN initiatives such as the erstwhile UN Norms on the responsibility of businesses which sought to impose essentially the entire range of human rights obligations on businesses but did not involve businesses in drafting the norms.[481]

Another factor often cited as being an important facet for private delegation is the expertise and flexibility of private actors. Lawrence noted that different forms of organisations have different capacities to innovate and respond flexibly to new ideas and situations.[482] As such, since governments have different motivations and constraints, they are less likely than specialised business actors to resolve specific business challenges.[483] Further, business entities are most likely to be able to design operational rules that fit the needs of specific business operations than governments could prescribe for them.[484]

In view of the salience of delegating rule-making to private actors, some scholars have concerned themselves with how to device suitable mechanisms to conduct such delegations while helping to safeguard against the problems associated with private delegations. Gillian Metzger posits that "mechanisms other than directly subjecting private entities to constitutional scrutiny can satisfy the demands of constitutional accountability, and can do so without intruding unduly on government regulatory prerogative" and that it is only "where such mechanisms are lacking that the grant of government authority to private entities represents unconstitutional delegation".[485] She suggests that if the focus of judicial

[479] See also Weber's view as presented in section 3.3 above.
[480] Lawrence (n 224) 653.
[481] Norms (n 205).
[482] Lawrence (n 224) 653.
[483] ibid.
[484] ibid, 657.
[485] Metzger (n 423) 1367.

enquiry is placed directly on the special problems posed by private delegations, one may expect the law to become more consistent and sustaining principles to emerge".[486]

Further, it is worth-noting that the failures of States to regulate matters of global concern has led to an emerging trend of transnational private regulatory regimes which, to a greater extent, project the States as rule-taker instead of rule-maker.[487] Such transnational private regulatory regime consists of a new body of rules, practices and processes, created primarily by private actors, firms, NGOs, independent experts such as technical standard setters, among others, either by exercising inherent autonomous regulatory powers or by implementing delegated powers conferred on them by international or national legislation.[488] The growth of this regulatory trend constitutes a re-allocation of regulatory power from domestic to the global spheres and a redistribution of regulatory power between public and private regulators.[489] This redistribution concerns not only rule-making but also compliance and enforcement of rules and raises questions as to whether private transnational regulations complement or supplant State regulations at the national level.[490] Regarding this, private transnational regulations may be seen as preceding the creation of public regulatory regimes. This means that for purposes of filling regulatory gaps, private entities may design new markets, institutions and regulatory initiative which may later be supplanted by hybrids of regulations and national regulatory systems when necessary.[491] Thus, private delegation does not supplant domestic regulations but may be a precursor to or fill in gaps in public regulation. This view is consistent with the logic of the doctrine of delegation as mechanism that subjects delegated rule-making to State supervision to be acceptable for limitations.

According to Cafaggi, the emerging trend of private regulation is driven by a number of factors, one of which is the need to harmonise the normative fragmentation of market regulation which comes about as a result of either the multiplication of private regulations or the divergent domestic public legislation which is seen as a major barrier to trade.[492] Other factors include the weakness of States as global rule-makers, the weakness of State

[486] Lawrence (n 224) 655.
[487] Cafaggi (n 250) 20, 21
[488] ibid, 21.
[489] ibid.
[490] ibid, 24.
[491] ibid.
[492] ibid, 25.

regulation in monitoring compliance with international standards and the growth in technology which creates re-distribution of rule-making power in favour of private actors, as well as technical standards in supply-chain affairs that are difficult for States to monitor.[493]

In brief, delegating rule-making powers to private entities remains an important facet of administrative law and is a significant tool to bridge regulatory gaps in State governance of private actors. The discourse above therefore suggests that delegation of regulatory powers to private actors is not necessarily proscribed in the laws of different States and may even be required in certain circumstances for practical governance of specific interests, especially in contexts where direct State regulation is not tenable such as noted in section 3.2 above of the inadequacies of State regulation of corporate compliance with human rights. On the bases of the foregoing, this study posits that private delegation is part and parcel of rule-making in democratic State systems and therefore delegating regulatory powers to businesses to govern human rights would not necessarily be unreasonable from a legal perspective. However, in order to scrutinize this more succinctly and to explore whether businesses have the disposition to exercise delegated rule-making functions, there is a need to show that they have a certain degree of autonomy as is suitable for them to be accorded that responsibility. The next section discusses the disposition of businesses to exercise delegated rule-making.

3.4.2 The Disposition of Businesses to Exercise Delegated Rule-Making

In the preceding sections, the point was made that from a human rights perspective, an entity other than the law-making institutions of a State, whether private or public, may be delegated to make rules to govern its activities if it has a certain degree of recognised autonomy.[494] It has also been noted that within the specific context of human rights law, rules that are authored through delegated functions are lower ranking in character but are nonetheless applicable for permissible limitations of human rights because they are, as a rule, subject to State approval. Thus, in order to make sense of whether businesses have the

[493] ibid, 29.

[494] Recalling that in both the *Şahin* and *Barthold* cases reviewed in section 3.3.3 above, the European Court of Human Rights used the expressions 'independent rule-making powers' to identify an entity as delegated in law to make lower ranking laws under State supervision to govern its activities.

disposition to make rules that may validly serve as bases for permissible limitations of human rights, there is the need to show that they have recognised autonomy in society.

The extent to which businesses are known to have such a degree of autonomy to govern themselves was discussed in section 3.2 above, referring to scholars, including Sally Falk Moore, who characterised businesses as "semi-autonomous social fields" that have rule-making capabilities and means to induce compliance outside their contractual relations.[495] In the modern era, corporate governance practices indicate that there is a certain level of consciousness among democratic States to accord businesses a certain level of autonomy to govern themselves, so that even though businesses are subject to State regulations, they still enjoy flexibilities to regulate their activities that are not directly regulated by States. The OECD Principles of Corporate Governance, referenced earlier, is one authority that captures the necessity for States to accord permissible autonomy to businesses. The OECD describes corporate governance as the framework through which the objectives of companies are set and the means to attain objectives, to monitor performance and to define relationships between management and stakeholders.[496] It adds that even though governments set rules and frameworks for markets, the specifics of corporate decision-making take place within the ambits of corporate governance, influenced by various relationships such as management boards, directors, shareholders and other stakeholders.[497]

The OECD maintains that in order to promote transparent and efficient markets, corporate governance typically involves a regulatory mix, comprising of elements of legislation, regulation, self-regulation and voluntary standards and encourages effective use of this regulatory mix with the desired goal of avoiding 'over-regulation' of businesses.[498] The OECD presents corporate governance as the decision-making machinery of a company and shows how the internal governance of business reflects in its external relations. Therefore, the flexibilities in corporate governance reflect directly in the regulation of businesses in respect of human rights. It shows also that self-regulatory measures that are taken by businesses are among the necessary pivots that allow for strategic development of

[495] Moore (n 73) 720.
[496] OECD Principles (n 226) 11.
[497] ibid, 11-14.
[498] ibid, 29.

businesses, hence, the OECD cautions States against 'over-regulating' of businesses, considering this as a risk that must be avoided for markets to function effectively.

The UK Corporate Governance Code also emphasises the need to accord flexibility to the governance of businesses. In its introduction to the UK Corporate Governance Code, the Financial Reporting Council (FRC) states that "the purpose of corporate governance is to facilitate effective, entrepreneurial and prudent management that can deliver the long term success of business".[499] Therefore, to achieve this end, corporate governance in the United Kingdom is guided by the comply or explain principle which recognises that "an alternative to following a provision may be justified in particular circumstances if good governance can be achieved by other means".[500] This approach recognises that even though companies are under State supervision, there is the need to relax State control of their decision-making mechanisms in order to facilitate efficient running and steering of businesses. According to the FRC, this corporate governance strategy adopted by the United Kingdom is strongly supported by companies and shareholders and widely emulated by many other countries.[501]

The reported international emulation of the UK Code does not necessarily mean that all States would follow the UK's flexibility approach. However, a study led by the RiskMetrics Group for the European Commission has found that the 'comply-or-explain' principle has become a feature of the European Union approach to corporate governance. Within the European Union, national corporate governance codes lay down rules or recommendations that are not mandatory and companies may either comply with the rules or explain their deviations from standards.[502] It adds that the European Union recommends the application of company-specific extra-legal principles to deal with issues if following the set rules is not helpful.[503] According to the study, factors such as board organisation, audits and shareholder rights are usually regulated by law but others such as remunerations, independence of members, internal control and risk managements are not, while other issues may advance from code-based to regulations.[504] This is also widely supported by corporate stakeholders.[505]

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[499] Financial Reporting Council, 'the UK Corporate Governance Code' (September 2012) 1, paras 1-6.
[500] ibid.
[501] ibid, para 1.
[502] RiskMetrics Group (n 227)11.
[503] ibid.
[504] ibid.
[505] ibid, 12.

In sum, business entities that are organised in the corporate form have notable autonomy in democratic societies to govern their activities even though they are subject to State supervision. The fact that the decision-making systems of businesses are not stringently controlled by States indicates that States generally recognise the disposition of businesses to govern themselves including the need to make some of the rules that govern their operations in order to comply with standards where State regulation is not applicable or need to be discouraged to allow for strategic development of businesses. Descriptively, the disposition of businesses to govern themselves may be seen as 'supervised' or 'controlled' autonomy because they are under State supervision but they have what it takes to govern themselves without State intervention in all activities. This reflects how Sally Moore characterises businesses as "semi-autonomous social fields".[506]

According to the jurisprudence of the European Court of Human Rights as noted of the *Şahin* and *Barthold* cases reviewed above, the requirement for an entity to have the disposition to enjoy delegated rule-making is whether it has a degree of autonomy.[507] The phrase 'a degree of autonomy' means that the entity does not have to have absolute independence from State authority to be considered as having the disposition to be recognised for delegated rule-making. On the basis of the foregoing, businesses have the required degree of recognised autonomy to make operational rules, and if such rules are subjected to State control and approval, they are no longer voluntary, and may serve as bases for assessing measures that interfere with human rights, albeit under State supervision. Apart from these theoretical reflections on the rule-making powers of businesses, there is evidence that States and judicial bodies have recognised their legitimacy to make rules for themselves.

The cases presented in sections 3.2 above indicate instances where businesses have made rules for themselves on issues that have not been directly regulated by States and courts of law have actually tolerated such rules as permissible bases for human rights limitations. One of such cases was the *British Airways* case in which a dress code upon which British Airways based its restrictions on exposure of religious symbols at work and thereby affected the freedom to express religious beliefs was issued by the company itself. The Code was not prescribed by laws of the United Kingdom but was nonetheless accepted by the European

[506] Moore (n 73) 720.
[507] See sub-section .3.3.3 above.

Court of Human Rights as a legitimate basis for the impugned measures. Also, in the *Viking* and *Laval* cases, the European Court of Justice overtly recognised the liberty of businesses to make rules to govern issues such as the relocation of business and foreign registration of employees. In the *South African Airways* and *Walmart* cases, courts in South Africa and the United States respectively have recognised the legitimacy of companies to make rules to govern matters relating to operational efficiency, compensations and promotions. These are few but significant confirmations that businesses do regulate themselves on issues that are not regulated by States and such measures may have the effect of restricting human rights.

Studies confirm that States do not explicitly prescribe all rules that companies have to comply with and therefore in order to comply with standards, multi-national companies especially are advised to adopt other instruments to complement the rules set by States.[508] In view of such flexibilities in corporate governance and regulation, many scholars have found that the State is not the only source of regulating businesses.[509] Arthur Robinson has noted that businesses even develop their own cultures that influence the rules that they make, and how they respond to specific issues including human rights and environmental matters. As such, corporate culture could serve as basis for corporate liability for human rights aberrations.[510] In view of this intricate mix of State and non-state regulations on businesses, writers point out that the *Guiding Principles* which constitute contemporary focal point for corporate implementation of human rights is dependent on corporate self-regulation.[511] Corporate self-regulation is riddled with many problems but it is not necessarily negative. Even though it may be abused, it is an important strategy within the system of regulating the modern free-market and may sometimes be a better alternative for businesses to deal more effectively with some of their business concerns than prescriptive State regulation.[512]

Having noted that businesses in democratic societies possess the degree of autonomy required for them to govern themselves implies that they have the disposition required to exercise delegated rule-making functions in their domains. This means it is fairly reasonable for States to recognise their rule-making capacity and where necessary, accord them flexibilities to make rules for themselves. Moreover, where those rules comply with the

[508] Cronstedt (n 70) 450.
[509] Smith (n 70) 386.
[510] Robinson (241) 1.
[511] Jägers (n 222) 328.
[512] Priest (n 256) 237.

doctrine of delegation, it must be possible for States to enforce such rules. To test this observation further, it is necessary to look at the practice of State delegation of rule-making powers to businesses, and whether the business context facilitates or inhibits this practice.

Margot Priest has found that any governmental function, including rule-making, monitoring, enforcement and adjudication, could be delegated to purely private actors, including businesses, except the power to exact penal sanctions that still remains the preserve for governments.[513] Dimity Smith also argues that an important factor that makes it appropriate to delegate rule-making powers to businesses is that the governance of businesses consists of legislative and administrative rules and judicial principles that are drawn from various professional groupings such as auditors, remuneration expert committees, managerial experts, litigation experts as well as actors in markets for capital, labour and products.[514] Business decisions are thus taken by professional groupings such as legal experts, accountants, stock brokers, recruiters and others that make up the leadership frameworks of modern businesses. Therefore, the specifics of decisions made by businesses are in effect, managerial decisions adopted by various professional groupings in the business set-up.[515]

This feature of professional orientation of business management has an important implication for identifying the dispositions of businesses to govern their operations. The European Court of Human Rights has made the link between professionalism and autonomy when it noted the Veterinary Surgeons Council in the *Barthold* case as private professional group that enjoys autonomy under State supervision to make rules to govern its affairs.[516] By implication, the decision making framework of businesses involves conglomerations of professional groupings that can make rules for themselves. This means that decisions taken by businesses are underpinned by professional orientations and may therefore be technical and nuanced in ways that may not be fully grasped by external regulations with less understanding of business strategies that apply in specific contexts. As Max Weber noted, businesses have monopoly of knowledge in the market intercourse than open to regulators.[517]

[513] ibid, 238.
[514] Smith (n 70) 382.
[515] ibid.
[516] *Barthold* (n 382) para 46.
[517] Weber's view was noted in section 3.2 above.

Related to this, Baltzell noted that State legislatures, composed of many individuals sitting for brief periods cannot make rules to govern all activities in modern States, and also legislatures do not have the capacity to solve technical problems and apply general principles to all specific cases.[518] In view of this, delegating rule-making enables specialised private entities to amplify the laws, fill in gaps and execute actions to achieve specific goals that cannot be addressed by States.[519] In essence, Baltzell is only reflecting the necessity that businesses, as entities that have monopoly of knowledge in their fields of operations, could be more suitable to be delegated to make rules that fill gaps in State laws applicable to them.

Other scholars have also argued that delegating rule-making powers to businesses is embedded in the power of corporate licensing. The licence is considered as a privilege that is directly or indirectly granted by the State, and that confers authority on the licensee to take steps which would be illegal if done without the licence.[520] In this sense, the licence granted by a State to an entity to perform an act or function identifies the State as the source of licensing power and the licence is an implicit delegated power.[521] Similarly, a licenced entity could be considered as delegated by the State to perform specific acts and the performance of such function entails supervised power to regulate internal affairs, including the prescription of operational rules, monitoring enforcement of the rules and adjudication of deviations from prescribed rules.[522] Considering the licence as a source of delegation is more relevant to multi-national companies who have to comply with human rights in different State jurisdictions, with the possibility to meet different standards affecting human rights.

Such companies would include those incorporated in home States with certain human rights profiles but with subsidiaries registered in other countries with different human rights profiles. By considering the licence as a form of delegation to regulate their compliance with human rights, they are in a position to act within their systems of internal control and may thereby develop attitudes, rules, policies, courses of conduct and practices within the body corporate, generally or in part of the body corporate, within which relevant activities take place.[523] This directly defines the internal control of companies and goes beyond that control

[518] Ernest Baltzell, 'Statutory Rules and Orders' (1931) 6:8 ILJ 470.
[519] ibid.
[520] Louis Angel and Jack Siegel, 'Licensing as a Regulatory Device' (1957) UILF 61.
[521] ibid.
[522] Priest (n 256) 237.
[523]Alice Belcher, 'Imaging How a Company Thinks: What is Corporate Culture?' (2006) 11 DLR 2.

to the wider dimensions of corporate relations.[524] Within the body corporate, several mechanisms are available for companies to self-regulate themselves, one of which is the adoption of voluntary code of conducts by which businesses impose voluntary standards upon themselves to guide special priorities and to avoid restrictive governmental controls.[525]

Dimity Smith argued that corporate self-regulation has gained importance and acceptability in recent years such that corporate governance standards, codes and guidelines as valuable means to govern businesses, continue to gain wider acceptance.[526] Thus, the use of codes of conducts has proliferated in modern regulations of businesses. This reflects especially in the business and human rights field where internationally developed voluntary guidelines, codes of conducts and domestic laws and rules generated by non-state actors, all play significant roles.[527] Peer Zumbansen therefore describes the modern company as both an object and subject of governance, meaning that they are subject to external regulation but that they also govern their internal and external relations.[528] Self-regulation is therefore an essential aspect of the spectrum of strategies allowed by democratic States to regulate the activities of businesses. Companies are encouraged to regulate themselves in some contexts while States must avoid prescriptively regulating them to enhance market efficiency.[529]

In sum, it is appropriate for States to delegate rule-making capacities to businesses so as to make supplementary rules to govern their activities in contexts where State regulations are not applicable or discouraged for strategic purposes and in contexts where they simply have not adopted legislations, for whatever reasons. The OECD Principles of Corporate Governance and UK Corporate Governance Code cited earlier are telling examples showing that democratic societies recognise the autonomy for businesses to govern themselves and this is important to avoid over-regulating the decision-making systems of businesses. In essence, businesses have a certain degree of autonomy or "semi-autonomy" in society and have rule-making capacity to govern issues that also affect stakeholders.[530] In light of the link that the European Court of Human Rights has set between recognised autonomy and the

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[524] ibid, p.14.
[525] Priest (n 256) 238.
[526] Smith (n 70) 378.
[527] ibid.
[528] Peer Zumbansen, 'Rethinking the Nature of the Firm: The Corporation as a Governance Object' (2011-2012) 35 Seattle ULR 1469.
[529] Dominique Thienpont, 'Corporate Governance in the EU: The Commission's Approach', (2004) 1 ECL 57.
[530] Moore (n 73) 720.

power to exercise delegated rule-making, or enforceable rule-making as found in *Barthold*[531] and *Şahin*,[532] businesses that have been fully incorporated and follow corporate governance practices, have the required autonomy to exercise delegated rule-making under State control.

By implication, businesses are in position to make rules to govern issues that are not regulated by States. Rules made by businesses under State approval constitute rules of concerned States and may therefore serve as valid bases for human rights limitations. Thus, if they adopt own rules and use them to take measures in contexts where State regulations are not applicable or non-existent, and in course of executing such measures, they interfere with human rights, they could be held accountable on the bases of such instruments. This contributes to closing the regulatory gap in respect of the human rights performances of businesses and also maintains the supervisory authority of States since the self-regulatory functions of businesses remains subject to State control. This means that by using the doctrine of private delegation, both the State-centred[533] and business-centred[534] mechanisms for regulating businesses in respect of human rights are relevant for the assessment of corporate interference with human rights. This conclusion is developed further in the next section and framed into a proposed concept of 'corporate self-regulatory accountability'.

3.4:3 Towards a Concept of Corporate Self-Regulatory Accountability

Following the observations in the preceding sections, this study proposes a concept of 'self-regulatory accountability' for corporate interference with human rights, holding that:

> In the absence of directly applicable domestic law, corporate interference with human rights could be assessed on the basis of the self-regulatory instrument(s) adopted by the concerned entity, if such an instrument forms the direct basis of the impugned measure, and had been subjected to State authority.

[531] *Barthold* (n 382) para 46.
[532] *Şahin* (n 223) para 84.
[533] This means State regulation of businesses.
[534] This means corporate self-regulation.

This proposition implies a two-way view of corporate accountability for human rights: a State-centric dimension that assesses corporate interference with human rights on the basis of directly applicable domestic laws, and a corporate-centric dimension that assesses corporate interference with human rights on the bases of operational rules that are generated by businesses themselves but have been subjected to domestic authority. In this sense, the concept of law as required to set valid basis for permissible limitations of human rights in business contexts is portrayed in two ways: a primary dimension comprising of directly applicable domestic laws, and where this is lacking, a supplementary dimension, comprising of the operational rules that are generated by businesses themselves under State supervision. This means that if an instrument in the latter category happens to form the direct basis for a measure that interfered with human rights in the absence of directly applicable domestic law, such an instrument could be scrutinised as law to determine the legal basis of the measure and its qualities could be assessed as to whether it is sufficiently clear, predictable and accessible to affected stakeholders. Thus, such an instrument becomes that first step in the process to determine whether the impugned measure constitutes human rights violation.

This idea was developed on the basis of the doctrine of private delegation. By means of this doctrine, operational rules generated by businesses could attain significance as lower-ranking laws and may therefore serve as permissible bases for assessing their interferences with human rights. Thus, by means of the doctrine of private delegation, businesses could be held accountable for human rights violations on the basis of their self-generated rules as contained in the concept of self 'self-regulatory accountability' proposed above.

The 'self-regulatory accountability' model is envisaged as a supplement to the State-centric approach to adjudicating corporate violations of human rights. This supplementary function has been borne out of the necessity created, as discussed in sections 3.1 and 3.2 above, by the inadequacy of the state-centric regulation of businesses, including direct law-making, which has been found to be insufficient to capture all aspects of corporate interference with human rights. Further, businesses prefer to regulate themselves for strategic reasons, and part of this includes making rules to regulate their activities that are not directly regulated by States. In view of these, it has been argued that within the context of businesses, rules generated by businesses also need to be taken into consideration in contexts where directly applicable domestic laws do not exist, to determine the justification of corporate interference

with human rights. Thus, where States do not make laws to govern their operations, businesses may generate rules for themselves to fill any gaps that may be created by the lack of direct law-making by States. In this sense, the 'self-regulatory accountability' model is a supplementary model, expected to be relevant only in contexts where State regulation is not tenable. It is therefore a mechanism to foreclose conceivable inadequacies in domestic laws for assessing corporate violation of human rights.

For the 'self-regulatory accountability' model to be useful for judicial assessment of corporate interference with human rights, rules generated by businesses must be in position to be assessed by adjudicatory institutions. The analysis conducted so far in this chapter suggests that by means of the doctrine of private delegation, operational rules generated by businesses could attain recognition by concerned States and thus become subject to judicial scrutiny for assessment of their interferences with human rights if they are subjected to State supervision. In essence, the self-regulatory model portrays the rule-making capacity of businesses as a matter of a delegated function. This requires that such privately-generated rules must have the approval of domestic authorities to attain relevance and be enforceable by State.[535] This idea is rooted in the paradigm of 'enforced self-regulation' that has been propounded by Ayres and Braithwaite in their work on Responsive Regulation.[536]

In their 'enforced self-regulation' model, Ayres and Braithwaite consider self-regulation as 'enforced' when "the firm is required by the State to do the self-regulation" and "the privately written rules can be publicly enforced"; that is, by domestic State authority.[537] 'Enforced self-regulation' therefore differs from 'self-regulation', in the sense that, unlike self-regulation, 'enforced self-regulation' requires State enforcement of privately written rules. In view of the centrality of State authority in this model, the authors describe 'enforced self-regulation' "as a form of sub-contracting regulatory functions to private actors" which may include the firm playing "some or all of legislative, executive, and judicial regulatory function" under State supervision.[538] They clarified this further by noting that "delegation of legislative functions need not imply delegation of executive and adjudicative function", and argued that "retaining public enforcement (detection and

[535] Section 3.5 below elaborates on the practicality of this model and discusses the implications for assessment of human rights limitations in contexts where corporate rules do not receive State approval.
[536] Ayres and Braithwaite (n 235) 101-132.
[537] ibid. 101.
[538] ibid, 103.

punishment) of privately promulgated standards is likely to be an important component in constituting genuine private self-enforcement".[539] They view this model as a mid-way approach that minimises, albeit imperfectly, the challenges associated with State regulation on the one hand and corporate self-regulation on the other.[540]

The proposed 'self-regulatory accountability' model is fashioned on the logic of the 'enforced self-regulation' model of these authors. Like 'enforced self-regulation', the idea of 'self-regulatory accountability' proposed in this study requires that businesses play rule-making functions to self-regulate in contexts where State law-making is impractical or discouraged, or simply absent. However, unlike the 'enforced self-regulation' model which envisages that businesses may also perform judicial functions based on their rules, the self-regulatory accountability model requires that judicial assessment of corporate measures that affect human rights essentially remains a State function. This means that if businesses generate their own rules and use such rules as bases for taking specific measures that interfere with human rights, domestic authorities preserve the power to scrutinise those instruments to ascertain the justification of the impugned measures and to accordingly hold businesses accountable. Therefore the 'self-regulatory accountability' model implies governmental enforcement of self-regulation. The practicality of this model is explained further in the next section with an example of a State's practice on enforced self-regulation.

In view of the close link of the proposed 'self-regulatory accountability' to the 'enforced self-regulation' model, most of the merits and challenges associated with the enforced self-regulations are also practically relevant for the proposed self-regulatory accountability model. Ayres and Braithwaite argue that rules generated by businesses are comprehensive in coverage, tailored to the needs of businesses, respond swiftly to changing environments and needs, shift the cost of regulation to businesses, foster regulatory innovations and enhance businesses compliance with rules that they have written.[541] In addition to these, another advantage that the proposed 'self-regulatory accountability' model brings is that it would make it possible to use corporate-initiated rules as bases for assessing instances of their interferences with human rights in contexts where direct State law is absent or discouraged. However, the fact that this model also dwells on businesses having to generate rules and

[539] ibid.
[540] ibid. 101.
[541] Ayres and Braithwaite (n 235) 110-116.

States having to give approval for the privately written rules to have significance for human rights limitation makes it prone to some conceivable challenges that need clarification.

Ayres and Braithwaite have identified and defended some conceivable weaknesses in their 'enforced self-regulation' model, some of which have bearings on the proposed 'self-regulatory accountability' model. One difficulty that the authors identified in respect of businesses having to write rules and States having to recognise and enforce such rules as embedded in the 'enforced self-regulation', was that "western jurisprudence might not be able to accommodate privately written rules being accorded the status of publicly enforceable laws".[542] The authors debunked this concern by noting that the "proposal runs with the tide of growing judicial recognition of privately written rules", citing instances where rules written by medical associations, trade unions, businesses and others have been enforced by courts of law, in the United States and beyond.[543] Thus, there is a growing recognition of private rules.

The proposed self-regulatory accountability also requires State recognition and enforcement of privately written rules of businesses. It therefore depends on judicial systems to treat operational rules written by businesses as bases for assessing their violations of human rights. As has been elaborated in section 3.2 above, there have been instances where privately written rules were accepted in judicial proceedings. In section 3.3.3, the jurisprudence of the European Court of Human Rights has been shown to have accepted that privately written rules that complied with the doctrine of private delegation as acceptable or permissible bases for measures that interfere with human rights because they must be subject to domestic authority. Thus, self-regulatory accountability is subject to State recognition.

In addition to this, the authors have also considered the concern that businesses writing rules for themselves would become susceptible to an increased number of rules that State agencies must approve each year.[544] To debunk this fear, the authors compared the costs and benefits associated with universal and particularistic rule-making and suggested that overall, particularistic rule-making is likely to be cost effective and efficient to address issues than

[542] ibid, 123.
[543] ibid.
[544] ibid. 120.

universal laws.[545] They added that businesses that could not write rules for themselves would borrow and adopt rules from other businesses hence the net total number of rules would not necessarily be high or expensive for States to regulate.[546] Surya Deva assessed this claim and maintained that the model would lead to increased costs passed on to end-users.[547] The 'self-regulatory accountability' model also requires State recognition of privately written rules by businesses and raises the challenge of costs associated with the large number of businesses having to make rules. These concerns are largely minimised in light of the proposed 'self-regulatory accountability' model in the sense that unlike the 'enforced self-regulation' model, corporate rule-making is required only in contexts where State laws do not set bases for corporate measures that interfere with human rights. There is therefore an expectation that instances where self-regulatory accountability would be required are relatively fewer.

Further, for an instrument to serve as a permissible basis for human rights limitations, it must have the qualities of being clear, precise, predictable and accessible as explained in section 3.3 above. Therefore, the self-regulatory accountability model is only valid when businesses make their own rules that satisfy these qualities. It is conceivable that most small-scale businesses may not have the disposition to generate operational rules that have such qualities. Related to this, for a business entity to make rules that satisfy the doctrine of delegation, it would have to be in the form that could reasonably be expected to have autonomy to make rules for itself. This is because, as has been discussed earlier, the autonomy of a business entity to make rules principally derives from whether it is in position to implement corporate governance principles. In that sense, minor businesses that cannot be expected to have boards of directors and other components for corporate governance and its processes for rule-making are excluded from the coverage of self-regulatory accountability.

For the proposed self-regulatory accountability to be applicable to all businesses, the idea of 'borrowing' as described by Ayres and Braithwaite, may be applied. This concept holds that businesses that do not have the required rule-making disposition and systems may be assessed on the bases of comparable cases drawn from large businesses or in essence, borrow the rules from larger enterprises within their applicable sectors of operation.[548] In this

[545] ibid.
[546] ibid, 121.
[547] Deva (n 6) 190.
[548] Ayres and Braithwaite (n 235) 121.

way, the smaller businesses are subject to 'borrowing and adoption of rules' within their sectors and are not necessarily expected to generate their own rules. One factor that needs to be borne in mind is that the 'self-regulatory accountability' model is based on necessity as it derives from the inadequacies of direct State regulation to deal with corporate accountability for human rights infringements in all circumstances. Deploying the doctrine of private regulation shows how the self-generated instruments of businesses may also be brought into conformity to the concept of law as required for human rights limitations. It means that businesses may be held accountable for human rights violations in all circumstances, whether directly applicable domestic laws exist or not and thus bridges possible gaps in their accountability for human rights violations. The next section reflects further on this model.

3.5 Practicality and Further Reflections on the Concept of Law

The idea of corporate self-regulatory accountability, proposed in this chapter as part of the concept of law for assessing corporate infringements on human rights, dwells on State supervision of private rule-making. Some insights have already been given into how State supervision and enforcement of private rule-making would work in practice, including its merits and solutions to associated challenges, using the model of 'enforced self-regulation' as proposed by Ayres and Braithwaite.[549] This section presents further reflections on State supervision of corporate rule-making and the consequences that it may have for human rights limitations and accountability if corporate rules do not receive State approval.

The Norwegian model of governmental enforcement of private self-regulation, adopted to regulate the oil sector, provides a typical illustration of how State supervision of private rule-making would work in practice, in line with the doctrine of private delegation as discussed in this chapter. Prior to 1985, the Norwegian government directly controlled the oil industry through prescriptive regulation in which the State sets all rules for businesses. Following some incidents that threatened health and safety in the oil sector, the Norwegian government acknowledged that the oil and gas industry had become more complex and made technical advances that made it difficult for the State to prescribe all rules to

[549] It was on the basis of their model that this study proposed and substantiated the 'self-regulatory accountability model discussed in section 3.4.3 above.

effectively safeguard health, safety and environmental issues.[550] In 1985, Norway passed the Petroleum Activities Act[551] to create a formal hierarchy of authority in which the main oil companies were situated at the apex and given authority to make rules and to regulate the oil sector. [552] Lower in the hierarchy were clusters of other private actors, including contractors and sub-contractors involved in the delivery of services, who were subject to the rules prescribed by the oil companies at the top of the hierarchy. The government then established a collaborative system to monitor the companies with regards to compliance with their own standards, identify areas of adjustments and to punish deviations from standards. [553]

By adopting this approach, Norway moved from prescribing stringent operational rules on health, safety and environmental issues in the oil sector, enabling the companies to adopt rules and take steps as they deem effective in addressing specific operational risks. This means that even though the government is not responsible for prescribing rules for the oil sector, it preserves the power to punish deviations from the standards and norms set up by the private actors within the structure of self-regulation as delegated to them.

Some of the cases reviewed earlier in this chapter also provide examples of how rules that are privately enacted by businesses could practically attain significance for judicial assessments of corporate interferences with human rights. For instance, in the *British Airways* case, it was found that the dress code that was directly generated by British Airways as a private company had no direct basis in the laws of the United Kingdom, but the State overtly showed recognition for that code when it was found to have resulted in restrictions on freedom of religion.[554] In such an instance, the dress code authored by the company may be considered as a product of delegated function carried out by the company on behalf of the State. The code may then be scrutinised in the absence of directly applicable domestic laws, and an assessment may be made as to whether it satisfied the qualities of being clear, precise, accessible and foreseeable by the target addressees. The same may be said in relation to the *South African Airways* and *Wal-Mart* cases in which specific measures taken

[550] Paul Bang and Olaf Thuestad, 'Government-Enforcement Self-Regulation: the Norwegian Case' in Preben Lindøe, Michael Baram and Ortwin Renn (Ed), *Risk Governance of* Offshore *Oil and Gas Operations,* (CUP 2013) 243-273.
[551] Norway passed its first Petroleum Activities Act in 1985 and is now Act No. 72 of 29 November 1996.
[552] Bang and Thuestad (n 550) 243-273.
[553] ibid.
[554] Recalling the case in sub-section 3.2.1 above.

by the companies that resulted in interferences with human rights were not prescribed by the States concerned but were nonetheless approved by them. Those instruments formed the direct bases of the measures taken by the companies and in line with the doctrine of private delegation they could have been subjected to judicial scrutiny as part of assessments and determination of whether the companies violated human rights in those instances. From a human rights perspective, law as required for permissible limitation of human rights, is construed in a substantive sense[555] and the use of vague or unrelated laws as bases for taking measures that interfere with human rights may constitute human rights violations.[556]

Another important caveat that needs to be borne in mind with regards to the arguments in this chapter is that the satisfaction of the requirement of law by means of State recognition and supervision of corporate rule-making does not automatically validate corporate interference with human rights. In accordance with the framework for assessment of human rights limitations as outlined in section 1.3 above, the requirement of law is only one of the basic conditions required for permissible restrictions on human rights. This means that if in a given case a rule adopted by a company receives State recognition, only one condition for justifying the specific impugned measure would be fulfilled. Other requirements must also be fulfilled before the justification of the impugned measure may be established. Thus, the existence of a valid rule enacted in accordance with the doctrine of private delegation in such a context only answers the question of whether the measure is prescribed by law, without independently validating the impugned measure. This means that instances in which businesses interfere with human rights on the bases of operational rules that do not receive State approval constitute unlawful interferences with human rights, given that interferences with human rights must necessarily be underpinned by law to be justifiable.

The *Guiding Principles* made it clear that "the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined by national law provisions in relevant jurisdictions".[557] This suggests that businesses may adopt policies that are favourable to human rights even in contexts where concerned States do not commit to the protection of specific human rights standards. In such contexts, businesses could adopt the International Bill of Rights and the ILO core conventions as

[555] Recalling the explanation given in section 3.3 above.
[556] Svensson-McCarthy (n 72) 59.
[557] *Guiding Principles* (n 3) para 12.

points of reference for taking measures that favour human rights. The *Guiding Principles* add that these instruments constitute the applicable benchmark against which business impacts on human rights are assessed, indicating that direct reference to international instruments on human rights is one way businesses can operate within the ideals of human rights. However, this does not automatically satisfy the requirement of law to justify corporate limitations on human rights. In addition, it leaves open the possibility for businesses to argue that obligations for human rights as framed within human rights treaties are geared towards States, and may thus evade accountability in specific contexts.

For human rights limitations to form part of the human rights obligations of businesses, there must be clear means by which rules generated by businesses for their operations that are not regulated by States, could be recognised by concerned States as a matter of delegated function. As stated earlier, one way that corporate rule-making could be said to have State approval is by means of an international treaty that States commit to, giving overarching notification that in the event that businesses have to generate rules to govern their measures that are not regulated by States, such rules could be deemed as delegated functions and thus subject to judicial scrutiny by concerned States. An international treaty on business and human rights may serve this purpose for clearer regulation of corporate responsibility for human rights. It has also been noted in section 3.4.1 that States express delegated rule-making by means of licencing,[558] privatisation[559] and outsourcing.[560] Further, as discussed in section 3.4.2, the flexibilities that States incorporate into contemporary corporate governance practices also accord businesses the autonomy to make rules and regulate issues that are not governed by States, and this indicates an expression of consent for businesses to make rules and regulate their activities that are not directly regulated by States. In contexts where a State does not regulate or proscribe a specific business measure, it could be assumed that the State approves rules generated by concerned businesses as a matter of delegation, either through direct expression of consent or through tacit and implied consent. In this sense, the need to have domestic validation of corporate rule-making may be realised by means of an obvious lack of regulation, or consent may be derived from licencing, outsourcing, privatisation, or any expressions of State consent for private self-regulation.

[558] Parker (n 243) 3-4.
[559] Metzger (n 423) 1367.
[560] Shapiro (n 448) 389.

The proposed approach for the conceptualisation of law within the context of businesses as espoused in this chapter is expected to make it possible to realise the requirement of law for the purposes of human rights limitations, both in contexts where States directly regulate business activities, and in contexts where businesses self-regulate. This only guarantees that the requirement of law as a condition for permissible limitation of human rights is realised in any context of business operation and enhances the requirement of legal certainty for such purposes. This, though, is only one condition for the justification of human rights limitations and does not independently validate measures that interfere with human rights in pursuit of other interests. In sum, the concept of law as espoused in this study can be realised through direct law-making by States or through delegated rule-making, and given that delegated rule-making depends on State approval to be meaningful, instances where corporate rules do not receive State approval do not meet the requirement of delegation and thus not satisfactory for permissible limitations of human rights. But as noted earlier, there are various means including licencing, outsourcing and privatising, through which State consent for private rule-making may be inferred or derived apart from direct expression of consent.

3.6 Chapter Conclusion

This chapter has considered what the concept of law as required for permissible limitations of human rights implies from a corporate perspective, as part of the enquiry into whether businesses could validly subject human rights to limitations. It has been noted that domestic laws do not always provide the basis for corporate measures that interfere with human rights[561] due to gaps in State regulation of businesses.[562] In view of this, the objective of this chapter has been to find out whether, and if so, how business-made rule could be considered as 'law' for the purposes of human rights limitations. Considering that the term law for such purposes refers to domestic law,[563] the challenge lay in understanding how the rule-making capacity of businesses could be used in this regard without undermining State authority.[564]

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[561] Jägers (n 222) 30

[562] Simons Penelope and Macklin Audrey, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge 2014) 9-16.

[563] See the explanation given by the European Court of Human Rights in *Marper* v *the United Kingdom* (2008) ECHR [30562/04; 30566/04] para 95. For further reading, see Yutaka (n 40) 336-7.

[564] See the introduction provided in section 3.1 above.

Using the jurisprudence of the European Court of Human Rights, it was found that by means of the doctrine of delegation, a private entity may make rules that conform to the concept of law for permissible limitations of human rights if such an entity can be considered as having some recognised autonomy, and if rules so generated are in subjection to State authority.[565] The disposition of businesses to exercise such a delegated function has been analysed, drawing on aspects of corporate governance and regulation. It has been found that businesses are entitled to make rules for themselves and therefore the rule-making capacity of businesses can be considered as delegated function.[566] This suggests that rules generated by businesses and subjected to State authority can serve as relevant bases to subject human rights to permissible limitations in the absence of directly applicable domestic laws and may be used as bases to hold businesses accountable for human rights violations in such contexts.

The chapter concludes in reply to the first sub-question of this study that to a large extent, businesses are in position by means of the doctrine of private delegation to generate rules that may serve as valid bases for subjecting human rights to permissible limitations. This suggests that within the business context, the notion of law includes laws that are directly prescribed by States and where lacking, rules that are generated by businesses in subjection to State authority. On account of this, a concept of corporate 'self-regulatory accountability' has been propounded as a supplementary means for evaluating corporate violations of human rights. The next chapter deals with the second sub-question of the study related to the analysis of the requirement of legitimate aims for purposes of permissible justification of measures that interfere with human rights and how these may be met in corporate contexts.

[565] Recall the discourse in sub-section 3.3.3 above.
[566] Recall the discourse in section 3.3 above.

4

Business Interests as Grounds for Human Rights Limitations

4.1 Chapter Introduction

This study has been considering whether human rights limitations should form an explicit part of human rights obligations of businesses. One of the two problematic issues identified as requiring further investigation to answer this question, apart from the requirement of law as discussed above, is the requirement of the pursuit of 'legitimate aims' as basis for limitations.[567] In his "integrated theory of regulation", Surya Deva noted that within the business and human rights discourse, there is a fundamental need to understand how to establish balance and integration between human rights and business interests.[568] Deva dwelt on the works of other researchers who variously suggested that the application of human rights in business requires consideration of both business interests and human rights issues but they have not clearly spelt out which business interests must be prioritised as competing claims against human rights and how the balance between business interests and human rights may be achieved is they clash or come in conflict.[569] This indicates that there is a need to conceptualise how the balance of interest dynamics in human rights law could apply from a corporate perspective, especially given that the UN *Guiding Principles* espoused responsibilities for businesses but did not explicitly clarify whether and how human rights limitations could apply to corporate discharge of the responsibilities ascribed to it.

As part of the response to the overarching research question noted above, this chapter addresses the second sub-question of what constitutes legitimate aims from a corporate perspective. It is designed to explore whether business interests should be adopted as explicit grounds for permissible limitation of human rights. This chapter thus identifies the core interests of business and evaluates their judicial significance as grounds for human rights limitations, based on the requirement in human rights law that any measures that restrict human rights must pursue legitimate aims to be justifiable. The chapter pinpoints the

[567] It is a general requirement that any measures that interfere with human rights must pursue legitimate aims to be justifiable. This requirement has been problematised from a corporate perspective as set in section 1.5 above.
[568] Deva (n 6) 195.
[569] ibid.

set of core business interests that have bases to be considered as 'legitimate aims' from a corporate perspective, examines the extent to which human rights law accommodates them as bases for permissible limitations of human rights, how they have been considered in human rights related cases against businesses in various courts of law and the challenges that are unique to each of the business interests if used as grounds for human rights limitations.[570]

The ultimate objective of this chapter is to give an insight into whether the current structure of human rights law is adequate for application of human rights limitation as part of corporate responsibility for human rights or whether a separate framework is required for such purpose. This is based on the assumption that for human rights limitations to be directly applicable in business contexts there would be the need to identify the set of business interests that could generally be considered as legitimate competing claims to be balanced with human rights. It is also about whether these interests would have to be of a nature that if cited in judicial proceedings, they would reasonably set grounds for the expectation of courts to apply "balance of interests" tests in adjudicating corporate interferences with human rights.[571] This does not necessarily suggest that the enquiry needs to go into the general question of whether a specific business interest is legitimate *per se*; rather it is about which business interests could be prioritised as grounds for permissible limitation of human rights, whether or not the current structure of human rights law accommodates such business interests as grounds for such purposes or whether *lex specialis* would be required on this specific issue.

To address these questions, this chapter is composed of five sections. The first section gives a synopsis into the set of substantive grounds for permissible limitations of human rights as provided for in the International Bill of Rights and the regional conventions on human rights, pinpointing what human rights law dictates about extending human rights limitations for purposes other than those explicitly permitted. The second section delves into business literature to retrieve the factors considered as most important for business growth, and submits those factors as core interests of business that form the basic framework from where competing claims against human rights may arise in business contexts. Given that the study is interested in the judicial significance of business interests as competing claims against

[570] The core interests of businesses that are of interest here are addressed in section 4.3 of this chapter.
[571] Refer to the framework of tests for assessing human rights limitations as indicated in section 1.1.2 above.

human rights, the third section surveys reported cases from various jurisdictions, identifies those with relevance to the core business interests and draws lessons from them to ascertain how various courts of law consider business interests in human rights cases against businesses and the challenges that are unique to each identified business interest. The fourth section provides further reflections on business interests as grounds for human rights limitations, explaining the caveats in the use of business interests as grounds for human rights limitations. The last section draws lessons from the cases and gives opinion on the adoption of the core interests of business as grounds for human rights limitations.

4.2 The Substantive Grounds for Human Rights Limitations

Apart from the requirement that any measures that interfere with human rights must be prescribed by law as reviewed in the preceding chapter, another requirement is that any such measures must pursue legitimate aims to be justifiable.[572] In human rights law, the factors that are considered as legitimate aims or grounds that may be balanced with human rights are State-centric, and are explicitly listed in various human rights treaties. Thus, whereas businesses interests are obviously legitimate, their standing as grounds for human rights limitations needs to be verified. The premise for this is that permissible grounds for human rights limitations are strictly construed in the sense that human rights law contains limitation clauses that restrict the limitations on human rights for purposes other than those provided.

Such restrictions on the extension of human rights limitations for purposes other than those provided for are evident in the core human rights instruments. For instance, Article 5(1) of the International Covenant on Civil and Political Rights states that nothing in the Covenant may be interpreted as implying for any State, group or person to engage in any activity aimed at the limitation of the rights bodied in it to a greater extent than is provided for in the Covenant.[573] Similarly, Article 18 of the European Convention on Human Rights states that "the restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".[574]

[572] These requirements have been discussed in section 1.3 above.
[573] ICCPR (n 25) Art. 5(1).
[574] European Convention (n 27) Art.18.

As will be shown below, similar expressions are embedded even in the specific limitations that are placed on specific human rights. Therefore, human rights law doctrinally prohibits the extension of human rights restrictions for purposes other than those specifically provided for within the respective human rights instruments. This implies that the question of whether businesses should directly apply the existing limitation clauses on human rights invites the question of whether the purposes or motives that businesses normally pursue and form bases of their interferences with human rights, are consistent with the grounds for human rights limitations as provided in human rights law. To make sense of whether human rights law accommodates business interests, a closer look at the limitation clauses is needed.

Article 29(2) of the Universal Declaration of Human Rights states that human rights are subject to limitations only for "the purpose of securing due recognition of and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Thus, in light of the Universal Declaration of Human Rights, the only permissible grounds for human rights limitations are the rights and freedoms of others, morality, public order and the general welfare of democratic societies. These permissible grounds are broadly worded and may be interpreted in various ways but at face value, they are mainly concerned with State interests. Subsequent development of human rights law followed on the structure of limitations in the UDHR.

According to Article 4 of the International Covenant on Economic, Social and Cultural Rights, States may subject the rights protected in the Covenant only to such limitations that may be compatible with the nature of the specific rights and solely for the purpose of promoting general welfare in a democratic society.[575] The statement that limitations must be compatible with the nature of the rights does not have substantive importance for discussion in this chapter, in that it only suggests that the limitations must not destroy the substance of the rights in question. The only relevant ground for limitations identified in Article 4 is the pursuit of the general welfare in democratic society. Given that Article 4 places a general limitation clause on all the rights embedded in this Covenant, the wording of this clause suggests that economic, social and cultural rights can be limited only in pursuit of the general welfare in democratic society. The only exception is the limitation placed on the right to form and join trade unions in Article 8(1) which states that no restrictions may be

[575] ICESCR (n 26) Art 4.

placed on the exercise of this right other than necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedoms of others".[576] Thus, this Covenant differs from the Universal Declaration in the sense that it does not list all the grounds provided for in the Universal Declaration for general limitations on the set of rights it covers and even in relation to the right to form and join trade unions, this Covenant does not refer to general welfare in democratic societies as in the UDHR.

The International Covenant on Civil and Political Rights is more elaborate in the list of explicit grounds for human rights limitations. It places limitations on the rights to liberty of movement and to choose residence,[577] freedom to manifest religion,[578] freedom of expression,[579] the right to peaceful assembly[580] and freedom of association and to form and join trade unions.[581] This extended list of limitation clauses provides a broader range to identify the permissible grounds for human rights limitations. Regarding the right to freedom of movement and to choose one's residence, the Covenant provides that restrictions are only permissible for purposes of protecting national security, public order, public health or morals or the rights and freedoms of others.[582] In Article 18, the Covenant shows that even though the rights to freedom of thought, conscience and religion are not limited, the freedom to manifest religion is limited, but this limitation is only permissible if necessary to protect public safety, order, health, or morals or the rights and freedoms of others.[583]

The Covenant provides in Article 19 also that the right to hold opinions is not limited but freedom of expression is subject to limitations that are necessary only for respect of the rights or reputations of others and for protecting national security, public order, public health or public morals.[584] Similarly, Article 21 states that no restrictions shall be placed on the right to freedom of associations other than those in pursuit of national security or public safety, public order, the protection of public health or morals or the protection of the rights

[576] ICESCR (n 26) Art. 8(1).
[577] ICCPR (n 25) Art.12.
[578] ibid, Art. 18(3).
[579] ibid, Art. 19(3).
[580] ibid, Art. 21.
[581] ibid, Art. 22(2).
[582] ibid, Art. 12(3).
[583] ibid, Art. 18(1, 3).
[584] ibid, Art. 19(1, 3).

and freedoms of others.[585] Then its Article 22(2) provides that the right to freedom of association and to form and join trade unions shall only be limited in pursuit of national security or public safety, public order, the protection of public health or morals, or protection of the rights and freedoms of others.[586]

Thus, according to the International Bill of Rights, the substantive grounds for permissible limitations of human rights include the following: the rights and freedoms of others, the reputation of others, public health or morals, public order, national security, public safety and the general welfare of democratic societies. One significant observation that needs to be highlighted is that the grounds for limitations are absolute in the sense that in each limitation clause, the Bill of Rights uses restrictive expressions such as these 'rights shall not be subject to any restrictions except those which…' or these rights 'may be subject only to such limitations as…'.[587] Such clauses are herein captioned loosely as limitations or restrictions on limitations, meaning that there is a cap on the purposes for which human rights may be limited in the sense that they may not be limited for purposes other than specifically stated.

The regional human right instruments also take similar approaches to restrict the permissible limitations on human rights as noted of the International Bill of Rights. The European Convention on Human Rights for instance provides elaborate grounds for permissible limitations, tailored for specific human rights, but has restriction on limitations.[588] In relation to the right to respect for private and family life, this treaty permits restrictions only in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[589] In respect of the right to manifest religion, it permits limitations in the interest of public safety, protection of public order, health or morals, or for the rights and freedoms of others.[590] In respect of freedom of expression, it permits limitations only in the interest of national security, territorial integrity or public safety, the prevention of disorder and crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or for

[585] ibid, Art. 21.
[586] ibid, Art. 22 (2).
[587] See for instance the nature of limitation clauses in Articles 12(3), 18(2), 21 and 22(2) of the ICCPR (n 25).
[588] European Convention (n 27).
[589] ibid, Art. 8(2).
[590] ibid, Art. 9(2).

maintaining the authority and impartiality of the judiciary.[591] In respect of freedom of assembly and association, it permits restrictions only in the interest of national security or public safety, prevention of disorder and crime, protection of health or morals, or for the protection of the rights and freedoms of others.[592] Thus, as noted of the Bill of Rights, the European Convention emphasises restrictions on limitations in each limitation clause and states generally in Article 18 that the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purposes other than those prescribed".[593]

The American Convention on Human Rights also takes a similar approach to the provision of permissible grounds for human rights limitations.[594] This Convention recognises similar grounds as enumerated above, for purposes of human rights limitations. For instance, in respect of freedom to manifest religion, Article 12(3) permits limitations only to protect public safety, order, health, or morals, or the rights and freedoms of others.[595] With regards to the right to freedom of expression, the Convention permits limitations in respect for the rights or reputations of others or for the protection of national security, public order, or public health and morals.[596] With regards to freedom of assembly, it permits limitations only in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.[597] The same grounds are permitted for limitations on freedom of association[598] and for restrictions on freedom of movement.[599]

The African Charter on Human and Peoples' Rights is of no exception to restrictions on limitations. In view of the 'claw-back' clauses used in this treaty for the formulation of human rights, it does not contain extensive list of explicit limitation clauses as noted of the other regional instruments and the International Bill of Rights. However, in the few instances where the Charter formulates explicit limitation clauses, it provides grounds for such purposes that are similar to those contained in the other treaties.[600] For instance, the Charter permits limitations on freedom of assembly only in the interest of national security,

[591] ibid, Art. 10(2).
[592] ibid, Art. 11(2).
[593] ibid, Art. 18.
[594] American Convention (n 337).
[595] ibid, Art. 12(3).
[596] ibid, Art. 13(2).
[597] ibid, Art. 15.
[598] ibid, Art. 16(2).
[599] ibid, Art.22(3).
[600] African Charter (n 339).

the safety, health, ethics and rights and freedoms of others[601] and permits restrictions on freedom of movement only for the protection of national security, law and order, public health and morality.[602]

From this synopsis, it is notable that the International Bill of Rights and the regional human rights instruments generally permit restrictions on human rights only in the interest of the general welfare in democratic society, national security, public health, public order, public safety, public morality, prevention of disorder and crime, the rights and freedoms of others and the reputation of others. There are few exceptions, for instance, the African Charter uses ethics instead of morality in Article 11 in respect of limitations on freedom of assembly. The European Convention adds 'the economic wellbeing of the country' in Article 8(2) in respect of limitations on the right to private and family life and adds territorial integrity, prevention of information received in confidence and the maintenance of the authority and impartiality of the judiciary as additional grounds for limitations on freedom of expression.

The restrictions on permissible limitations as embedded in human rights limitation clauses provide clear indication that the core human rights instruments including the International Bill of Rights and the regional treaties provide mainly for State interests and not directly business interests as permissible grounds for human rights limitations. Further they limit the extent to which limitation clauses may be used. The exclusion of business interests becomes obvious when the list of legitimate aims is compared to the core business interests listed in section 4.3 below. The question then arises as to whether business interests should be considered as accommodated or subsumed in the permissible grounds listed above.

One option available to deduce the extent to which business interests are accommodated in the current structure for permissible limitations is to resort to interpretations of the various permissible grounds so as to subsume the interests of business into the list. Of course, some business interests may overlap with some of the State interests. For instance, business growth and the benefits that flow from it may be considered as in the interests of the general welfare in a democratic society. This study however does not recommend considering business interests as subsumed in the list of legitimate aims. It reasons that interpreting the

[601] ibid, Art. 11.
[602] ibid, Art. 12(2).

permissible grounds so as to subsume the interests of businesses is likely to contradict the restrictions that human rights treaties have generally placed on the purposes for which human rights may be subject to permissible limitation. It may also contradict Article 31 of the Vienna Convention on the Law of Treaties which states that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning of texts in their contexts and in light of the object and purpose of the treaty.[603]

On the basis of the foregoing, over-stretching the terms used in the development of human rights treaties to subsume the unique and specialised interests of business as explicit grounds for human rights limitations is not plausible. The permissible grounds for human rights limitations must be taken in their ordinary face value so as to avoid the possibility of making such limitations uncertain and clumsy if applied directly to businesses. Therefore, the study proceeds to identify the unique interests of business and how courts of law construe them in judicial settings so as to deduce their judicial importance for human rights limitations.

It needs to be mentioned beforehand that the use of cases from various jurisdiction is in respect of the fact that corporate application of human rights is State-based and due to the scarcity of relevant reported cases on corporate interference with human rights, relevant judicial decisions from any country are considered as valuable data to throw light on aspects of the research interests. This is also in accordance with Articles 38 (c, d) of the Statute of the International Court of Justice which states that principles of law recognised by civilised nations and judicial decisions are sources of international law. The study therefore takes relevant judicial decisions from any democratic States as sources of insight into business interests in judicial settings. Before going further, the next section identifies the core interests of businesses that may serve as legitimate grounds for human rights limitations.

4.3 The Core Interests of Businesses

Businesses are special organs of society and as such, they have unique interests that they aim at; interests that are largely different from the interests of States. This uniqueness is implicit in the UN *Framework* on Business and Human Rights which states that as economic actors,

[603] Vienna Convention (n 95) 339.

companies have unique responsibilities that should not be entangled with the obligations of States.[604] By this, the *Framework* suggests that the economic nature of businesses places them in a special disposition apart from States and this in turn ought to inform the way we consider their human rights obligations as compared with States. This uniqueness of businesses is important beyond the scope of human rights responsibilities ascribed to them; it also reflects in the core interests that they pursue and the strategic *modus operandi* they adopt to achieve those interests which may conflict with human rights in their operations.

Having presented an overview of the substantive grounds for permissible limitation of human rights as contained in the main human rights instruments, the next step taken in this chapter is to provide a composite view of the core interests of businesses that may serve as the equivalents of legitimate aims that if they come in conflict with human rights, may require balance of interests.[605] Two steps are taken in the two main sub-sections that follow to clarify this issue. The first step involves a review of business literature to identify the core priorities or interests that businesses pursue, with the aim to provide a composite view of what could be generally considered from a corporate perspective as the equivalents of 'legitimate aims' that may serve as competing claims against human rights in business contexts. The second step involves a survey of cases in which the identified businesses interests have been cited in judicial proceedings as the bases for corporate interferences with human rights and to draw lessons for further analyses of the research objectives.

4.3.1 Theoretical Exposé of the Core Business Interests

This section pinpoints the factors that are considered in the literature to constitute the core interests of businesses that may serve as competing claims against human rights. It dwells on analyses from business literature in a bid to articulate what writers in that field suggest as the core factors that are theoretically agreed upon as directly related to business growth and

[604] Framework (n 2) para 6.
[605] Business interests as used her include the factors that businesses prioritise as important to them for growth and the pursuit of which may interfere with human rights.

profitability.[606] The starting point for analysis so as to identify the core interests of business is to address the question of what constitutes the purposes or legitimate motives of business.

The question of what businesses are made for and expected to achieve has long been at the centre for academic discussion. In her work on 'The Purpose of the Corporation', Marilise Smurthwaite addresses this question and provides some useful insights into what various schools of thought have agreed upon as the incontrovertible purposes of businesses.[607] In this work, Smurthwaite reviews and summarises the core theories and debates among scholars as to what constitutes the rightful purpose of business and corporate responsibility in general. This makes it easier to make sense of theoretical positions on the priorities that businesses are expected to pursue in society and why they prioritise certain interests over others. In an effort to provide such a summative overview of academic discourse on what businesses are established to achieve, Smurthwaite first recounts the conclusion arrived at by pioneering researchers such as Berle and Means who noted that the purpose of the corporations is to serve all of society. Smurthwaite considers this position as inconclusive, noting that the debate on the purpose of the corporation rather hinges on whether the corporation (or business in general) is only to make profit for shareholders or whether in addition to profit-seeking, it has extra objectives.[608]

Smurthwaite points out that scholars within the classical liberal economic school of thought and those adhering to what is referred to as the 'financial theory of business', believe that the purpose of business is only to make profit. One of the most prominent and often cited proponents of this view of the corporate purpose is Milton Friedman. In his essay published in the New York Times Magazine issue of September 13, 1970, Friedman claimed that "there is one and only one social responsibility of business to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud".[609]

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[606] The list of these factors will be adopted from Blowfield and Murray (n 40) 135-136.

[607] Marilise Smurthwaite, 'The Purpose of the Corporation' in Oliver Williams (ed) *Peace Through Commerce: Responsible Corporate Citizenship and the Ideals of the United Nations Global Compact* (Notre Dame 2008).

[608] ibid 25.

[609] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' (Sept.1970) NY Times.

Smurthwaite recalls that other writers have similar views like Friedman, believing that the purpose of business is to seek profit maximisation and other pursuits are distractions.[610]

According to Smurthwaite, conceptions at the other end of the spectrum take a broader view of the purpose of the corporation. She refers to thinkers at this other end as the 'profit-plus-extra' contingents who variously advocate that in addition to profit seeking, the corporation has broader purposes in its relationship with society.[611] Adhering to this view are various schools of thought on why business should have more than the profit motive. For instance, theorists of Catholic Social Thought contend that even though business has a legitimate role to seek profits, it exists as a community of persons seeking to satisfy their basic needs and form a particular group in service of the whole community.[612] Similarly, theorists of corporate citizenship, notably Goodpaster, believe that the corporation must be a good citizen who must not only perform its functional role but must also share responsibility for the common good of the community as a whole.[613] Others take ethical views of the corporation, suggesting that business must be ethical and do more than profit-seeking. A host of theoretical variations exist, including theories of sustainability, within the broad realms of corporate social responsibility (CSR) and generally, these theories emphasise the responsibility of businesses to satisfy the economic, social and environmental bottom-lines.

The core point that resounds from this review of Smurthwaite's work is that there is a consensus among scholars that businesses have a legitimate aim to seek profit; no theorist has ever disputed the profit motives of business. However, the contentious issue is whether business should have more than the profit motive. After her elaborate review of differing views on the purposes of business, Smurthwaite concluded that the larger number of scholars agree that apart from profit seeking, businesses must serve other priorities in society. This makes the profit-plus-extra position the dominant view of the purpose of the corporation. But there is no agreement on what exactly forms part of the 'extra' purposes of business apart from the profit motive.[614] Smurthwaite therefore opined that while the profit-

[610] Smurthwaite (n 607) 25.
[611] ibid, 26.
[612] ibid.
[613] ibid, 27.
[614] ibid, 29,

making role of business is clearly important and generally agreed upon, it must not eclipse the satisfaction of stakeholder interests, be employees or others affected by its policies.[615]

Thus, businesses have a legitimate interest to seek profit for shareholders but that is not all; they must also pursue other priorities in society beyond the profit motive. Other writers have given support for this position. Frynas for instance reviews academic perspectives on the roles that business is expected to play in society and confirms that the stakeholder theory has become the dominant theoretical perspective within the corporate responsibility debate.[616] The stakeholder perspective directly opposes the stockholder or shareholder perspective that hinges on the profit motives of business. It presupposes that apart from its interest to pursue profits for stockholders, business must also pursue motives that satisfy the needs of "any group or individual who can affect or be affected by the achievement of the organisation's objectives', including employees, customers, suppliers, shareholders, creditors, governments and NGOs.[617] It has therefore become increasingly popular among researchers that business can no longer concentrate on profit-making and that the stakeholder perspective constitutes the ideal managerial theory of how business works and is most suited for integration of business, ethics and social considerations.[618] This dominant perspective extends business interests beyond the profit motive, leading to a surge in other theories that seek to justify the extension of business motives beyond profit. These include theories of corporate compliance with law, corporate community investment, corporate environmental management, corporate sustainability and others, variously emphasising that business must among other things satisfy the triple-bottom-line of economic, social and environmental development.[619] Importantly, the notion that business must have more than just the financial interests implicitly sets the prelude to the contemporary discourse on business and human rights.[620]

The direct implication of the extension of corporate motives beyond profit-seeking is that factors that may come within the ambit of corporate interests are extensive and indeterminate. For the purposes of this study, however, it is essential to pinpoint those

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[615] ibid, 43.
[616] Frynas (n 45) 15.
[617] ibid.
[618] Edward Freeman and Ramakrishna Velamuri, 'A New Approach to CSR: Company Stakeholder Responsibility, in Andrew Kabadadse and Mette Morsing (Eds), *Corporate Social Responsibility: Reconciling Aspirations with Application* (Palgrave 2006) 11.
[619] Blowfield and Murray (n 44) 24-29.
[620] John Ruggie noted this in his the introductory remarks to the *Framework*. See *Framework* (n 2) para 2.

factors that are generally considered as core interests of business and can be listed as such as factors that must be considered in light of the human rights obligations of business. The research interest of the present study does not call for review of the entire theoretical extension of business interests beyond profit-seeking. It suffices to note, as drawn from the preceding review, that businesses have diverse interests that may underpin their conducts in different spheres of operation and that such interests may come in conflict with human rights. However, there is also a need to scale down to those factors that may be considered as the core interests of business and are most likely to constitute generally acceptable legitimate aims from a corporate perspective.

In order to narrow down on the specifics of such core interests of business, the work of Blowfield and Murray on *Corporate Responsibility: A Critical Introduction* provides a useful platform.[621] In this work, Blowfield and Murray have assembled the measures or indicators of business performance, defined as the various conditions that business managers usually attend to so as to enhance business growth and development.[622] According to these authors, business literature generally point to ten such factors, seen as the core priorities that businesses pursue in order to enhance business growth and actually determine the overall measures of business success.[623] These factors include *shareholder value*, defined as the changes in a company's stock price and dividend, *revenue*, defined as the changes in a company's income due to pricing, market share and new markets, *operational efficiency*, defined as "a company's cost-effectiveness in turning inputs into productive outputs", *access to capital*, defined as "a company's access to equity and debt capital" and *customer attraction*, defined as "a company's ability to attract and retain customers".[624]

Other factors include *corporate reputation*, defined as how others perceive the company and comprises of the image or value that stakeholders assign to a company and its brands or products, *human capital* which constitutes the company's ability to attract, retain and develop knowledgeable and skilled workforce or employees and *risk management* which deals with exposure of a company's assets to short and long term risks.[625] The rest of such factors include *innovation* which describes a company's ability to invent so as to maintain

[621] Blowfield and Murray (n 44).
[622] ibid, 135-136.
[623] ibid, 136.
[624] ibid.
[625] ibid.

competitive advantage in its service or product environment by making better products, services and business methods and last but not the least is the *licence to operate*, defined as a company's ability to maintain acceptance among its stakeholders to operate effectively.[626]

Thus, from the work of Murray and Blowfield, the factors that are generally acknowledged as central indicators and drivers of business growth include shareholder value, revenue, operational efficiency, access to capital, customer attraction, brand value and reputation, human capital, risk management, innovation and licence to operate. These authors acknowledge that there may be other factors that enhance business growth that are not sufficiently captured by this model, however, these factors are still the most central or core factors noted in literature as the most important concerns for business managers to manipulate in order to enhance the growth of business and enhance profit maximisation.[627]

It is apparent that the factors listed above are directly linked to financial performance and therefore the use of the term business growth relates to the financial bottom-line. As stated earlier, business performance involves more than financial performance. How then are these ten factors singled out as the core interests of business? The criterion for selection is embedded in what is commonly known as the 'business case'. Casually, this is described herein as the relationship between non-financial factors and the financial performances of firms. According to Blowfield and Murray, even though financial performance is only one aspect of business performance, most effort has been on how to demonstrate that the non-financial aspects of business performance, notably elements within corporate social responsibility sphere, could help or hinder the financial performance of the firm, or in order words, how monetary values are assigned to non-financial motives.[628] The business case suggests that whether or not a business considers a factor as significant for attention primarily depends on whether that factor contributes to the financial bottom-line. Researchers have therefore focused attention on proving the correlation that exists between the social and environmental bottom-lines of business performance and the financial bottom-line as a way to prove that businesses have justified reasons to pursue non-financial motives.

[626] ibid.
[627] ibid, 136.
[628] ibid, 134.

Various studies indicate that the specific elements of corporate responsibility that have effects on financial performance of firms include ethics, values and principles, accountability and transparency, eco-efficiency, environmental product focus, community development, human rights, quality work environment, stakeholder involvement and quality of engagement with external stakeholders.[629] According to Blowfield and Murray, these factors may have positive, neutral and negative correlations to the elements of business performance.[630] A study on the 'Business Case for the Green Economy', by the United Nations Environmental Programme (UNEP)[631] in collaboration with SustainAbility[632] and Globescan[633], has found that "business strategies that reflect the attributes of a resource efficient and green economy can positively impact on the financial metrics of companies of all sizes", including sales growth, duration of sales, capital expenditure, profit margin, tax rates and cost of capital.[634] Therefore, the concept of the business case as geared towards demonstrating to business that non-financial motives may translate into improvements in their financial performances, does not necessarily undermine the profit motives or financial performances of businesses. Rather, it points to the primacy or supremacy of growth in financial performance in the whole notion of business performance and viability.

A summary of the relation that the profit motive has with non-financial motives is helpful to identify which interests of businesses may be considered as the core interests. From the preceding discourse, it is apparent that no theoretical perspective on corporate responsibility actually disputes the need for businesses to pursue the financial motives. It cannot be argued that businesses should not make profits at all because that is the prime foundation of business. Also, there is general understanding that businesses do not only have to pursue the profit motive but that they must pay attention also to social and environmental issues beyond the profit motives as theorists of the business case suggests. There are, however, disagreements with regards to whether businesses should be concerned with issues beyond

[629] ibid, 135-140
[630] ibid.
[631] UNEP is the UN agency that leads and promotes coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as advocate for the global environment.
[632] SustainAbility is an independent think tank and strategic advisory firm working to facilitate business leadership on sustainability, curled from their website http://www.sustainability.com/, visited 25/4/15.
[633] Globescan is a foundation that provides "evidence-led strategic counsel that understands the drivers, dynamics, and outcomes of these relationships and networks, throughout the global business, NGO, and multilateral organization communities", curled from the website http://www.globescan.com/ visited 25/4/15.
[634] UNEP, 'The Business Case for the Green Economy: Sustainable Return on Investment' (2012) 3.

the profit motive as stockholder theorists seek to suggest and even stakeholder and other theorist who believe that businesses should have more than the profit motive are not certain about what those 'extra-motives' of business should actually entail. A typical example of this disagreement reflects in the business and human rights discourse. Even though it is generally agreed that businesses must respect human rights, there are debates with regards to whether businesses should have voluntary or mandatory obligations for human rights.[635]

On the basis of the preceding narrative, the primacy of the financial performance of business as embedded in the concept of the business case provides a significant clue to identify the core interests of business as those factors that are agreed upon as directly determining or affecting the financial performance of businesses. These include the shareholder value or profit motive, revenue generation, operational efficiency, access to capital, customer attraction, brand value and reputation, quality human capital (also known as human resources, personnel or employees), risk management, innovation and the licence (both legal and social) to operate.[636] For the purpose of this study, these factors are adopted as the 'core interests' of business because of their direct link to financial performance of business. They are taken as the factors that must be considered as competing claims against human rights in business contexts. This does not suggest that these factors must trump human rights. Rather it suggest that these are the factors that businesses would pursue at all cost to enhance growth and are therefore the core factors that constitute competing claims against human rights in business contexts and that conflicts between these interests and human rights would require appropriate balancing of interests.

The focus on selecting some factors as the core interests of businesses that may have to be considered in tandem with human rights is in accordance with how human rights law is designed for States. Even though States have diverse interests that they may like to pursue, only a few factors that are most important to them have been selected and codified into human rights treaties as the legitimate aims the pursuit of which States may apply limitations on human rights.[637] Similarly, it cannot be said that businesses may interfere with human rights in pursuit of any interests imaginable. Such an assumption would make the application of human rights in the business context vague and unpredictable. Rather it is

[635] This debate will be revisited in the last chapter of this thesis.
[636] Blowfield and Murray (n 44) 136.
[637] Recall the review in section 4.2 above.

plausible to focus on the interests that matter most, and these are logically found in the general agreement on the primacy of the financial motives of business. This does not imply that non-financial motives are not important and may not call for balance of interests when in conflict with human rights. Non-financial motives are not prioritised into the list of core interests because there is no strong theoretical consensus on the extra motives of businesses beyond the profit motives. Also, businesses may have varied notions of what non-financial motives they may pursue and how they should prioritise such factors in specific operations.

In concluding this section, it is taken as given that if a business entity submits in judicial proceedings that an alleged interference with human rights is in pursuit of shareholder value, revenue generation, operational efficiency, access to capital, customer attraction, brand value and reputation, human capital, risk management, innovation or the licence to operate, it would call for the balance of interests test. These are the 'equivalents' of legitimate aims' that may be called upon to serve as competing claims to human rights in business contexts. The next sub-section resorts to analyses of cases in which the core business interests have been cited in judicial proceedings and the lessons that may be drawn for some insights into what these core interests may look like in judicial contexts if they were adopted as legitimate interests of businesses in binding framework on the human rights obligations of business.

4.3.2 Outlook of the Core Business Interests in Judicial Assessments

The factors identified for analyses as the main determinants of business growth and development and are therefore the core interests of businesses include shareholder value, revenue generation, and operational efficiency, access to capital, customer attraction, brand value and reputation, human capital, risk management, innovation and licence to operate.[638] The objective of this chapter is not necessarily about whether the selected core business interests may conflict with human rights and how such conflicts may be resolved. It is taken as given that these interests may conflict with human rights, and that finding the appropriate balance between these and human rights would depend on the context and facts of specific cases. Rather, the main and necessary point of interest is whether these factors may have any

[638] These factors, what they mean and their related literatures are discussed below in different sub-sections.

inherent dispositions that, if adopted as competing claims against human rights, may pose unique challenges in judicial determination of their balances with specific human rights. The question of whether these factors may pose unique challenges in judicial assessments is loosely described here as their judicial significance or relevance in relation to human rights.

In order to make sense of the significance and challenges that each of these core business interests may pose in relation to assessment of corporate interference with human rights, this section reviews cases to elaborate on each of these factors in terms of (i) whether they have the propensity to set bases for litigations and (ii) whether they have any unique dispositions that make it difficult for judicial assessments. The expression 'propensity to set bases for litigations' is meant to convey the idea of whether businesses actually pursue these specific interests and as a result of such pursuits they take measures that interfere with human rights to the extents that require judicial intervention. Since part of the aim of this chapter is on how to determine appropriate balance between human rights and business interests, cases in which business interests have been cited, and the merits on the balance between business and human rights interests have been considered, are prioritised for analyses in this section. Each of the core business interests and cases reflecting on them are presented in separate headings and the lessons to be drawn from them are shown at the end of each discourse.

4.3.2.1 The Profit Motive

One of the main factors that determine business growth is the shareholder value. Shareholder value is defined as the "changes in a company's stock price and dividends" and due to its direct link to the growth of businesses, it is one of the main interests that businesses prioritise as very important for them.[639] The value that businesses create for shareholders is directly dependent on the profits that they generate and therefore profit-maximisation is the main factor that businesses pursue in order to create stock value for shareholders. In view of this, the primary step that business managers attend to in order to foster business growth is to maximise profit. Profit is defined as 'revenue minus costs', that is, the net income a firm retains after its costs for providing goods or services are deducted from its total revenue in a

[639] Blowfield and Murray (n 44) 136.

period of time.[640] Due to its centrality to business growth and to determine what businesses do and how they do it, profit-maximisation is considered as the factor that imposes order and discipline in business organisations, fosters cost-reducing innovations and encourages savings and risk-taking.[641] Profit is of course, also considered a legitimate reward for the inherent risk of investing capital in a business.

Businesses legitimately attach much seriousness to the profit motive, but the pursuit of this motive may lead them to take measures and adopt policies that, within the mindset of business management, are normal strategies, but in hindsight, may have implications for human rights. Robert Clark was concerned with how businesses react to threats to their ability to make profits and thereby adopt strategies to save cost and retain profits that may have spillover effects on human rights. He observed how the newspaper industry in the United States had reacted when it was hit by threats to profit-making and noted that even though the newspapers were making significant profit for many years, as soon as the economic down occurred, they started cutting back on expenses so as to generate greater profit for stockholders.[642] He noted specifically how the threats to profit-making had caused the Wall Street Journal to immediately close down one of its main branches, lay off reporters in a number of subsidiaries and forced several senior officials to take early retirements.[643] Similarly, the Los Angeles Times stopped selling newspapers in California and a news company in Florida laid off forty-six employees in a single week.[644]

When faced with threats to profitability, businesses take further measures such as relocating productions and services to areas with cheap labour, employee lay-offs, wage reductions, targeted or suspended promotions, transfer of resources to different locations, closure of branches and forced leave without pay. These are normal businesses practices that may be deployed to save costs and increase profit margins. In a study conducted for the OECD, Bravo-Biosca, Criscuolo and Menon noted that the financial motive of business is such an important driver of growth that it permeates the entirety of business conducts and affects the

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[640] Profit analyses, see Martin Fridson and Fernando Alvarez**,** *Financial Statement Analysis: A Practitioner's Guide* (John Wiley and Sons 2011).
[641] ibid.
[642] Robert Clark, 'The Founding Fathers and the Bottom Line' (1991) 17 SRJLM 31.
[643] ibid.
[644] ibid.

re-allocation of resources within and across industries.[645] However, these 'normal' business practices may have direct or indirect conflicts with the ideals of human rights.

As an analogy, a company may decide to dismiss some employees to reduce costs and increase its profit margin, but the way it selects who to dismiss and who to retain may create instances of differential treatments. If differential treatment is not carried out properly, it may lead to discrimination. Similarly, a company may be so obsessed with the need to generate profits that the human rights consequences of planned projects may be poorly assessed or forged to pay way for the commencement of projects. In such circumstances, there is increased probability that the motivation to make profits may lead to conflicts with the rights of persons living within the catchment areas of business operations.

Due to the importance that businesses attach to profit-maximisation, there is a conceivable possibility that the pursuit of profit-making may lead them to take measures that interfere with human rights. Since profit-seeking is a legitimate businesses interest, instances in which business pursuit of profit-seeking conflicts with human rights, judicial assessments for balance of interests would be required. Such conflicts would depend on the context of events but there is the chance that they may occur. In view of this, the profit-motive is one of the core interests of business that needs to be incorporated into the formulation of permissible grounds for human rights limitations in business contexts. This implies that if businesses attain the right to utilise human rights limitations in course of the discharge of their obligations, cases may arise in which the balance would have to be struck between the profit motive and the specific human rights interests at risk. For the purposes of this study, it is the propensity of the profit motive to conflict with human rights that matters. The next point is whether this particular businesses interest could pose any unique challenges in judicial determination of its balance with specific human rights.

In order to make sense of whether judicial assessment of the profit motive could have special challenges, it is important to analyse cases in which the profit motive has been cited as the bases for a disputed corporate interference with human rights. After reviewing a number of cases, it has been found that indeed, the profit motive has been cited in various

[645] Albert Bravo-Biosca, et al, 'What Drives the Dynamics of Business Growth?' in *OECD Science, Technology and Industry Policy Papers* (OCED 2013) 7.

instances as the basis of alleged corporate infringements on human rights. Most of the cases have been dismissed on jurisdictional grounds and therefore do not provide useful insights into judicial assessment of the profit motive in relation to human rights and are therefore not used for analyses. For instance, the case of *Shimari* v *CACI International* brought by Iraqi nationals against private security firm CACI International for alleged crimes committed against them in Abu Ghraib prisons and heard in the US Court of Appeals of the Fourth Circuit in 2012, had made some reference to the financial motives of business. Similarly, the of case *Abtan* v *Erik Prince* brought by Iraqi citizens against the Blackwater group of companies for alleged arbitrary killings, and heard in the United States District Court for the Eastern District of Virginia Alexandra Division in 2009 also referred to profit-seeking as the motive behind the company's actions. Such cases were dismissed and not used for analyses.

Some other cases have been concluded by the adjudicatory institutions and therefore provide some insights in respect of the profit-motive. One such case in which the profit motive of business was cited was in a quasi-judicial proceeding at the South African Human Rights Commission, brought against Anglo Platinum for alleged human rights violations it had committed during a re-location exercise it embarked upon in the Limpopo Province of South Africa to pave way for its platinum mining activities in the area.[646] The South African Human Rights Commission was mandated to mediate and investigate the conflict and after having considered the merits of the complaints, it issued a report with detailed recommendations.[647] A memorandum appended to the report indicated that the main crux of the conflict was that the affected communities perceived Anglo Platinum as pursuing its profit motives at the expense of human rights and as a result, one of the affected communities, the Sukuruwe Community, vehemently resolved to fight against the company's profit motives in order to put people before profit.[648] Thus the main task that confronted the Commission was to resolve a conflict between the financial motives of the company and the set of human rights of persons in the communities directly or implicitly affected by the allegedly forceful relocation exercise conducted by the company.

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[646] South African Human Rights Commission report titled, 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo, athttp://www.reports-and-materials.org/sites/default/files/reports-and-materials/SAHRC-report-on-Anglo-Platinum-Nov-2008.pdf, Accessed 29 January 2015.

[647] ibid, Annex 2.

[648] ibid, 96.

The report indicated that the Commission had taken a balance of interest approach to resolve the conflict that arose between the profit motives of the company and the rights of the local communities. This became clear as the Commission made recommendations that could help the communities to become aware of their rights and obligations, and the company to clearly design its operations in such a way as to ensure that its financial pursuits in the area would not conflict with human rights. The Commission proposed that there was the need for community education for the people to understand and access their rights, noting that it would be of great benefit to conduct a general education programme in all affected communities in South Africa who had to be relocated, but ideally prior to resettlement consultations, with the objective of raising human rights awareness of all rights and obligations arising from proposed or existing resettlement processes and the knowledge of all grievance redress mechanisms.[649] The Commission noted that the aim of its proposition was to assist extractive industries who would undertake community relocations in pursuit of mineral wealth. It explained further that even though it could not confer broad obligations on the company to respect, protect and promote the rights of persons in its operating area, the allegations against Anglo Platinum demonstrate the reputational and financial risks of not engaging with potential human rights impacts.[650]

The case was resolved through an arbitration process and as a consequence the full details of the settlement have not been published on how the Commission carried out the balance of interest exercise that led to its final recommendations. It is however apparent that forcefully relocating communities to pave way for business activity could conflict with a constellation of human rights issues that are connected to people's places of abode and such rights may be impeded in forceful relocations. As an example, forcefully relocating people could directly affect their livelihood, cultural life, family life and other rights that are protected, for instance, by Articles 10, 11 and 15 of the International Covenant on Economic, Social and Cultural Rights.[651] Given the nature of rights involved in this case, a balance of interests approach rather than an outright prohibition of the company's measures, was required to resolve the conflict in pursuance of Article 4 of the Covenant which sets the basis for balance of interest in such situations. This Article stipulates that all rights within the spheres of economic, social and cultural rights may be subjected to permissible limitations for

[649] ibid, 93
[650] ibid.
[651] See UN Doc. A/6316 (1966) or 993 UNTS 3.

purposes of promoting the general welfare in democratic society. Thus, the human rights context of this case disclosed an instance where a balance of interest approach that conforms to the modalities for human rights limitations was required to resolve the conflict.

From a human rights perspective, the Commission took the right approach to address the conflict, but taking the report as it has been published, it appears that the Commission's efforts were not satisfactory to balance the competing claims that arose. The Commission did not attempt any systematic analyses of the issues as human rights law would require, such as to provide answers to such factors as the nature of the law that prescribed the relocation, the legitimacy of the aims pursued by the company and whether there was reasonable proportionality between the means deployed by the company in relocating the people and the ends it sought to achieve. The company also did not present any submissions contradicting the claims submitted by the communities, who also did not substantiate their claim that the profit motive actually underpinned the company's conducts. Somehow, there was understanding that the conflict required a balance between the financial interests of the company and the rights of the affected communities but the procedures through which the case was resolved were not clear. The possibility that such a case scenario may occur as businesses commit to human rights obligations shows that there is a need for an established framework that sets the modalities and guidance for adjudicatory bodies to apply in cases where the profit motive is cited as the bases of corporate interference with human rights.

Due to the primacy that businesses attach to profit-making, they may sometimes undertake complex investment strategies that their stakeholders may not be able to grasp and such situations may lead to cases that require judicial interventions. A case arose in this vein between Biwater Gauff Tanzania Limited, BGT, and the United Republic of Tanzania. The case, arbitrated in 2008 by the International Centre for Settlement of Investment Disputes, ICSID, involved a conflict between the right of BGT to protect its investments in a water project in Tanzania and the right of the people in its area of operation to have access to clean water.[652] In 2003, the World Bank, the African Development Bank and the European Investment Bank awarded a funding to Tanzania for a water and sewerage infrastructure in Dar es Salaam, on condition that Tanzania appointed a private operator to manage the

[652] *Biwater Gauff (Tanzania) Ltd* v *United Republic of Tanzania* (2008) ICSID [ARB/05/22].

system.[653] Tanzania accordingly invited tenders and Biwater International Ltd, incorporated in England and Wales and its partner HP Gauff Ingenieure GmbH and Co KG-JBG (Gauff), jointly won the bid and were contracted to operate and manage the project. In June 2005, the government of Tanzania seized the assets of the local subsidiary of BGT that was established to operate the project, installed a different management and deported the senior management of BGT.[654] BGT considered those events as constituting expropriation of its investment and amounted to a breach of Tanzania's international and domestic obligations in respect of investment protection.[655] As a result, in August 2005, BGT complained to the International Centre for the Settlement of Investment Dispute, to arbitrate the case.[656]

During the arbitration proceedings, one of the main arguments advanced by the State to justify its abrogation of the contract was that the project did not constitute an investment within the meaning of the term because it was not intended and designed to be a profit-making venture. The State argued that BGT designed the project as a 'loss-leader', that is, an inevitably unprofitable venture that was intended to further BGT's possible future projects and as such, it could not be regarded as an investment under the Convention for investment protection.[657] BGT agreed it knew that in the short term the project was loss-making, however, it anticipated that the project would generate profits in the mid to long term range.[658] The arbitral tribunal agreed with BGT and rejected the use of direct profit-maximisation as a strict definitive feature of an investment. The tribunal argued, among other things that if a party has ulterior motives for undertaking a project, and perhaps anticipates only a long-term and indirect benefits such as other profitable opportunities, it does not disqualify itself from investment protection.[659] It added that it was unnecessary to investigate into the economic profiles and the motivations behind any given projects in order to determine whether such projects constituted investments for protection under the treaty.[660]

[653] ibid, para 3.
[654] ibis, para 15.
[655] ibid, para 16.
[656] ibid, para 18.
[657] ibid, para 307.
[658] ibid, para 237.
[659] ibid, para 321.
[660] ibid.

The human rights context of the case involved more than analyses of investment protection. The *Amici*[661] submissions to the tribunal pointed out that the main reasons behind the State's abrogation of the contract were sustainable development and human rights concerns, and they moved the tribunal to look at the case from that particular perspective rather than purely under the terms of international investment protection, bearing in focus that the core of the case concerned the rights of the public to have access to clean water.[662] The *amici* argued that human rights and sustainable development considerations should condition the nature and extent of investor responsibilities in the case, noting that projects intimately related to human rights should impose the highest level of responsibility on the investor instead of seeking to protect its financial interests under international law.[663] Here, a balance of interest approach was sought by the *amici* to weigh the people's right to clean water and the prospective profitability of Biwater's investment. By means of submitted motions, the *amici* sought to place human rights above the investment interests of the company, contending that the company failed in its responsibility to take adequate care in its investment practices and thereby posed threats to human rights.[664] On the bases of such failures, the *amici* moved the tribunal to rule that the government's abrogation of the lease contract conformed to its obligations under human rights law to provide access to water for its citizens.[665]

BGT on the other hand stuck to the terms of investment protection. It contended that the government's abrogation of the investment contract failed to pursue legitimate public purpose related to internal needs of the Republic and amount to discrimination against the company[666] and an interference with its reasonably-to-be-expected economic benefits.[667] The State retorted that the company failed to comply with standards and as a result it posed a threat to public health and welfare and that failure justified the abrogation of the contracts, considering the important bearing that the issue had with human right.[668] Thus, the company suggested that the States' obligations under international investment protection law ought to trump the domestic human rights concerns raised but the State suggested, among other

[661] The tribunal described the *amici* as a group of human rights experts and NGOs with interest in the case.
[662] ibid, para 379.
[663] ibid.
[664] ibid, para 381.
[665] ibid, para 387.
[666] ibid, para 397.
[667] ibid, para 417.
[668] ibid, para 436.

things, that its internal human rights concerns ought to trump the terms of investment protection. This placed burden on the tribunal to choose the path to resolve the case.

The arbitral tribunal restricted itself to its mandate under the investment treaty and found a series of the Government's breach of its obligations outlined in the treaty.[669] It stated among other things that in all the circumstances, there was no necessity or public purposes to justify the government's interference with the company's investment rights.[670] Thus, the Arbitral Tribunal failed to take a human rights-focused approach to resolve the case, due in part, to its fixation on the terms of the investment treaty and even though the *amici* sought to move the Tribunal to take such an approach, it did not. A human rights-based approach would have added value in many ways to the resolution of the conflicting claims in this context.

From a human rights perspective, protection of access to water and health concerns cited as the bases for the State's abrogation of the licence are socio-economic rights. Article 11 of the International Convention on Economic, Social and Cultural Rights recognises the right of everyone to have adequate standard of living. This right embraces adequate food and water, and requires States to seek international cooperation to secure this right for everyone within their respective jurisdictions.[671] However, Article 4 of this Covenant permits some limitations on socio-economic rights for the purposes of promoting the general welfare in democratic society. Thus, the context of the case required a concerted balance between human rights and the prospective profitability of the company. It did not disclose a context where interference with the said rights was absolutely prohibited. However, the framework of international investment protection law used to resolve the case did not provide sufficient tools for comprehensive balance of the said rights with the economic interests of investors, leading the proceedings to veer from consideration of the human rights aspects of the case.

This case illustrates that the contemporary international investment regime is ill-equipped to resolve conflicts between investment interests and human rights due to the disjuncture between investment protection and human rights. Reiner Clara has noted that the role of human rights in investment arbitration continues to rise but as to whether the arbitral system is suited to deal with breaches of human rights remains controversial due to differences

[669] ibid, para 814.
[670] ibid, para 515.
[671] ICESCR (n 26) Art. 11.

between international investment law and human rights law.[672] For instance, whereas international investment law applies an all-or-nothing principle in investment arbitration, such that an investor totally secures its interests in the event of a conflict between its rights and other interests, human rights law strives to get appropriate balance of proportionality between conflicting interests so as to incorporate human rights considerations into the pursuit of other interests.[673] The London School of Economics observed in support of this that the international investment arbitration system may not reflect human rights impacts and may limit the ability of States to regulate businesses for the protection of human rights.[674]

Cases such as the above indicate that if the profit motive is adopted as one of the legitimate grounds that businesses may cite as bases for taking measures that interfere with human rights, there would be the need to bear in mind that the profit motive, the common strategies that businesses adopt to generate profits and how they might interfere with human rights, may be misconstrued. For instance, some stakeholders of businesses would need to understand that businesses may invest in projects that do not make profits instantly but may be used as means to further projects that may generate profits. There would also be the need to clarify instances where profit seeking is permissible and where it is not. For instance, as the *Anglo Platinum* case suggests, stakeholders may easily vilify a company for attempting to make profits without them being able to discern the applicability of balance to their cases. These and other matters related to profit making need to be clarified if the profit motive is adopted into a binding framework as basis for corporate interference with human rights.

4.3.2.2 Revenue Generation

Closely related to the profit motive is another salient motive of business: revenue generation. Revenue generation is a core business interest because it is directly related to the profit bottom-line. In a review of previous researches on revenue, Christopher Nobles suggests that revenue is best defined as "the gross increase in equity resulting from in-flows from

[672] Reiner Clara, 'Human Rights and International Investment Arbitration' in Pierre-Marie Dupuy, Ernest-Ulrich Petersmann and Francesco Francioni (Eds) *Human Rights in International Investment Law and Arbitration* (OSO 2010) 95-96.
[673] ibid.
[674] See post by LSE at http://blogs.lse.ac.uk/investment-and-human-rights/connections/resolving-investment-disputes/, accessed 28/5/15.

customers for certain types of performance under contracts".[675] Put simply, revenue is the amount of turnover or income that a company receives from the sale of goods and services to its customers. The larger the revenue base of the firm, the more likely it is that the company can increase its profit margin. This makes revenue generation an essential catalyst of the profit motive of business. As considered in relation to the profit motive, two issues are of interest in relation to revenue generation as a core business interests; first, whether it has the propensity to conflict with human rights and whether it has some inherent challenges for judicial assessment of the balance that it may have with specific human rights.

The propensity of corporate revenue generation to conflict with human rights could partly be seen through some of the strategies that businesses adopt to generate revenue. One main revenue generation strategy is known as price differentiation, also referred to with some slight connotations as differential pricing, price discrimination, equity pricing, preferential pricing or personalised pricing, which is a pricing strategy in which businesses segment their markets based on their own criteria of consumer differences and charge different prices for same products with the same qualities.[676] Thus, businesses have an established tendency to charge different prices, higher or lower, to their customers depending on their own classification of customers. This standard pricing approach has been found to generate about a third of revenues for the businesses that engage uniformly in this pricing strategy.[677]

From a human rights perspective, differential treatment of differently placed persons is allowed to avoid indirect discrimination. Similarly, treating similarly placed persons equally is required to avoid direct discrimination. The challenge with regards to price differentiation is that how a business classifies its customers as different or similar may be biased in reality and therefore even though price discrimination is a normal revenue strategy, it may easily run the risk of discrimination. For example, if a business depends on hearsay and impulse buying behaviours to consider a customer as rich and subjects that customer to higher pricing, it may turn out that the person is poorer. Charging such a person higher than similarly poor customers could amount to differential treatment that if not justified, could lead to discrimination. Price discrimination is just one of the different strategies that

[675] Christopher Nobles, 'On the Definition of Income and Revenue in IFRS' (2012) 9:1 AE 85-94.
[676] Agnieska Wolk and Christine Ebling, Multi-Channel Price Differentiation: An Empirical Investigation of Existence and Causes' (2010) 27 IJRM 142.
[677] ibid.

businesses adopt to generate revenue with the propensity to conflict with human rights. Given that revenue generation is central to the profitability and growth of business, it would have to be incorporated into the list of legitimate business interests. This means that its conflicts with human rights would normally call for judicial balance of interests. This leads to the need to examine cases to ascertain if revenue generation as a business interest has any unique dispositions that may challenge judicial assessment if it conflicts with human rights.

A case in which revenue generation was cited as the primary motive behind corporate interference with human rights was the class action brought against Coca-Cola in the United States District Court in Northern District of Georgia.[678] In that case, Coca-Cola was reported to have committed disparate treatments of its employees on racial grounds due to its practice of segregating the company into divisions where African-American leadership was unacceptable. Complainants submitted that this 'glass wall' phenomenon was manifest in various aspects of the company's systems, especially in relation to revenue generation. They reported that Coca-Cola restricted African-American leadership only to sections of the company that had no direct link to revenue generation and African-Americans could not lead or take any revenue generation tasks and decisions in the company.[679] In this sense, Coca-Cola used the pursuit of revenue as tool for disparate treatments of its employees.

From a human rights perspective, an instance of differential treatment may constitute discrimination if it is not prescribed by law, pursue illegitimate aim(s) and has no reasonable proportionality between the aims pursued and the means adopted to achieve them.[680] Therefore, selecting only a certain class of employees to lead the revenue generation hubs of the company while others do not have that opportunity, constitutes a measure of differential treatment that if not based on justified grounds, could constitute discrimination. Coca-Cola settled the case and compensated the victims and a task force that was mandated by the court to supervise the company's compliance with the terms of agreement of the settlement reported after five years that Coca-Cola made the required changes.[681] No further details were provided in terms of how the conflict between revenue generation and the right to non-

[678] *Abdallah* v *Coca-Cola Company* (1999) NDGa [1-98-CV-3679].
[679] ibid, 4.
[680] Recall the *Framework* for assessment of human rights violations as described in section 1.3 above.
[681] The report of the task force is online at:
www.findjustice.com.php5-21.dfw1-2.websitetestlink.com/cases/civil-rights/racial-equality/results/coca-cola/. Accessed: 5 Feb 2015.

discrimination was resolved. However, it became quite clear that the motive of the company to embark on differential treatments was in order to prevent the loss of revenue by means of the class of employees it did not trust to safeguard revenue. The fact that the company settled the case and compensated the victims indicates that the revenue motives of business could conflict with human rights and require balance of interests but in this case, no special difficulties in respect of revenue generation were noted in consideration of the case.

One other case in which corporate pursuit of revenue was cited in a lawsuit was the case filed against Copper Mesa in Ontario Superior Court of Justice.[682] In that case, complainants from the Junín Community of Ecuador alleged that employees, agents and affiliates of the Copper Mesa Group engaged in intimidation, harassment, threats and violence aimed at silencing local opposition to a proposed open-pit mining of copper in the area, estimated by Copper Mesa to yield net revenue of about thirty-two billion dollars.[683] Complainants sued a number of parties, including the Ontario Stock Exchange regulators TSX Inc. and TSX Group Inc., for ignoring warnings to avoid listing Copper Mesa on the Ontario Stock Exchange, two members of the board of directors for Copper Mesa for acts and omissions that contributed to the reported abuses and the parent company of Copper Mesa itself for vicarious liability for acts committed by its subsidiary.[684] According to complainants, local opposition to the mine, led by various community members, represented the biggest impediment to the project and since the financial success of Copper Mesa depended on the success of the project, Copper Mesa prioritised its estimated net revenue of about thirty-two billion US dollars over human rights.[685] By these statements, the complainants referred directly to the pursuit of revenue as the reason for the company to take measures that conflicted with their human rights.

The case was referred to the Ontario Court of Appeals and in its judgment, that court acknowledged that the threats and assaults alleged by the plaintiffs were serious wrongs.[686] It however ruled that plaintiffs' claims disclosed no reasonable cause of action, for various reasons that pinpoint some unique challenges that might arise in attempts to hold companies

[682] *Piedra* v *Copper Mesa Mining Corporation* (2009) OSCJ [W09-37354].
[683] ibid, para 29, 35.
[684] ibid, paras 10-12.
[685] ibid, para 135.
[686] *Piedra* v *Copper Mesa Mining Corporation* (2011) ONCA [191] para 99.

accountable for human rights aberrations.[687] The court noted that the applicants' submission that the Ontario Stock exchange regulators did not exercise the duty of care by ignoring warnings to avoid listing Copper Mesa on the stock exchange, had failed. This was due to failure to establish that the alleged wrongs committed by the company were foreseeable by the regulators and also to prove that the complainants were sufficiently within proximity for the regulators to have been able to comprehend, appreciate and protect their interests. Also the court concluded that there was no proof that the directors had knowledge or directly involved in the acts so as to establish personal liability against them.[688] It added that circumstances in which directors and company officers may be held personally liable for acts of companies are limited[689] in order to eliminate, mitigate or contain the risk of drawing corporate directors and officers away from action in respect of business due to exposure to ill-founded litigations.[690] No special challenges have been observed in this case for assessing the pursuit of revenue but the case does confirm the propensity of revenue seeking to conflict with human rights and may raise challenges for judicial assessments.

4.3.2.3 Access to Capital

Access to capital has also been recognised as one of the core interests of businesses. Access to capital is defined as "a company's access to equity and debt capital".[691] This means that whereas the term capital may be used in various ways such as in social capital or intellectual capital, it is the volume of financial capital that is available to the firm to invest in its operations, whether debt or equity, that is the key focus here. Research shows that financial capital is one of the most visible resources of the firm and it can create "buffer zones against random shocks and allow the pursuit of capital-intensive strategies, which are better protected from imitation".[692] In view of the importance of capital attraction to business development, it is listed as one of the core interests of business. If capital attraction is adopted as a legitimate interest that may have to be balanced with human rights, there is the need to identify its propensity to conflict with human rights and whether it has specific

[687] ibid, para 8.
[688] ibid, para 91.
[689] ibid, para 73.
[690] ibid, para 75.
[691] ibid.
[692] Arnold Cooper, Javier Gimeno-Gascon and Carolyn Woo, 'Initial Human and Financial Capital as Predictors of New Venture Performance' (1994) 9:5 JBV 371. For further reading, see

dispositions that may challenge judicial assessments. Theoretically, the propensity of capital attraction to conflict with human rights is discernible in the strategies that businesses adopt to attract such capital in the first place. One capital attraction strategy that has the direct potential of conflicting with human rights is advertisement. Research has found that managers attract investors by manipulating advertisement tactics, which never portray the underlying product or firm in a comprehensive and objective manner so as to impress and attract investors who, due to their limited attention to details and information processing capacities, may respond overly optimistically to the prospects of the investment.[693]

This suggests that attracting investment capital by manipulating details in advertising may mislead investors, create short run returns which may change dramatically in the near future, with the potential for adverse impacts on the livelihoods of investors. Thus, even though the pursuit of investment capital is normal from a business perspective, the strategies that businesses adopt to attract capital may be varied and could conflict with human rights. Apart from manipulating advertisements and visibility to attract capital, businesses are also known to invest in cheap labour markets so as to conserve equity. Such investment scenarios may also have direct consequences for human rights. Given that capital attraction is a legitimate business interests as discussed above, its propensity to conflict with human rights would also require judicial intervention. Some cases have therefore been examined to find out if it poses some challenges to judicial assessment.

One way that this may happen is through the juridical personality of business. In *Kiobel et al* v *Royal Dutch Petroleum Co.,* judges in the US Court of Appeals for the Second Circuit were engaged is a discussion that brought out some challenges pertaining to corporate access to capital as a legitimate business interest.[694] In the opinion of the majority, businesses that are based on the abuse of human rights do not utilise the business advantages, including access to capital, that are inherent in taking the juridical corporate forms.[695] By this, the majority of the bench indicated that access to capital is one of the advantages that a company could have for being fully incorporated with limited liability and legal personality. In response to this, a dissenting opinion from Judge Leval noted that access to capital, due to its embeddedness in the juridical personality of businesses, could create advantages for both

[693] Dong Lou, Attracting Investors Attention through Advertising' (2014) JFR 1-33.
[694] *Kiobel* (n 368).
[695] ibid, 127.

businesses that are established on good motives and those that may engage in heinous activities such slave trade, human trafficking and piracy because the juridical personality of the firm helps all businesses to secure autonomy and convenience to attract capital.[696]

Judge Leval made it clear that businesses with bad motives can be lucrative but are also expensive ventures as businesses established with good motives and therefore they require capital in the same way as lawful businesses require capital and in order to secure capital, they adopt the corporate form which affords their investors with the needed protections and conveniences to supply capital, including the limitation of liability.[697] Thus, the case suggests that if access to capital is adopted as a legitimate aim for human rights limitations in business contexts, there would be the need to clarify how its access by means of corporate personality covers up businesses that are prone to serious violations of human rights and how judicial institutions could detect wrongful access to capital under the corporate veil.

Another instance in which access to capital received judicial recognition was the *Wiwa* case in which the United States Court of Appeals for the Second Circuit made explicit analyses that showed that it recognised the legitimate interest of business to pursue capital.[698] *Wiwa* originated from lawsuits brought by residents from Nigeria, alleging that the defendant companies participated with the Nigerian Government in human rights violations by imprisoning, torturing and killing leaders of reprisals against malfeasances in Shell's oil exploration activities in the Ogoni-land of Nigeria. As part of its reasoning on the case, the Court made remarks that showed its recognition of the legitimate interests of businesses to attract capital. The Court noted that "the defendants are huge publicly traded companies with a need to have access to capital markets and that "the importance of their need to maintain good relationships with existing investors and potential investors is illustrated by the fact that they paid over half a million dollars per year to maintain an Investor Relations Office" in New York.[699] The Court stated that the amount of money that the defendant companies invested in the maintenance of investor relations illustrated the importance they attached to capital attraction.[700] It opined that this interest in attracting capital in New York supported

[696] ibid.
[697] ibid.
[698] *Wiwa* v *Royal Dutch Petroleum, et al* (2000) USCA 2nd Cir. [99-7223 L, 99-7245 XAP].
[699] ibid.
[700] ibid.

retention of jurisdiction in the United States.[701] This conclusion acknowledged that businesses have legitimate interest to attract capital but the Court did not actually discuss how capital attraction compared with the rights in question. One could however suggest hypothetically that in the event that a company cites the need to attract capital as reason for taking measures that affect human rights, as exemplified in the preceding case, there would be a need for judicial balance of interests rather than outright denunciation of such measures.

In conclusion, access to capital is a known corporate interest and may have to be clarified and incorporated into the list of permissible grounds for human rights limitations in the event that a binding framework of business and human rights is formulated. The clarification of this factor would have to do with the possibility that businesses may adopt unclear strategies such as advertisements to lure investors. Further, the fact that access to capital is closely linked to and facilitated by the juridical personality of businesses, there would be the need for further clarification as to how businesses that are created primarily to engage in serious human rights abuses could be ripped off access to capital to justify interferences.

4.3.2.4 Operational Efficiency

Operational efficiency has also been identified as one of the core business interests, defined as "a company's cost-effectiveness in turning inputs into productive outputs".[702] Businesses are keen on how efficient they are in doing what they are established to do with minimum costs. In view of this, they use various means to track performances and to ensure that they are efficient.[703] A case that depicted how corporate concern for operational efficiency could interfere with human rights was *Hoffmann* v *South African Airway*, cited earlier as the *South African Airways* case, adjudicated in the Constitutional Court of South Africa.[704] In that case, Jacques Hoffmann challenged the refusal by South African Airways to hire him as cabin attendant solely on the grounds that he was medically living with HIV AIDS, as a

[701] ibid, 14.
[702] ibid.
[703] Further reading: Stefan Tangen, 'Performance measurement: from Philosophy to Practice (2004) 53:8 IJPPM; Yu-chan Zhang and Cai-bo Liu, 'Empirical Research on Operational Efficiency of the Logistics Enterprises based on DEA' (2011) IEEE; Carlos P Barros and Nicholas Peypoch, 'An Evaluation of European Airlines' Operational Performance' (2009) 122 IJPE 525.
[704] *South African Airway* (n 188).

measure that amounted to discrimination against him.[705] One of the points submitted by South African Airways to defend its decision was that they were justified on the grounds of customer safety, operational efficiency, costs and medical considerations.[706] The company explained that its flight crew had to be fit for world-wide duties and therefore it considered persons living with HIV/AIDS as more likely to contract opportunistic diseases such as yellow fever and that may make them unable to perform emergency and safety procedures that they are required to perform as cabin crew members.[707] The company noted further that it had the practice of screening out all kinds of disabilities that may affect the operational efficiency of its staff and noted that all major airlines utilised similar practices.[708]

In the first instance of addressing the case, a High Court in South Africa vehemently agreed with the company, stating that the exclusion of the applicant from employment was aimed at achieving worthy and important social goals.[709] According to the High Court, corporate pursuit of operational efficiency justified corporate restriction of non-discrimination and other rights impeded in the case. The Constitutional Court did not necessarily rebuff this purported trump of corporate interests over human rights; rather, it focused on the basis of medical evidences suggesting that the HIV status of the applicant did not really expose him to the risks anticipated by the company and that there were precautions to minimise such risks.[710] Based on its impression that lapses in the company's practices formed the main bases for its awarding decision in favour of the applicant, the Court of Appeal was inclined to agree with the justification offered by the company, had the medical report showed that the applicant was indeed prone to operational inefficiency. The court noted that the fact that some people living with HIV may under certain circumstances be unsuitable for employment as cabin crew does not justify excluding all HIV positives persons from employment as cabin crew.[711] It reasoned that such wholesale exclusion would limit the chances for medical examination of the fitness of persons who have HIV but nonetheless fit for employment and this might heighten discrimination against persons living with HIV.

[705] ibid, para 6.
[706] ibid, para 7.
[707] ibid.
[708] ibid.
[709] ibid, para 9.
[710] ibid, para 15.
[711] ibid, para 32.

These by no means suggest that the court trumped human rights over operational efficiency of the company; rather it suggests that medical examination was needed to support it. The case illustrates the propensity of conflict that may arise between corporate interests in ensuring operational efficiency and demands for respect of human rights. The point resounded even clearer in the submission by the company that other major airlines also practiced the same policy of excluding from employment all disabilities perceived to affect operational efficiency irrespective of whether applicants were technically qualified for employment in particular instances.[712] This shows that there is a certain level of caveat in the extent to which judicial entities may be able to determine the balance that corporate pursuit of operational efficiency may have with specific human rights due to the difficulties that may be encountered to figure out what a company considers as risk to operational efficiency.

Thus, operational efficiency is one legitimate business interest because it is linked to financial performance and growth of firms but it has the propensity to set bases for corporate measures that interfere with human rights. Consider the following scenario: Company A refuses to employ a disabled person due to concerns for operational efficiency, Company B taps into the conversations of its employees at work to weed out those who complain about tiredness due to concerns for operational efficiency, and Company C discourages religious activities at the workplace to save more time for productive hours. Such scenarios could interfere with equality, privacy and freedom of religion in pursuit of operational efficiency and each would have to be scrutinised judicially to determine human rights violations. The challenge is that the term 'operational efficiency' is a fluid term and quite unclear because it depends on what the company defines as the goals it must achieve and how to achieve them. Thus, what a company might consider as legitimate risk to its operational efficiency may not be easy to assess. Besides, the nature of rights that may be at risk in corporate pursuit of operational efficiency may depend on the company as well. Given that operational efficiency is a core business interest, it would nonetheless have to be incorporated into the human rights obligations of businesses but this would need a framework that clearly details how operational efficiency must be defined and weighed in relation to human rights.

[712] ibid, para 7.

4.3.2.5 Reputation Management

Apart from the profit motive, probably the most often-mentioned interest of business is the development and protection of corporate reputation. Corporate reputation is variously defined but it is closely related to corporate image, reputational capital and brand value.[713] These terms are used synonymously under the umbrella description of corporate reputations as "observer's collective judgment of a corporation based on assessments of financial, social and environmental impacts attributed to the corporation over time".[714] The main point of interest here is to show that businesses have vested interest in managing the way their brands are perceived by others and the management of such perceptions may lead to measures that affect human rights in certain circumstances and require appropriate balance of interests.

Research shows that businesses attach great importance to reputation management because there is strong correlation between good reputation and financial performance of businesses. Roberts and Dowling reported, after using two complimentary dynamic models to analyse the relationship between corporate reputation and the dynamics of financial performance, that "firms with relatively good reputation are better able to sustain superior profit outcomes over time".[715] In view of this strong correlation between positive reputation and financial performance, businesses do whatever is possible to attract, improve and sustain favorable corporate reputation and brand image. Studies suggest that business quest for good reputation is a key driver for compliance with environmental and social standards and that they mainly adopt codes of conducts as signaling devices to demonstrate positive credentials aimed at strengthening corporate reputation and organisational legitimacy.[716] Reputation is therefore dear to business but for purposes of this study, the point of interest is the propensity of corporate pursuit of reputation management to form bases of measures that interfere with human rights, and whether it poses unique challenges for judicial assessments.

The *South African Airways* case presented earlier provides additional insight into the judicial relevance of corporate management of public perception and the challenges that this may

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[713] Michael Barnett, et al, 'Corporate Reputation: The Definitional Landscape' (2006) 9:1 CRR 26.
[714] ibid, 34.
[715] Peter Roberts and Grahame Dowling, 'Corporate Reputation and Sustained Superior Financial Performance' (2002) 23 SMJ 1077.
[716] Christopher Wright and Alexis Rwabizambuga, 'Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles (2006) 111:1 BSR 90.

pose to human rights in business contexts. A High Court in South Africa in the first instance of addressing the case noted that South African Airways was justified to practice the exclusion of HIV positive applicants from employment as cabin crew in order to promote the health and safety of its passengers and crew, adding that this measure pursued a worthy and important social goal to safeguard the commercial operation and public perception of the company.[717] In the court's opinion, if South African Airways were obliged to employ HIV positive persons as cabin crew members, it would damage its reputation and it would be seriously disadvantaged in competition with other airlines and that would hurt its competitiveness and growth.[718] By these statements, the court suggested that in the event that a corporate entity submits that it omits or commits a particular cause of action that would otherwise have protected human rights and justifies such a measure as in pursuit of protecting its public image or reputation, such a submission would attract judicial recognition as competing claim to human rights. Such a case would call for judicial balance of interests rather than to be dismissed outright as frivolous claim against human rights.

On appeal, the South African Constitutional Court made a number of remarks that provided greater insight into how corporate pursuit of good reputation ought to be construed in judicial assessment of interferences with human rights. The court acknowledged that legitimate commercial requirements were important considerations to determine whether to employ individuals but cautioned that it's important to guard against allowing stereotyping and prejudices to creep in under the guise of commercial interests.[719] The court declared that the greater interest of society was to recognise the inherent dignity of human beings and to eliminate all forms of discrimination in society and that it was when the weak, marginalised, socially outcast and victims of prejudice and stereotyping are protected that human rights are truly protected.[720] The Court reasoned that in a context of prevalent prejudices against persons living with HIV/AIDS, there was the need to give them extra protection and be treated with compassion, unless otherwise dictated by medical and well-reasoned grounds.[721]

The following points of interest can be deduced from the proceedings of the South African Constitutional Court. The Court exemplifies a judicial body that actually acknowledged the

[717] *South African Airways* (n 188) para 9
[718] ibid.
[719] ibid, para 34.
[720] ibid.
[721] ibid, para 37.

importance of corporate pursuit of good reputation or public image but considered that human rights ought to prevail over corporate reputational interests in circumstances such as disclosed in the case. The case further displays the difficulties that may arise to balance the legitimate business interest in good reputation and the ideals of human rights. This difficulty has much to do with the fact that reputation is dependent on perception, which in turn, is also prone to prejudices and stereotyping. Nonetheless, in the event that a corporate entity submits that an alleged interference with human rights is predicated on its concerns for good reputation and image, the court demonstrates that such a case would require balance of interest strategies to determine the wrongfulness of the specific corporate measures at issue.

One other case that illustrates the legitimacy of the corporate pursuit of reputation and the challenges that this poses to human rights was the *British Airways* case, the facts of which were already presented in section 3.2 above as it came before the European Court of Human Rights as *Eweida* v *The United Kingdom*.[722] One of the points submitted by United Kingdom as a justification of the company's restrictions on wearing religious symbols at work was that British Airways was entitled to insist that its employees wore a specific uniform in exclusion of other uniforms so as to maintain its professional image and company brand.[723]

By this statement, the State projected recognition of the legitimate interest of the company to communicate a certain image and promote recognition of its brand. The domestic competent authorities who handled the case all concluded that the company had the legitimate right to protect its image and that outweighed the rights of the applicant to practice and manifest her religion.[724] The European Court of Human Rights also agreed that the interest of the company to build and project a particular image was clearly legitimate but it considered that the company's reputational interest cannot outweigh the religious rights of the applicant in this instance. The court noted that the domestic courts gave too much weight to the protection of the company's image, given that there was no clear evidence that previously permitted religious symbols had any negative impacts on the company's reputation.[725] By this, the Court tilted the balance in favour of the right to manifest religion and decided that the restrictions on the wearing of religious symbols at work violated freedom of religion.

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[722] *British Airways* (n 263).
[723] ibid, para 61.
[724] ibid, para 93.
[725] ibid, para 93.

This conclusion reached by the court does not necessarily mean that the freedom to manifest religion would always trump corporate interest in reputation management. As noted earlier, the Court tilted the balance in favour of religious freedom because it found no established evidences supporting the view that religious symbols impacted negatively on the image of any company. Thus, to a large extent, it is evident from the case that if evidence was found that dressing in religious regalia had negative impact on corporate reputation, the court would have determined and tilted the balance differently, given that according the Article 9 (2) of the European Convention on Human Rights, the right to manifest and practice religious belief is not an absolute right and requires appropriate balance of interests.

Further, the revelation in the submissions that all the domestic courts in the United Kingdom that dealt with the case had unanimously favoured the protection of corporate image over the religious freedom of the applicant shows that corporate reputation is a strong competing claim against human rights and poses significant challenge to effective realisation of human rights in corporate contexts. These indicate that whether or not businesses could directly apply limitations on human rights requires clarification of how corporate reputation balances with specific human rights. However, significant difficulties may arise in balancing corporate reputation with specific human rights since reputation is dependent on perceptions. Therefore, for businesses to rightfully apply limitations on human rights, the issues of reputational management need to be clearly spelt out in a human rights framework that is tailored specifically for businesses and clarify how reputation balances with human rights.

4.3.2.6 Human Capital

Among the key interests of businesses identified in the literature review above, the interests of businesses to attract and retain quality and skilled human capital is one of the most essential and well noted corporate interests. Harter, Schmidt and Hayes have conducted a meta-analysis of data from nearly eight hundred business units in thirty six countries to examine the relationship between employee satisfaction/engagement and business performance outcomes and found strong correlation between employee satisfaction and

engagement and business performance outcomes including profitability.[726] This correlation between employee performance and corporate profitability makes businesses attach much importance to factors that increase their ability to attract and retain desired and skilled workforce, variously referred to as human capital, human resources or employees. Thus, human capital is an important factor for business growth for the obvious reason that employees are in direct helm of all company affairs and productivity and, as such, any measure that could normally be expected of a company to secure and safeguard desired human capital comes within the ambits of legitimate interest of businesses to pursue human capital. For the purposes of this study, the point of interest is how corporate interests in attraction and retention of human capital receives expression in judicial contexts, looking at whether judicial examination of this business interest could pose unique challenges as a competing claim against human rights.

One case in which employee protection featured in a judicial setting was the case of *Hiribo Mohammed Fukisha* v *Redland Roses* in Kenya, adjudicated in the High Court at Nairobi.[727] Redland Roses is a floriculture company specialised in the production of flowers and part of its production processes require the use of pesticides and herbicides on the flowers. In April 2000, Mr Hiribo Fukisha filed a lawsuit against Redland Roses, claiming that the company failed to give him adequate protection from the dangers of pesticides during the period he worked as a sprayer for the company and as a result his health was affected by the effects of chemicals and he was forced to retire on medical grounds.[728] The company did not deny the fact that it had responsibility to take good care of the employees. Rather, the point of difference was that whereas the company argued that it provided all protective suits to all employees, including the applicant, and supervised that they wore protective clothing while at work, reduced the number of hours an employee came in contact with chemicals, reduced the stockpile of chemicals, conducted regular medical services for employees and gave monetary allowances for working with chemicals, the applicant argued that the company was negligent in its protective scheme and responsible for his health situation.[729] This illustrates a judicial context in which an employee considered it as a duty incumbent upon

[726] James Harter, et al 'Business-unit-level relationship between employee satisfaction, employee engagement, and business outcomes: A meta-analysis (2002) 87:2 JAP 268-279.
[727] *Hiribo Mohammed Fukisha* v *Redland Roses* (2006) HCN [564/2000].
[728] ibid, 1.
[729] ibid, 1-12.

the company to protect his interests, the company taking overt steps to prove that it did just that and a court of law scrutinising the claims of the purported protection of employees.

The court awarded judgment in favour of the applicant, not because the defendant company was actually negligent in its duty to protect employee interests or that it did not recognise and respect that duty but rather on the basis of Kenyan legal provisions which dictated that in circumstances such as disclosed by the facts of this case, the injured employee must be compensated.[730] Thus, whereas the case did not involve a balance of interest exercise, it does throw light into the importance that businesses attach to the protection of employee interests which, in turn, forms part of the broad range of measures that businesses adopt in order to attract and retain the desired human capital. It is notable that a company that safeguards the interests of employees and makes concerted efforts to attract and retain a vibrant workforce will ultimately protect and promote the realisation of a host of human rights. However, for the focus of the present study, the case does show that businesses have vested interests in the management of employee interests and the pursuit of this interest may be submitted as justification in the event that specific measures taken are found to contravene some other facets of human rights. An analogy is helpful to create a mental picture of such scenario. Imaging that a company extracting natural resources in an indigenous community is accused of inadequate consultation and the company defends this as in pursuit of the privacy of its employees. How would a judicial balance of interest exercise resolve this issue; would employee interests trump free and prior consent of indigenous people in such a case?[731]

Another possible scenario could be that the protection of certain aspects of employee interests may lead to infringements on other facets of employee interests. This scenario was depicted in the *South African Airways* case, discussed earlier, in which the company refused to employ a qualified but HIV positive applicant and justified this measure by submitting, among other points, that it did so in pursuit of protecting the other employees from being infected with the ailment.[732] Here, the right of the prospective applicant to be treated fairly and not to be object of discrimination came in conflict with the health and safety concerns of the other employees. Save the medical evidences that negated the bases of the company's actions, the South African Constitutional Court would have had a daunting task to provide

[730] ibid, 15-17.
[731] Section 4.4 below provides further reflections on conflicts between business and indigenous people's rights.
[732] *South African Airways* (n 188)

fair balance between these claims. Thus, as part of the responsibility on businesses to deal with human rights, there is the need to take into consideration how corporate interests in pursuing various measures to attract and protect its workforce should be seen in relation to human rights standards, including conflicts with the rights and freedoms of others. This is because the efforts by the company to protect some rights may suppress other human rights.

4.3.2.7 Risk Management

Blowfield and Murray identified risk management as one of the core interests of business.[733] Risk is a generic term and may comprise of any challenge that exposes the company to short or long term drawbacks, being it in relation to assets, productivity, stakeholder interests or more importantly profitability.[734] For purposes of this chapter, the main interest is to look at how judicial institutions have considered corporate interests in risk management in contexts of adjudicating corporate interference with human rights, whether any lessons could be drawn to make sense of risk management as a competing claim to human rights in business and whether there are any unique challenges in assessing this factor in judicial proceedings.

One factor that challenges judicial assessment of corporate interests in risk management is foreseeability. A company's ability to foresee and interpret an issue as a significant risk to a specific interest is a central challenge within the complexity of business management. A slight misjudgment of a risk situation may result in a company taking undesirable measures that may jeopardise human rights or may result in stakeholder agitations and accusations of human rights violations. Such a situation is depicted in *Milieudefensie* v *Shell* in a judgment rendered on 30 January 2013 by the District Court of The Hague.[735] This case, casually referred to as the *Akpan* case, originated from a lawsuit brought in the District Court of The Hague by Mr Friday Alfred Akpan, a citizen of Nigeria, in association with the NGO Vereniging Milieudefensie. The complainants submitted that Shell committed torts and was liable for such acts for its failure to prevent risks of third party sabotage on an abandoned oil

[733] Blowfield and Murray (n 43) 24-29. For further reading see OECD, *Risk Management and Corporate Governance* (OECD 2014); Antonio Borgeshi and Barbara Gaudenzi, *Risk Management: How to Assess, Transfer and Communicate Critical Risks* (Springer 2013); Gregor Gossy, *A Stakeholder Rationale for Risk Management: Implications for Corporate Finance Decisions* (DWW 2007).
[734] Blowfield and Murray (n 44) 24-29.
[735] *Milieudefensie, et al* v *Shell, et al* (2013) DCHa [C/09/337050/HA ZA 09-1580of:].

wellhead in Ikot Ada Udo in Nigeria which eventually caused oil spills in 2006 and 2007, polluted the environment and damaged properties including the farm of Alfred Akpan.[736]

In defense, Shell did not argue that it did not have a duty to prevent risks posed by its operations. Rather, it argued that the spill was due to sabotage by an unknown person and sought the dismissal of the case, claiming among other things that the district court had no jurisdiction to try the case and that the claims by the applicants were inadmissible. The court was therefore moved to decide whether the damage to Shell's wellhead by saboteurs constituted an instance of corporate negligence in failing to manage risk. The court found that Shell was committed to risk management because Shell had a whole department for risk management. However, in this particular instance, Shell was found to be negligent for failure to foresee and mitigate the foreseeable risk that its abandoned wellhead posed to the local communities. This is because prior to the sabotage in question, there were frequent sabotages to oil pipelines and facilities in Nigeria and even the sabotage in question was carried out so easily, indicating that the nature of the well abandoned by Shell faced greater risk of being damaged by third parties.[737] For this and other reasons, the court ruled that the subsidiary of Shell that operated the well was negligent for its inability to take measures to prevent a foreseeable risk, noting that the said sabotage was done too easily in a context of frequent sabotages to oil facilities.[738]

Diverse lessons could be drawn from this case. One lesson that is more glaring is that if the case was configured differently, for instance to read that Shell failed to respect certain human rights because it was obsessed with taking measures to prevent the said risks emanating from its abandoned well, for instance, by using surveillance that infringe on the privacy of suspected saboteurs, that measure would have been in pursuit of legitimate corporate interest in risk management. Such an instance would have required a balance of interest litigation to determine the wrongfulness of the measure. Invariably, the case did indicate that risk is a very fluid concept in the sense that what constitutes risk in a specific business context may be unclear and depends on the company's capacity to forecast it.

[736] ibid, 1-6.
[737] ibid, 22.
[738] ibid, 28.

PriceWaterhouseCoopers (PwC) defines risk as "the possibility that an event will occur and adversely affect the achievement of objectives".[739] Risk occurs when events that affect the company's objectives have or can be predicted to intersect with the company's objectives and such events could be as diverse as in relation to strategic, operational, compliance, financial, fraud, market, credit, customer, supply chains or auditing issues.[740] In view of its broad coverage and the fact that it depends on predictions by managers, the propensity of risk management to conflict with human rights is equally diverse. For instance, a business manager may fail to effectively exercise due diligence in his operation and thereby fail to effectively predict that an event will occur and if it does, it may result in interference with human rights. This fluidity poses greater risk to corporate respect for human rights in diverse contexts, given that whatever a corporate entity may interpret as a risk factor to its interests may be diverse and indeterminate but nonetheless constitutes legitimate business concern.

Risk management as a legitimate interest of business also featured in a number of other cases. Sometimes, corporate commitment to risks management is taken as a basis to demand accountability for breach of the duty of care. This is illustrated in a lawsuit filed against Hudbay Minerals and HMI Nickel in the Ontario Superior Court of Justice, in which claimants alleged that the respondent companies breached their self-proclaimed duty of care when at their request, security forces forcefully evicted and raped members of the indigenous Mayan community in Guatemala.[741] Plaintiffs referred to HMI/Skye's public commitments and representations that it was committed to abide by its performance standards to assess the risks that security forces deployed could pose to those within and outside the project sites and to take steps to ensure that such risks were minimised.[742]

The Court accordingly dismissed a motion filed by the companies to dismiss the lawsuits, stating that considering the circumstances of the case, the plaintiffs had pleaded reasonable claims to sustain the charges against the companies for negligence of care to manage the risks.[743] This shows that in some circumstances companies themselves have recognised and publicly declared that they had vested interest in the management of risks that emanate from

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[739] PwC, 'A Practical Guide to Risk Assessment: how Principles-based risk assessment enables organisations to take the Right Risks' (2008) 5.
[740] ibid, 9-10.
[741] *Margarita Caal Caal* v *Hudbay Minerals Inc* (2011) ONSC [W-11-423077]3.
[742] ibid, 20-26.
[743] *Choc* v *Hudbay Minerals Inc.* (2013) ONSC [CV-10-411159, 11-423077 & 11-435841]75].

their operations, the complainants sought to hold them accountable for such public representations and the court recognised this responsibility on the company. In sum, risk management is an important interest of business and would have to be incorporated into human rights limitations for business but it is based on predictions and is such a broad and fluid term that must be well defined to be meaningful for such purposes.

4.3.2.8 Innovation/Invention

Among the core business interests identified earlier, innovation is one that has received much recognition. Hee-Jae Cho and Vladimir Pucik have examined the relationship between innovativeness, quality, growth, profitability and market value and found that "a firm's ability to balance innovativeness with quality could drive growth and profit, which in turn drives superior market value.[744] Businesses therefore have much interest in innovations and inventions so as to develop new and diversified products and services in order to maintain fair competitive advantages and advancement in their fields of establishment. Innovation is therefore central to business growth due to its direct link to business profitability.[745]

Besides its direct link to profitability, the right for a business to innovate is a protected right under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).[746] The TRIPS agreement contains important provisions to protect copyrights, trademarks, geographic origins of products, industrial designs, undisclosed information and patents rights and is applicable to products of legal persons as well as for natural persons.[747] Article 27 defines patentable objects as any inventions in all fields of technology, provided that they are new, involve inventive steps and are capable of industrial application. Article 28 provides that a patent shall confer exclusive rights to the owner of product or process and exclude others from making, using, selling or importing such product or service without the consent of the owner. This includes the right to prevent information lawfully within the

[744] Hee-Jae Cho and Vladimir Pucik, 'Relationship between Innovativeness, Quality, Growth, Profitability and Market Value' (2005) 26 SMJ 555-575.
[745] Donald F Kuratko, Jeffrey G Covin and Jeffrey S Hornsby, 'Why Innovation is so Difficult' (2014) 57 BH 647-655.
[746] WTO, 'The Text of the General Agreement on Tariffs and Trade' (Geneva, July 1986), Annex 1C.
[747] Art. 39(2).

inventor's control from being disclosed to, acquired or used by others so long as the information is secret, has commercial value and kept secret.[748]

These protective provisions are especially important for business growth. Among other things, businesses must research and engage in product and process innovations and safeguard secrets in such endeavors so as to gain and retain competitive advantage in their objects of establishment. However, excerpts of TRIPS indicate that there are limits and exceptions to the enjoyment of patent rights. The essence of such exceptions is highlighted in Article 7 of TRIPS which notes that protection of intellectual property is to contribute to the promotion of technological innovation, provide mutual advantages to both producers and users and more importantly to balance rights and obligations.[749] Thus, the rights protected under TRIPS are conditional and involve balance of interest considerations. Even though businesses have vested interest in innovation and the TRIPS agreement indicates that such interests are protected, this is not necessarily an unfettered right. The pharmaceutical sector is one business sector where the pursuit of innovation can easily conflict with human rights especially in relation to the production, marketing and benefitting financially from essential medicines such as cancer drugs. To illustrate the challenges that may hinder judicial assessment of conflict between corporate right to innovate and human rights, the case of *Novartis AG and others,* held in the Supreme Court of India, provides some insights.[750]

In this case, a scientist named Jürg Zimmermann invented some derivatives of drugs, including Imatinib, for the treatment of tumors in human beings and got this drug patented in the United States and Europe in his name. After a reported two-stage invention process, Novartis AG claimed to have found an incremental invention based on Zimmermann's patented Imatinib. Novartis named the first product 'Imatinib Mesylate' and the second product as a beta crystal form of Imatinib Mesylate and proceeded to file application for patent rights in India for the beta crystalline form of Imatinib Mesylate. Novartis claimed that the said product had therapeutic effect of treating chronic myeloid leukemia and certain kinds of tumors, as the original product, but in addition had more beneficial flow properties, better thermodynamic stability and lower hygroscopicity. These properties are said to make it easier to process and store Novartis product than the original invention by Zimmermann

[748] ibid, 336.
[749] ibid, 323.
[750] *Novartis AG* v *Union of India (*2013) SCC [2706-2716/2013].

and therefore Novartis claimed that its product had added value beyond the original invention and therefore qualified for exclusive marketing rights.[751]

The Indian Supreme Court was therefore asked to answer the question of whether the product described above involved technical advancement over existing knowledge and therefore constituted a patentable invention and whether, even if so, patentability of the drug could still be questioned and denied in consideration of other factors such as affordability.[752] The disposal of this case revealed reasonable division among the competent authorities in India with regards to whether the product could be considered as an invention and thus deserved the grant of patent rights and whether there were compelling grounds to subvert the grant of patents even if it qualified as an invention. The debates that ensured from this case provide some insights into the challenges that may arise in the event that a corporate entity claims the pursuit of innovation as bases for taking measures that affect human rights.

In the first instance of assessing Novartis's application for patent, the Assistant Controller for Patents and Designs rejected the claim by Novartis that the subject product was new and deserved patent rights, stating that the invention claimed by Novartis was anticipated by prior publication on the original invention by Zimmermann and that it was obvious to persons skilled within the field.[753] Novartis challenged this decision, claiming among other things that the Assistant Controller's decision was not in compliance with the guidelines provided under TRIPS and submitted an appeal to the Intellectual Property Appellate Board (IPAB). IPAB reversed the findings of the Assistant Controller, stating that the subject product satisfied the test of novelty and non-obviousness and therefore it constituted an invention. IPAB however noted that India introduced higher standards for assessing inventive processes and products and therefore what could be considered as patentable in other countries may not be patentable in India and reasoned on the basis of this that there was a need to 'prevent evergreening' in the grant of patents; a term used to represent the need to remove obstacles to easy access to life saving drugs needed to provide good health care to the citizens of the State.[754] This concern for protecting access to essential drugs was based on suspicion that Novartis might charge higher prices for this important product if it

[751] ibid, para 5-9.
[752] ibid, para 4.
[753] ibid, para 14.
[754] ibid, para 17.

were granted exclusive patent rights. To back this suspicion, the Board referred to a previous instance when Novartis charged high prices for essential drug when it previously held exclusive marketing right to a cancer drug.[755]

When the case was brought before the Supreme Court of India, it assessed the claim of innovation and reviewed extensive legal materials, both domestic and under TRIPS and affirmed the denial of patent rights to Novartis. To reach this decision, there were debates on certain pertinent issues relating to tests of what constitutes invention. Central among these was the distinction between coverage and disclosure in patent claims. The scope of claim or coverage of an invention is what is specifically stated as an invention in a given patent claim and is distinct from the scope of disclosure of the claim, which is the scope of teaching or knowledge that the patent unravels. In the present case, counsels for Novartis believed that the scope of coverage in a given patent is distinct from its disclosure and therefore argued on the basis of this that the product developed by Novartis covered knowledge that was not disclosed by prior invention and therefore constituted a patentable invention in itself.[756]

In its assessment, the Supreme Court noted that creating a dichotomy between coverage and disclosure of a patent would negate the rationale of the law of patent, which is to ensure that a monopoly is granted to a private individual in exchange of an invention being made public so that at the end of the patent term, the invention transfers to the public.[757] The court recounted that other countries may have legal systems that accommodate this dichotomy but it did not wish the law of patents in India to develop large gaps between coverage and disclosure in patents, emphasising that such a dichotomy would make the scope of patent to be determined not by "its intrinsic worth of invention but by the artful drafting of its claims by skillful lawyers".[758] In light of the foregoing, the Supreme Court rejected the first step in Novartis' inventions as not new beyond the existing patent and did not deserve patent rights.

The second inventive product submitted by Novartis actually did receive recognition by the court as new product and thus an invention. This, however, did not lead to automatic recognition for patent rights. Rather the court was moved to decide whether a product must

[755] ibid, para 19.
[756] ibid, paras 136-137.
[757] ibid, paras 138-139.
[758] ibid, 156.

be a new form of a known substance and must in addition have known efficacy in order to be considered as patentable invention.[759] Counsels for Novartis argued in connection to this that a conceivable substance is not the same as a known substance and that the expression 'known' that qualifies a substance differs from its efficacy. The court agreed with this interpretation, noting that the expression 'known' is the same as the expression 'publicly known' which had expressly been used to codify the patent law in review but it noted further that even the expression 'publicly known' as used in the given statute had received quite an opposite interpretation by the court in a previous case brought before it.[760]

According to the court, the expression 'publicly known' was interpreted as not necessarily meaning that the subject matter should be widely used to the knowledge of the consumer public; knowledge is sufficiently public if it is known to persons in the pursuit of knowledge within the field of a specific subject matter.[761] In addition to the foregoing, the court found that even though the subject product of invention submitted by Novartis had more beneficial flow properties, better thermodynamic stability and lower hygroscopicity and therefore better storage and processing qualities beyond the original invention, it did not have any enhanced therapeutic efficacy, that is, enhanced ability to produce effect, beyond the original invention.[762] The court however noted that this decision must not be read as a rejection of all incremental inventions. Rather, it sought to establish that in respect of pharmaceuticals and chemicals in particular, what is considered as new product must in addition to being new have enhanced efficacy in order to qualify for patent protection.

For the purposes of the present study, the key lessons worth noting include that businesses have vested interest in the pursuit of innovation, that particular business interest is recognised and protected under TRIPS and that it constitutes competing claim to human rights interests in business operations. However, there are difficulties in terms of how to determine what constitutes an invention and the standard of testing for invention may differ from State to State and even within a given State, opinions may differ on innovativeness of a product. The difficulty in the determination of inventions may have to do with the scope of disclosure and coverage of an innovative product, especially if a given product is preceded

[759] ibid, para 158.
[760] ibid, para 159.
[761] ibid.
[762] ibid, para 191-196.

by a patented product and literature. It may also has to do with the importance of the invention to important human right dimensions such as health and safety and the need to avoid an inventor hiding behind the veil of patents to exploit society.

From the foregoing, it is quite obvious that even though businesses have legitimate interest in the pursuit of inventions and are protected to enjoy the proceeds of inventions, striking appropriate judicial balance between human rights and competing claims of innovations may present daunting and uncertain challenges. It is obvious from this case that if corporate pursuit of exclusive marketing rights bears directly on important human rights such as health and life, there is the likelihood that such rights will trump innovative interests. However, there is no certainty for this trend. Thus, the business interests of innovation is one issue that calls for a clear legal framework that spells out how the inventive products and processes of business ought to be construed in respect of human rights and how the technical difficulties in the determination of inventions should be resolved.

4.3.2.9 Customer Attraction

As noted earlier, one of the most important interests of business is to attract and retain customers. Due to the importance the customer loyalty has on business growth and profitability, businesses are obsessed with customer retention and loyalty to the extent that they target and adopt various strategies to prioritise and give special services to their most valuable customers as a strategy to increase profitability. Researchers have found that customer Prioritisation helps businesses to manage customer loyalty and if they in addition adopt strategies to minimise associated costs and perils, they can maximise the returns on profitability.[763] For the purposes of this study, the point of interest is to proof that corporate obsession with and efforts to attract and retain customers may interfere with human rights and to illustrate the judicial challenges inherent in balancing this factor with human rights.

Customer attraction is a broad term and businesses may adopt several measures to achieve it. Any of such measures may have unique challenges for human rights. The strategies they use

[763] Hauke Wetzel, et al 'Gratitude versus Entitlement: A Dual Process Model of the Profitability and Implications of Customer Prioritisation' (2014) 78 JM 1.

to attract customers can easily interfere with human rights. For example, advertisement or promotion is one of the most common strategies adopted by businesses to reach out to their customers, but this strategy is flout with certain inherent challenges that show the propensity of corporate pursuit of customer attraction and retention to pose challenges to human rights protection and may pose difficulties in the adjudication of cases requiring balancing of interests. This is illustrated by *Kasky* v *Nike*, brought before Supreme Court of California.[764]

In this case, Nike, a US-based corporation specialised in the manufacture and sale of athletic shoes and apparel, had sub-contracted most of its production to foreign agents in China, Vietnam and Indonesia. In 1996 and 1997, reports emerged in the United States that the factories producing Nike's products were subjecting their workers to extremely poor labour practices and working conditions including poor wages below the local minimum wages, compulsory overtime, physical, verbal and sexual abuses, exposure to toxins, dust, noise and heat in violation of local safety regulations.[765] Alarmed by the reputational damage that such an adverse publicity might have on its customer base, Nike took measures in the United States to negate the adverse reports by issuing public statements and letters to newspapers, universities and athletic directors, claiming that its products were protected from physical and sexual abuses and workers well paid with incentives beyond local minimum levels.[766]

In response to Nike's corrective publicity, Mr Marc Kasky, acting on behalf of the public, brought an action against Nike in addition to its directors and officers, claiming that in response to the criticisms and to induce customer loyalty to Nike's products, respondents had made false publicity of facts about the working conditions in Nike's external factories. This moved the court to answer the question of whether the false statements made by Nike amounted to commercial speech as that was less protected in the laws of the United States or non-commercial speech that was protected and should attract leniency.[767] Commercial speech was defined in the case as a message by a commercial speaker to commercial audience with facts about the speaker's business operations for the purpose of promoting sales of its products.[768] The court did not verify the facts of the case as its concern was only

[764] *Kasky* v *Nike Inc.* (2002) SCCal [SO87859].
[765] ibid, 3.
[766] ibid, 4.
[767] ibid, 1.
[768] ibid, 1, 20-22.

to classify Nike's publicity measures in the United States as commercial or non-commercial, neither did it deal with the lawfulness of the reported abuse that allegedly took place abroad.

For the purpose of this study, the point of interest is the human rights significance of the case and its conflict with business interest. As the case did not deal with the reported abuses *per se*, it offers no direct inputs for balance of interest analyses. However, a few extrapolations could be drawn from the case. The facts disclose alleged infractions on labour rights with clear human rights implications, and the competing interest of the company was clearly to attract and maintain customer loyalty. However, the case did not take a human rights based approach as it was not about resolving the conflict between the impugned rights and the interest of the company to manage customer loyalty. The court categorically noted that the issue before it was whether the alleged false statements made by the company constituted commercial speech to attract stronger restriction or non-commercial speech to attract protection and therefore all the legal intricacies resolved towards the decision on the case were focused on classifying the facts into this distinction.[769] Even though the case offers little into the balance between the said human rights and corporate interest in customer attraction, it does show some of the difficulties that may arise in contexts where corporate interest in protecting customer loyalty comes in conflict with human rights.

The special challenge revealed in this case is that it is very difficult for courts to differentiate commercial from non-commercial communication by businesses. Part of the challenge stems from the fact that corporate attraction and retention of customers depend on communication in the form of advertisements, promotions, direct discussions and other strategies that are considered as expedient to reach its customers. As noted by the court, commercial speech is purely within the hands of the commercial actor who presumably knows more about the commercial product than anyone else and since commercial actors act from profit motives, commercial speech is less likely to be chilled by regulation and foregone entirely.[770]

However, the case is telling in that communicative strategies easily run foul to the technicalities inherent in protections against inappropriate commercial speech. As stated, even though the plaintiffs claimed and showed evidences that satisfied the factors required

[769] ibid, 1.
[770] ibid, 13.

to determine commercial speech, including whether the speaker is commercial and speaks to commercial audience about a commercial content of his product, the courts were still divided on how to classify the statements made by Nike. It is reported that the Superior court and the Appellate court had considered Nike's statements as non-commercial but the Supreme Court of California considered it as commercial and reversed their decisions.[771] The technical details leading to the division among the courts are diverse and not necessarily relevant in this chapter but the diverse decisions taken on the case shows that even though a company has legitimate interests in attraction and retention of customers and it has to reach out to them in the form of advertisements, promotions and other forms of communication, such strategies are prone to technical difficulties inherent in commercial speech, which may easily run into problems with misrepresentation, falsehood and unfair competition.

By implication, the case shows that customer attraction may run in conflict with human rights but resolution of the conflict may be conflated with difficulties in terms of what is permissible in the means of communication adopted by the company to keep faith with its customers. A legal framework is required to set out how corporate interest in maintaining customer loyalty ought to be construed and assessed when in conflict with human rights.

One other case found to have some relevance for customer attraction was the *Wiwa* case discussed above, the facts of which have been presented earlier.[772] When the case was heard in the United States Court of Appeals for the Second Circuit, the court used the company's interest in customer attraction as basis to retain jurisdiction over the case in the United States. The court found that Shell demonstrated keen interest in customer attraction by situating an investor relations office in New York. It noted that even though the companies could have situated investor relations office in any other country, they chose to situate this office in New York in order to establish easy access to the city's rich market of potential customers, thereby serving their own interests.[773] By this statement, the Court categorically acknowledged that customer attraction was a key interest of Shell and as the company pursued this interest in New York, the US courts retain jurisdiction to adjudicate the charges of its human rights aberrations in a foreign country such as Nigeria. This novel statement suggests that the court recognised the importance of customer attraction as a core business

[771] ibid, 5-6.
[772] *Wiwa* (n 698).
[773] ibid,5.

interest and even sought to use it as basis for extra-territorial accountability of the company for human rights violations committed abroad. Even though the court did not discuss how corporate interest in customer attraction ought to have compared with human rights, it did indicate that customer attraction is recognised in judicial settings as one key business interests that needs to be taken into consideration when dealing with human rights.

4.3.2.10 Licence to Operate

Corporate licence to operate is another important interest that underpins the conduct of businesses. Blowfield and Murray simplified the definition of this as "a company's ability to maintain a level of acceptance among its stakeholders that allows it to operate effectively".[774] Thus, the licence to operate implies evidence that stakeholders, including governments, are still keeping faith with the company. The most obvious expression of this is the legal licence to do business and the other is the social licence to operate, expressed through the attitudes of stakeholders towards the company. The importance of corporate licence to operate is quite obvious, given that it determines whether a company can do business in the first place and whether it can retain customers from whom to raise sufficient revenue base to generate profits. The research interest in this connection is limited to whether this core interest of business has any propensity to serve as competing claim to human rights in judicial contexts and how courts of law resolve such instances.

An illustrative case to shed some insight into judicial balance of corporate pursuit of the licence to operate and human rights is the case between a subsidiary of Coca-Cola in India, named the Hindustan Coca-Cola Beverages Private Limited and the local authority in the area of operation named as the *Panchayat* (village level local government). This case, adjudicated by the Kerala High Court, arose out of the conducts of this subsidiary of Coca-Cola, a water-based industrial unit established at the Moolathara village in Perumatty Panchayat to manufacture, store and distribute aerated and carbonated non-alcoholic beverages, fruit beverages and packaged drinking water and by law subject to licensing

[774] Blowfield and Murray (n 44). For reading see Nina Hall et al., 'Social Licence to Operate: Understanding how a Concept has been translated into Practice in Energy Industries' (2014) 86 JCP 301.

jurisdiction of the Panchayat in its centre of operation.[775] Coca-Cola reportedly committed to environmentally friendly policies, safety standards, 'state-of-the-art' waste management technology, and community development goals in education, health and drinking water.[776]

In 2003, the Panchayat refused to renew Coca-Cola's licence to operate, claiming that it had found real evidence that Coca-Cola's activities negatively impacted the basic life patterns of the people in that community and the company engaged in excessive resource exploitation and environmental pollution.[777] Specifically, Coca-Cola was accused of excessive extraction of ground water through unauthorised bore-wells causing drought, poor waste disposal, believed to be causing skin diseases and distributing impure products.[778] The Panchayat submitted that the style of running the industrial unit did not inspire confidence. This led to agitations in the communities, suggesting that Coca-Cola had lost the social licence to operate, and eventually the loss of its legal licence to operate.[779] Coca-Cola objected to the allegations, claiming that the agitations were stage managed and for extraneous reasons.[780]

In an attempt to resolve the dispute, the court noted that the issue required authentic data for balancing the rights and aspirations of the people in the locality and the predicament of the company, and suggested that this balance must be based on scientific data collected by expert bodies.[781] Here, the court took a balance of interests approach to resolve the conflict and objected to the rigid stance taken by the Panchayat.[782] From a human rights perspective, the approach taken by the court was in order, given that the main human rights concerns raised by the Panchayat, such as water and health, are embedded in the set of internationally protected economic and social rights, which, according to Article 4 of the International Covenant on Economic, Social and Cultural Rights, are subject to permissible limitations. The research interest however is how this court sought to achieve the required balance.

The court took certain steps to address the case. First, it examined the validity of the two main grounds upon which the Panchayat denied renewal of the licence, namely that drawing

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[775] *Hindustan Coca Cola Beverages* v *Perumatty Gama Panchayat* (2005) KHC [KLT 554].
[776] ibid, para 11, 14.
[777] ibid, para 7.
[778] ibid, para 23.
[779] ibid.
[780] ibid, para 14.
[781] ibid, para 9.
[782] ibid, para 40.

of any amount of water for use by the company would be detrimental to the general interest of the community and should be halted absolutely.[783] Also, it noted the presumption that the products of the company were impure and likely to create health hazards in the communities.[784] In respect of the absolute prohibition of drawing any ground water, the court reasoned that water is a renewable resource and the same way as a natural person had the right to draw water, the company had the right to draw water for industrial use, arguing that the company being a water-based company that had invested hugely in the project, had the right to get water for its use.[785] It therefore relied on expert report to suggest that the amount of water drawn for industrial use must be adjusted in line with rainfall patterns instead of absolute prohibition and it accordingly instructed the Panchayat to renew the licence and instructed the company to draw water in line with a scientifically designed format and to continue its community development and supply of drinking water.[786]

In respect of health hazards, the Panchayat argued that if an industrial unit poses health hazards and pollution, its licence to operate must be withdrawn.[787] However, the court argued that even though the Panchayat had licensing jurisdiction as the local authority, it had no competence to examine the quality of the products of the company, suggesting that such examination was to be left to the appropriate authorities to undertake and therefore the Panchayat had acted arbitrarily in imposing the absolute restrictions on the company.[788]

The case reveals that the legal licence to operate is closely linked to the social licence to operate and that this link may be problematic in certain circumstances. As the submissions by the Panchayat suggests, the community confidence in a company may fade out on the bases of untested claims, lack of competence to comprehend technicalities in company products and processes and even as a result of misperceptions and staged agitations. Faded confidence implies loss of the social licence to operate, which in turn, leads to loss of legal licence to operate. Thus, in the absence of competent authorities to decipher relevant details to negate unfounded fears, businesses may run at risks of community agitations and loss of licence even under untested grounds and on the bases of unfounded agitations.

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[783] ibid, paras 26, 38.
[784] ibid, para 18.
[785] ibid, para 40.
[786] ibid, paras 44-55.
[787] ibid, para 41.
[788] ibid, para 41.

Similarly, a community with genuine concerns may be marred and twisted by technicalities in corporate processes and products. For instance, community agitations for safe-drinking water and pure environment were thwarted in this case only by technical findings that negate the fears of the Panchayat. If those scientific evidences were wrong, forged or manipulated by unscrupulous researchers, the community would suffer the feared risks as a result of the verdict of the court. When the court reached its decision that the Panchayat erred in absolute prohibition on drawing water, it did not proceed to examine whether there was any pressing social needs that would otherwise justify the restrictions on the company. It is not the prime interested of this study to decipher the correctness of verdicts because the core point of interest is whether human rights based balance of interest approach would have produced a different result in favour the community or in favour of the company. The lack of a detailed balance of interest analysis makes the court's decision somewhat incomplete.

The *Biwater* case discussed earlier also concerned withdrawal of licence to operate.[789] In that case, the Republic of Tanzania abrogated a permit granted to a subsidiary of Biwater to undertake a water project on the basis that the company had breached a number of terms in the investment contract and failed to exercise due diligence in important tasks. The State claimed that Biwater conducted itself in ways that made the project unsustainable and omitted some important steps which, according to *amici* reports, posed major threats to public health and welfare.[790] The company on the other hand, denied the allegations and rather considered the measures taken by the States such as its announcement of the termination of the contracts, usurpation of management control, unilateral cancellation of tax reliefs and deportation of the company's leaders as serious abuses of governmental power.[791] Thus, the context of the case shows an instance where the government, local communities and human rights experts who were important stakeholders of the company had lost confidence in its performance, leading to the loss of its legal licence to operate. The issue then was whether the State was to keep to international investment protection or was justified to withdraw the licence of the company in order to avoid threats to human rights.

One observable challenge that led to the conflict was that the State failed to comprehend the business strategy adopted by the company. This failure became evident in an objection

[789] *Biwater* (n 652).
[790] ibid, paras 381, 424 & 436.
[791] ibid, paras 417-418.

raised by the State that the said project was not a directly profit-making venture and therefore it could not be considered as investment within the meaning of the term in order to attract the terms of investment protection, arguing that a loss-leader investment is not investment in the proper sense and therefore Biwater had nothing to be expropriated.[792] Biwater on the other hand considered the project as having reasonably-to-be-expected economic benefits, and that even though it was not directly profit-making it constituted an investment with expected economic gains in the future. The Arbitral tribunal also concluded that the term investment does not have to be limited to immediate profit-making ventures, noting that the State erred in its interpretation of the term 'investment' under the treaty and specifically it failed to comprehend loss-leader projects as business strategies.[793]

Thus, as noted in the *Coca-Cola* case, the failure by the company's host country of operation to comprehend the technicalities within specific strategies for a particular business operation may easily lead to loss of confidence in the company operations; that is a loss of social licence to operate, and lead to loss of the legal licence to operate. The company may also resort to available measures, such as seeking solace in investment protection law to secure its investments, which may not be completely poised for human rights centered adjudication of disputes. As the case revealed, the tribunal stock mainly to the terms of investment protection treaty and largely ignored the human rights concerns raised by the State and the *amici* to support the public interest basis to abrogate the licence given to Biwater.

From the foregoing, it is evident that the licence to operate is not merely of importance in the relationship between businesses and States but also an issue that require managerial expertise to retain. Businesses need to adopt strategies to maintain the confidence that stakeholders have in their operations and they must manage confounding factors that affect confidence. As the cases cited above suggest, the social licence is prone to misconceptions and prejudices and the loss of social licence is a precursor to the loss of the legal licence. Given the significance that the licence to operate has on business sustainability, the quest of businesses to adopt measures to retain licence constitutes a legitimate business interest and if it comes in conflict with human rights, it would call for appropriate balancing of interests.

[792] ibid, paras 420-422.
[793] ibid, paras 307-318.

4.4 Further Reflections on the Concept of Legitimate Aims

This chapter presented a list of core business interests, considered as potential competing claims that may be used by businesses to justify their interferences with human rights, and the need, as a consequence, for these to be engaged with in the development of the human rights obligations of businesses. The thesis has sought to argue that to effectively attribute human rights obligations to businesses, it is imperative that their core interests are factored into any emerging business and human rights regimes. The primary driver behind this, as noted earlier, is two-fold: (i) that because the human rights obligations currently framed are addressed towards States, seeking to compel businesses to comply with human rights would be ineffective if their interests are not factored into their obligations; and (ii) that in seeking to gain greater compliance from businesses, an approach that engages their interests in the establishment of their obligations would be in keeping with the principle of fairness.

This thesis thus presents business interests as potential competing claims against human rights. This would appear to be simplistic, and may raise questions over the appropriateness of business interests to trump human rights, but for businesses to comply with human rights, it is important that the relationship between human rights and their unique interests is clarified. This clarification is essential to make sense of whether human rights trump legitimate business interests and whether business interests could serve as legitimate bases for corporate interference with human rights. It must be emphasised the logic of human rights limitation as presented in this thesis, rests on permissible balance of interests and as such, the factors that have been presented as the "legitimate interests" of businesses and may serve as legitimate competing claims against human rights do not necessarily have the weight to automatically trump human rights in balance of interest analyses. Rather, they are simply considered as legitimate concerns from the perspective of businesses and as such need to be factored into their obligations to enhance their compliances with human rights.

The legitimacy of business interests to be balanced with human rights is discernible in the fundamental question of whether businesses must exist at all, or whether society needs businesses besides human rights. In the introductory chapter to this study, it was noted that the growth and advancement of businesses contribute to the advancement of human rights, and the need to ensure that human rights protection goes in tandem with the advancement of

businesses, as pointed out in the section 2.3 above, lay behind the choice of 'principled pragmatism' as adopted by the author of the *Guiding Principles* to factor flexibilities into the human rights responsibilities of businesses. In as much as the factors presented above are the core factors that affect and determine the growth and viability of businesses, as the review in section 4.3.1 has pointed out, they are legitimate concerns from the perspective of businesses and need to be considered in tandem with their obligations for human rights, unless it can be argued otherwise that the success of businesses is not an essential need or concern of societies. This notwithstanding, the legitimacy of business interests only suggests that they must be considered in relation to, but not as automatic trumps to human rights.

In accordance with the modalities for human rights limitations, the satisfaction of the requirement of legitimate aims is only one step in the process of determining human rights violations.[794] The Siracusa Principles make it clear that the interpretative principles for justification of human rights limitations require foremost that "all limitation clauses shall be interpreted strictly and in favour of the rights at issue".[795] This means that the fact that a specific interest or concern of the duty-bearer is a legitimate competing claim against human rights does not necessarily mean that such an interest has the weight to automatically trump human rights. As James Nickel pointed out and noted earlier in this thesis, human rights are high priority and mandatory norms that, although they may not necessarily be absolute entitlements, are most likely to win in competition with other interests.[796] Human rights thus have superior weight in comparison with other interests. In view of this, the modalities for analyses of human rights limitations are such that a lack of legitimate aim(s) pursued by an impugned measure automatically constitutes a violation of human rights and would not call for further analyses, for instance, of proportionality. However, the existence of legitimate aims pursued by a measure that interferes with human rights does not automatically validate that measure; it only gives reason for further analysis to determine human rights violation.

For instance, if it is established that an impugned interference with human rights such as a restriction on freedom of expression pursues a legitimate corporate interest in protecting customer loyalty, that interest may not automatically validate that restriction, but would set a basis for further analyses to determine whether the measure maintains reasonable

[794] Refer to the framework for assessment of human rights limitations as described in section 1.3 of this thesis.
[795] UN Doc E/CN.4/1984/4 (1984) Principle 3.
[796] Nickel (n 118) 35.

proportionality between the aim pursued and the means adopted to achieve it. It is after the test of proportionality is found to be satisfactory that the measure may be deemed as justified and the pursuit of a specific 'legitimate interest' in that context may be said to have trumped the affected human right because it prevailed against it in that specific context.

Thus, in accordance with the framework for human rights limitations, all relevant questions required to determine instances of human rights violations must be satisfied before a right is trumped. For instance, corporate interference with human right such as the right to privacy would give rise to analyses of whether such restriction is underpinned by law. This could be addressed in the format described in chapter three of this thesis, taking into consideration directly applicable laws prescribed by the concerned State, or in the absence of these, the rules that are authored by businesses by means of the doctrine of delegation. This only satisfies the requirement that the measure must be in accordance with the law. If the measure does not satisfy this requirement, it amounts to a human right violation. If the requirement of being in accord with the law is satisfied, it does not validate the restriction and a further step is required to look at whether the measure pursued a legitimate or justifiable aim. This can also be addressed, as suggested in this chapter, by taking applicable businesses interests into consideration. If the measure does not pursue legitimate interest(s), it automatically amounts to human rights violation but even if it pursues legitimate interest(s), it does not necessarily justify the interference with human rights; it must be analysed further in terms of whether there exists reasonable proportionality between the aims pursued and the means adopted to achieve them.[797] It is only after all required levels of analyses are satisfied that the interference with the said human rights may be justified. Thus, in accordance with the framework for human rights limitations, the business interests submitted in this chapter would not automatically trump human rights; they are only legitimate from the perspective of businesses as potential duty-bearers as factors that also require their attention.

Another issue that needs further clarification is in respect of how the imperative of human rights limitations and balance of interests would work in contexts of conflict that may arise between (legitimate) business interests and groups that may be in vulnerable negotiating positions such as, for instance, minorities and indigenous peoples. The balance of business interests with the interests of such groups would clearly require special and extra attention in

[797] Recall the framework for assessing human rights limitations in section 1.3 of this study.

light of their vulnerability, a rationale that has sought to extend *lex specialis* to them in the first place.[798] The Preamble to the United Nations Declaration on the Rights of Indigenous Peoples indicates that indigenous peoples are entitled to all human rights recognised in international law, but they are further entitled to extra protection in view of concerns that they have suffered from historic injustices and that there is need for them to have control over developments that affect them so as to ensure that such developments are in line with their aspirations and needs.[799] The special protection accorded to such groups received further expression in the *Guiding Principles.* The *Guiding Principles* emphasised that depending on contexts, business enterprises need to consider additional standards in respect of specific groups that require particular attention, including minorities and indigenous peoples.[800] This provision in the *Guiding Principles* suggests that the modalities for human rights limitations, if applied in the contexts where business impacts on special groups such as indigenous peoples and minorities, would normally raise the threshold at which limitations on human rights are permissible. However, the special and additional protections accorded to such special groups do not necessarily obviate the imperative of permissible balance of interest in contexts where business conflicts with the interests of such groups.

One important provision for special protection of indigenous peoples that has emerged in recent years is the principle of Free, Prior and Informed Consent.[801] Whereas this principle accords indigenous peoples the right to have a say in any developmental issues that affect them, it does not necessarily override all developments that affect them.[802] Paragraph 7 of the Human Rights Committee's General Comment 23 on the interpretation of Article 27 of the ICCPR, read in conjunction with its paragraph 8, suggests that the special protection accorded to minorities and indigenous peoples must also be considered in line with the prescriptions of the Covenant, and these include its elaborate provisions for human rights limitations.[803] Thus, even though minorities and indigenous people are entitled to special protections, reasonable interference in their rights is nonetheless permissible. The Human Rights Committee noted in the *Länsman* case, involving a conflict between development

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[798] Article 4 of ILO Convention 169 particularly emphasises special protection for indigenous peoples.
[799] UN Doc A/ 61/295 (2008) Preamble.
[800] *Guiding Principles* (n 3) para 12.
[801] For details on the FPIC principle, see Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: the Transformative Role of Free, Prior and Informed Consent* (Routledge 2015).
[802] Philippe Hanna and Frank Vanclay, Human Rights, Indigenous People and the Concept of Free, Prior and Informed Consent' (2013) 31:2 IAPA 146, 157.
[803] HRC, 'General Comment 23(50) Art.27 (1994) [UN Doc. CCPR/C/21/Rev.1/Add.5] paras 7, 8.

and the interests of minorities, that "measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right" to special protection under Article 27 of the ICCPR.[804] This is in keeping with what pertains at the domestic level, where courts normally resort to the imperative of balance of interests in contexts where development conflicts with the interests of indigenous peoples or minorities. For instance, in the case of *Vedanta Resources* in which the bauxite mining project of a subsidiary of Vedanta, Sterlite Industries (India) Ltd, affected the indigenous population of Lanjigarh in the Indian State of Orissa, the Indian Supreme Court adopted a balance of interests approach to resolve the case by apportioning part of expected proceeds from the project to tribal development so as to sub-serve sustainable development.[805]

The special disposition of indigenous people makes it even more important that the specifics of human rights limitations in business contexts are clarified in more details so as to provide more certainty in contexts where business interests conflict with indigenous people's rights. This is because, as Joshua Castellino and David Keane have noted in the conclusion to their study on minority rights in the Pacific region, the protection of the rights of minorities and indigenous peoples is complicated in the sense that, given their special disposition, even the ideals of human rights law could clash with the special rights of indigenous peoples and minorities.[806] They observed that such clashes and tensions normally arise even in contexts where "well-meaning attempts are made to 'shoehorn' indigenous peoples and minorities into systems that are not designed with their particular nuances in mind".[807] These nuances of protection required for indigenous peoples make their context very sensitive, and as such the management of business interests that affect them requires extra due diligence and care. This makes a stronger case for clarity in instances where business interests have to be balanced with their interests. The attempt by this study to specify and clarify the specifics for human rights limitations within the context of businesses is therefore of paramount significance to the protection of the rights of indigenous peoples and minorities.

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[804] *Länsman* v *Finland* (1994) HRC [Communication No 511/1992] para 9.4.
[805] *Thirumulpad v Union of India* (2008) SCI [202/1995].
[806] Joshua Castellino and David Keane, *Minority Rights in the Pacific Region: A Comparative Analysis* (OUP 2009) 238-251.
[807] ibid.

4.5 Chapter Summary, Findings and Conclusion

This chapter spelt out what the concept of legitimate aims as a test for permissible limitation of human rights implies in business context. Two steps have been taken towards this end. First, the texts of the core human rights instruments, including the regional human rights treaties, have been perused to identify the substantive factors that have been provided for as permissible grounds for human rights limitations. It has been found that with slight difference in coverage among the human rights instruments, the grounds for permissible limitations of human rights typically include the general welfare in democratic society, national security, public health, public order, public safety, public morality, prevention of disorder and crime, the rights and freedoms of others and the reputation of others.[808]

Following this, a review of business literature was conducted to identify the factors which, from a corporate perspective, could be considered as the equivalents of legitimate aims. Using the consensus among business scholars that business interests revolve primarily around profitability and growth, ten factors have been found as the most significant factors that affect business growth and development. These factors include profit-maximisation/ shareholder value, revenue generation, operational efficiency, access to capital, attraction and retention of customers, good corporate reputation embracing brand value and image, the attraction and retention of quality human capital or employees, risk management, innovation and the licence to operate.[809] These factors have been adopted by this study as the list of corporate legitimate aims that would have to be considered in tandem with the demands of human rights within the context of businesses in view of their direct significance for growth.

Thus clearly, the items listed as permissible grounds for human rights limitations are textually different from the core interests of businesses. This has led to the question of whether the list of business interests could be considered as subsumed within the list of permissible grounds for human rights limitations. There may be some overlaps between the business interests and those listed for human rights limitations but further interpretations may be required to subsume the list of business interests into the grounds for human rights limitations. This study does not follow such an approach. It has been noted that human rights

[808] See section 4.2.
[809] See sub-section 4.3.1.

instruments have stated clearly that the limitations on human rights shall not be used for purposes other than specifically provided. It was therefore decided that considering the list of core business interests as subsumed into the list of permissible grounds for human rights limitations would lead to an over-stretch of human rights law. It would mean, for instance, that a business entity could submit that it restricted freedom of religion because it has to make profits, or it interfered with privacy because it has to protect its reputation, or it lured unsuspecting investors to a weak business base because it has to attract investment.

Even though corporate interests in such scenarios are legitimate, resolving these cases in light of the existing grounds for human rights limitations would require interpretation to fit profit-seeking into the list of permissible grounds for limitations, and so it would be for customer attraction and reputation. As shown in the preceding sections, business interests have technical meanings attached to them and may not be easy to subsume them into the permissible grounds for human rights limitations without creating uncertainties. In view of this, it was decided that the core business interests would have to be taken in their face value as the 'equivalents' of legitimate aims but within the context of businesses. This means that for businesses, these ten factors listed above, are their legitimate aims and require separate rule-making in the form of a human rights framework that is tailored for businesses.

Then, the next step was taken to consider the propensity of each of the legitimate aims of businesses to set basis for corporate interference with human rights, meaning the chances that businesses would pursue a specific interest and in course of doing so, conflict with human rights to the extent that requires judicial intervention. Relatedly, part of the task was to find out whether each of the factors has any unique challenges that may make it difficult for judicial assessment and determination of its balances with human rights. These tasks have been intended to project into what a particular business interest might look like if it were adopted into a binding framework as a legitimate basis for human rights limitations. It has been considered that from a theoretical standpoint, research already confirms that businesses would pursue the listed aims in pursuit of growth and therefore it could be taken as given that these factors would underpin corporate measures that interfere with human rights. The cases reviewed also confirmed instances where specific business interests were cited as bases for a disputed business activity. With regards to whether there are specific challenges for judicial assessment of the listed items, various issues have been found.

First, in respect to the profit motive, it was found that due to the primacy of the profit motive of businesses, it is the most obvious factor that stakeholders use to judge corporate performance and this tends to blind instances where profit motive is not the immediate aim of the firm.[810] Sometimes, the profit motive is projected as obnoxious motive such that people are quick to attribute what they consider as corporate misconducts to the profit motive, making it seem as if it is wrong for business to pursue profits. This is problematic because as seen earlier, profit-making is a legitimate business interest that sustains business. There as problems in relation to the strategies that businesses normally adopt to cut costs and to increase profits. Some may be drastic and have direct conflict with human rights. As a core business interest, it would have to be considered as legitimate grounds for human rights limitations but there are technical issues surrounding it, such as 'loss-leader' investments and cost saving strategies, which must be addressed. The issue of revenue generation is closely related to this; another factor that would have to be considered but as the *Coca-Cola* case has shown, a company's obsession with revenue generation may lead it to adopt measures that could easily conflict with human rights.[811] There would therefore be the need of a framework that clarifies the parameters of revenue generation and outsourcing issues.

Access to capital would have to be considered as a legitimate business interests. However, common strategies that businesses adopt to attract capital, such as creating favourable image about the firms so as to attract unsuspecting investors, would have to be addressed in relation to how they could be compatible with human rights. Further, as *Kiobel* shows, access to capital is facilitated by the corporate veil which could provide advantage to any kind of business to get access to capital. Thus, for access to capital to be used as a legitimate business interest, there is the need to define what it would entail for capital protection relation to businesses that have motives that are inimical to the ideals of human rights.

Operational efficiency as a core interest of business also poses some unique challenges. As the *South African Airways* has shown, operational efficiency is a technical issue within the confines of companies such that the factors a company may consider as important to foster or hinder its operational efficiency are determinable by the company itself and may be used

[810] Recall the *Biwater* case (n 652) in which the lack of profitability in a project designed as loss-leader was misconstrued by the Republic of Tanzania as not constituting to investment that deserves protection.
[811] See sub-section 4.3.2.2.

as bases to interfere with human rights even if not tested or proven.[812] Thus, operational efficiency is such a fluid term that depends on what the company considers as satisfactory performance in relation to set standards. There would therefore be the need to clarify what operational efficiency entails in respect of human rights. A related challenge is risk management as a core business interest. As shown in *Akpan*, it is difficult for companies to foresee or predict all relevant risk factors that may emanate from their operations and performances. These factors must be factored into the legitimate aims of businesses but their exact implications in relation to human rights would have to be clarified more precisely.

The other important but fluid business interest is corporate reputation, embracing corporate image and brand value. As the *British Airways* and *South African Airways* cases have shown, reputation is actually important for business but it is also very difficult for businesses and even courts to determine how specific human rights issues affect corporate reputation.[813] This is because reputation has to do with how others perceive the company and its products but perceptions are prone to prejudices, stereotyping, misjudgements and deliberately staged actions. To be a legitimate basis for human rights limitations, it needs to be clarified.

Innovations and inventions are legitimate interests of business. These are important for corporate growth and competitive advantages, but in judicial settings, they are prone to several challenges. As the case of *Novartis* has shown, the determination of what is new in an inventive product may be complicated, especially if preceded by a close invention.[814] The difficulty may have to do with technicalities in the determination of the disclosure and coverage required of a product in order to be considered as an invention and even if viewed as such, other factors such as health concerns may bar patenting. This is of particular interest to pharmaceutical and food industries. Thus, for corporate invention to be adopted for balancing with human rights, the newness factor and risks to human rights must be clarified.

Further, customer attraction as a legitimate interest of business is well recognised but prone to challenges. As *Nike* has shown, customer attraction depends largely on corporate communication with its stakeholders, carrying strategic commercial messages in the form of promotions and advertisements to enhance customer loyalty, but such commercial speeches

[812] See sub-section 4.3.2.4.
[813] See sub-section 4.3.2.5
[814] See sub-section 4.3.2.8.

may easily run into prohibited commercial conducts such as misrepresentation, unfair competition and it is difficult to differentiate commercial from non-commercial speeches.[815] Thus, for customer attraction to be set as legitimate interest of business that must be balanced with human rights, there is the need of legal framework to clarify which customer attraction strategies are unacceptable in the context of corporate dealing with human rights.

Finally, there are issues with corporate licence to operate, taken here as comprising of the legal and social licences to operate. The study found that corporate legal licence to operate is intricately linked to the social licence to operate in the sense that the loss of stakeholder confidence in the company often precedes the loss of the legal licence to operate. However, as the *Coca Cola* case in India has shown, stakeholder confidence in a company depends largely on perceptions and technical understanding of the company's activities. Therefore, misconceptions and lack of capabilities to unearth the technicalities in specific activities of a company may easily cause the loss of confidence in the company and this may affect the legal licence to operate.[816] A similar scenario was displayed in the case of *Biwater* in Tanzania.[817] This study submits that the corporate licence to operate is especially prone to stakeholder prejudices, misconceptions and incapacity to comprehend corporate operational strategies. In order to properly situate the licence to operate as a legitimate corporate interest that may serve as competing claim against human rights, there is a need of legal framework that clearly specifies how to deal with these challenges in judicial settings.

In conclusion, the question of what could constitute 'legitimate aims' for purposes of human rights limitations in business contexts necessarily have to include profit maximisation/ shareholder value, revenue generation, access to capital, operational efficiency, reputation/ brand image, human capital, risk management, innovation, customer attraction and the licence to operate. The exact meanings of these terms and how business strategies adopted to achieve them are related to human rights issues would have to the operationalised in a human rights framework that is specifically tailored for businesses. Otherwise, assigning human rights obligations to businesses without clarity of how these factors could be balanced against human rights interests would not be commendable. This is one conceivable reason why a separate legally binding framework on business and human rights is required

[815] See sub-section 4.3.2.9.
[816] See sub-section 4.3.2.10
[817] See sub-section 4.3.2.1

to set the modalities of how these factors could be construed for human rights limitations. If this is effectively operationalised, it would at least help to avoid unclear judicial decisions and arbitrary interferences with human rights.

As has been emphasised earlier and also in the preceding section, the list of factors presented in this chapter are considered legitimate interests of businesses because they are the core factors, according to business literature, that determine business growth and development. Given that businesses are also legitimate organs of society and they serve important aspects of the public good, including the advancement of human rights, their profitability, growth and development are equally important to all economies. In this sense the factors that determine their growth or collapse are legitimate concerns from a managerial perspective. Thus, to businesses, those factors are the essential factors that must be considered when in conflict with human rights. However, this does not mean that they are automatic trumps to human rights. In the event that they conflict with human rights, their consideration will come within the terms of the requirement of legitimate aims that any measures that interfere with human rights need to satisfy in other to be justifiable in human rights law. However, even the satisfaction of this requirement does not justify an impugned interference with human rights. In accordance with the framework for human rights limitations, as described in section 1.3 above, the next level of analyses after the test of legitimate aims, would involve the test of proportionality before the justification of human rights interference may be establishes. As section 1.5 explained, the test of proportionality is not part of this thesis and may be taken in further research. The next Chapter gathers the core observations made in this and the preceding chapters to discuss the value and implications of incorporating the ideals of human rights limitations into the human rights obligations of businesses.

5

Factoring Human Rights Limitations into the Obligations of Businesses

5.1 Chapter Introduction

Chapter one of this thesis alluded to the fact that one of the most enduring debates in the business and human rights discourse is the question of whether businesses have binding human rights obligations beyond the voluntary mode adopted by the *Guiding Principles*. It was also noted therein that this debate forms the central motivation for this study. As such, this final chapter is meant to show how the study contributes to that debate through examining of the applicability of human rights limitations in business contexts, presented earlier as one of the questions that need to be addressed in such a binding framework. The preceding chapters have engaged with some of the issues that the application of human rights limitations in business contexts would have to address. This chapter contributes to the debate by piecing together some of the core observations made in the preceding chapters.

The very focus of this study on human rights limitations, and their significance in business contexts, implies a positive inclination towards a binding framework on business and human rights. Human rights limitations and the assessment of interferences with human rights are issues that would make sense mainly in a legal framework. Thus, this study has been constructed in anticipation of a legally binding framework on the issue as has been discussed in chapter two. This chapter reflects on the development of the treaty debate, and seeks to use the main findings of this study as a contribution to foreclose some of the fears that have been identified against a binding treaty on business and human rights. The main contribution of this study is that human rights limitations must be properly engaged and operationalised in constructing the specifics of the human rights obligations of businesses. It has the view that the flexibilities embedded within limitations, if well applied, could provide the necessary safeguards for businesses as duty-bearers, while also ensuring that human rights concerns are addressed properly in business contexts without undermining the core essence of human rights. In contribution, the study suggests how the concepts of law and legitimate aims, linked as two core requirements for human rights limitations, could be construed in this regard. The next section begins substantiating this contribution, with the treaty debate.

5.2 The Treaty-Debate

One of the main shortcomings of the *Framework* and *Guiding Principles* on Business and Human Rights concerns the voluntary nature of the responsibility assigned to businesses. Soon after the publication of the *Framework*, scholars identified its lack of binding obligations on businesses as a serious weakness that derailed the entire business and human rights project from the normative foundations of human rights law.[818] This criticism has since taken a centre stage on the issue, leading to a protracted debate among scholars and significant actors with regards to whether there should be a legally binding framework in the form of treaty on business and human rights beyond the scope of *Guiding Principles*.

The backdrop to this debate is that human rights are not merely ordinary social issues; they are specially-negotiated entitlements that derive their fundamental value from the intrinsic worth and dignity of the human person.[819] In this sense, it is not by choice that an entity may recognise the claims that individuals have to their rights. Casting human rights as voluntary issues automatically throws them into the staid realms of corporate social responsibility that is already saddled with conceptual difficulties for implementation and which, for accounting purposes, businesses consider as non-financial externalities with voluntary connotations.[820] Therefore, considering human rights as part of the *milieu* of voluntary issues that businesses must manage could create uncertainties for the realisation of human rights in their contexts.

Initially the UN Human Rights Council endorsed the *Framework* and *Guiding Principles* with their voluntary orientation, established a Working Group to oversee its implementation and took steps to facilitate this process. Following agitations from some States and NGOs pushing for a change to a binding framework, the Council subsequently adopted Resolution 26/9 to set up modalities for further negotiation which may eventually result in drawing up a legally binding treaty. In an evaluation of debates that have ensued so far in relation to the treaty, John Ruggie made a statement that appears to suggest that both proponents of, and opponents to binding obligations for businesses have a common understanding that, indeed, further law-making on the issue is required; the dividing line is the difficulty that faces it.

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[818] Deva (n 6) 104-114; Bilchitz (n 6) 98-233.
[819] Nickel (n 118) 35.
[820] Blowfield and Murray (n 44) 31, 190.

Ruggie noted that:

> …as the business and human rights agenda continues to evolve, further legalization is an inevitable and necessary component of future developments. But we need to ask ourselves what form it should take at the international level. What does experience tell us about the approach that would yield the most benefit for affected individuals and communities, and in the shortest possible period of time?..[821]

Ruggie thereby outlines the factors that militate against a binding treaty in line with his self-declared 'principled pragmatism', focusing on what would work in the context of businesses and human rights.[822] He opposes the negotiation of a binding treaty, considering that States are so divided that they would not agree on a treaty, treaty would diminish the range of related efforts, it would take long and complex negotiations without materialising, and that extra-territorial challenges would thwart treaty enforcement.[823] Other scholars have noted the challenges that militate against the treaty. Nadia Bernaz, for instance, wonders how the unclear contours of States obligations with regards to extra-territorial activities of businesses could be overcome in a treaty framework. She suggests that perhaps the treaty idea needs not be abandoned but must focus on less ambitious goals, such as fortifying the international investment law to deal with business and human rights instead of treaty negotiations.[824]

It seems clear from this discussion, that it is the complexity of challenges militating against an effective development and implementation of the treaty that poses the greatest concerns, and not necessarily that a treaty would be of no value to the advancement of business and human rights. Regarding this, David Bilchitz argued that the treaty debate has started on a wrong point, such that attention has been given to the challenges that militate against the treaty instead of beginning with understanding the reasons why such a treaty is necessary.[825] He suggested that it is after the lacunae that exist on the issue are understood that clear targets could be set to address them and solutions to related problems could be found.

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[821] John Ruggie, 'International Legalization in Business and Human Rights' (11 June 2014) 3. Online: http://business-humanrights.org/sites/default/files/media/documents/ruggie_-_wfls.pdf, accessed: 20 May 2015.

[822] ibid.

[823] ibid, 4-5.

[824] Nadia Bernaz, 'Multilateral Agreement on Investment: Time to Awaken the Beast? –A Contribution to the "Business and Human Rights Treaty" Debate' (28 February 2014). Online: http://rightsasusual.com/?p=756#comment-22 , last accessed: 20 May 2015.

[825] Bilchitz (n 11) 2.

Among other compelling reasons, Bilchitz argues that human rights are fundamental entitlements that derive from the inherent and intrinsic worth of the human person and are therefore not amenable to voluntary implementation.[826] He added that "as both international, regional and domestic institutions and courts recognise, the mere infringement of a fundamental right is not sufficient to determine that a wrong has been done: a further step is necessary, namely, determining whether the infringement lacks a strong justification which can be said to be proportional to the benefits sought to be achieved" and that issues such as this need to be clarified in a binding framework on business and human rights.[827]

Bilchitz thus suggests that a binding treaty is needed to clarify how corporate infringement on human rights could be assessed to determine instances where interference with human rights amount to human rights violations, and instances where it constitutes justified deviations from standards. This issue has been the central core of the present study and will necessarily form part of law-making on the issue. Another useful purpose that calls for a binding framework for effective incorporation of human rights in business practices is the need to clarify issues that have not been adequately addressed in the *Guiding Principles*. As Sabine Michalowski has observed, the relationship between the concepts of 'due diligence' and 'complicity' as used in the *Guiding Principles* is unclear and must be clarified, no matter the difficulties that such an attempt may face.[828] With similar convictions, the present study has been designed to tackle some of the unclear issues that need to be addressed in relation to the determination of corporate violations of human rights. Observations made in the preceding chapters are assembled in the next section as a contribution to the debate. Before proceeding with such contributions, it is essential to engage with one of the main reasons why the set of *Guiding Principles* are criticised as not legally binding.

Some analysts contend that the *Guiding Principles* are not legally binding and therefore they do not protect the victims of corporate interference with human rights.[829] This criticism underlies the debate on whether a legal framework in the form of treaty is required to impose binding obligations on businesses beyond the nature of responsibilities espoused in the *Guiding Principles*. Given that the debate hinges on the binding effect of the *Guiding*

[826] Ibid, 2-3.
[827] Ibid, 5.
[828] Michalowski (n 146) 218-242.
[829] See for instance Deva (n 6) 104-114; Bilchitz (n 6)198-233; Černič (n 7) 1279-80.

Principles, a further analysis is required herein to make sense of the reason why the *Guiding Principles* could be considered as non-legally binding and as such criticised as an unsatisfactory framework for human rights protection in business contexts.

The question of why the *Guiding Principles* are criticised as imposing non-legally binding responsibility on businesses is quite intriguing in light of the fact that they have actually incorporated elements of legal force into the human rights responsibility of businesses. The *Framework* that culminated into the *Guiding Principles* stated that "there are situations in which companies may have additional responsibilities - for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations".[830] It added that "failure to meet this responsibility can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual courts"[831] and that "States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims".[832]

Thus, the *Framework* espouses the semblance of a mandatory responsibility for businesses to respect human rights. Further, by referring to judicial mechanisms to redress grievances that might arise from business activities, it also attaches a tone of enforcement into the responsibility of businesses. Elaborating on these elements within the *Guiding Principles*, John Ruggie noted that "effective judicial mechanisms are at the core of ensuring access to remedy" and that "their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process".[833] Why then are the *Guiding Principles* criticised as non-legally binding?

Some analysts indicate that even the fact that the *Framework* and *Guiding Principles* purport to suggest that respect for human rights is not a choice for businesses and allude to judicial mechanisms as effective means to remedy corporate infringement on human rights does not necessarily mean that they are legally binding from a legal perspective. David Bilchitz and

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[830] Framework (n 2) para 24.
[831] ibid, para 54.
[832] ibid, para 91.
[833] Guiding Principles (n 3) para 26.

Surya Deva have noted that the mere fact that the *Guiding Principles* differentiate between the human rights responsibility of businesses and States and clearly distinguish the language employed in relation to corporations as 'responsibility' and to States as 'obligation', shows that the responsibility of businesses are intended to be non-legally binding.[834] It could therefore be noted that the *Guiding Principles* are basically framed in the 'soft law' format which espouses rules of international law that do not stipulate concrete rights and obligations for the addressees or "those values, guidelines, ideas and proposals that may develop into rules of international law but have not yet done so and thereby lack legally binding effect".[835] To be legally binding, the *Guiding Principles* would have to spell out clear rules, rights and specific duties on the target addressees and to set out mechanisms to ensure that they are bound to comply with the obligations ascribed to them and to comply in good faith.[836] To the extent that these elements are lacking, they are not legally binding.

Human Rights treaties provide the closest example of legally binding instruments that have the mechanism to protect the essence of human rights as claimable entitlements. Generally, treaties are especially negotiated human rights instruments that have legal force. Article 1(a) of the Vienna Convention on the Law of Treaties defines a treaty as an agreement among States that is governed by international law and its Article 26 articulates the *pacta sunt servanda* principle of treaty obligations which holds that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".[837] In essence, treaties should normally commit the parties to implement human rights with the legal certainty required to give effect to human rights as claimable entitlements. Mark Gibney notes that the essence of a treaty is to bind contracting parties to the particular human rights being addressed by the focus of the particular treaty.[838] Hence treaties are expected to have binding effects on target parties and expected to make provisions to ensure compliance.[839]

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[834] David Bilchitz and Surya Deva, 'The Human Rights Obligations on Business: A Critical Framework for the Future' in Surya Deva and David Bilchitz (ed) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 15.

[835] Martin Dixon, *Textbook on International Law* (OUP 2007) 50.

[836] Alan Boyle, 'Soft Law in International Law-Making' in edn. Malcolm Evans, *International Law* (OUP 2010) 122-132.

[837] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).

[838] Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (Rowman & Littlefield Publishers, Maryland 2008) 99.

[839] Ibid.

It is helpful to note that the titles *Guiding Principles* and *Framework* as assigned to documents elaborating the business and human rights issue are legally sensitive titles in the sense that they are normally not meant to be legally binding. Researchers indicate that within the United Nations system for human rights protection, instruments that are labelled as declarations, standards, guiding principles, basic principles or norms are basically framed in soft law format and are meant to address issues that treaties or other legally binding instruments would have difficulties to address.[840] Such instruments may have some features that are typically found in binding treaties, such as identifying the entities that must have obligations, as the *Guiding Principles* have ascribed to States and businesses in their respective roles with regards to human rights, but they essentially remain non-binding.

One of such instruments is the Universal Declaration of Human Rights (UDHR).[841] Without necessarily comparing the *Guiding Principles* to the UDHR, it is instructive to note that even though the UDHR contains a list of human rights and identifies States and organs of society as bearers of human rights obligations, and that some analysts believe that it imposes obligations on those actors[842] and could even be said to have significant legal importance,[843] its textual formation is terse and aspirational in nature rather than framed as an accomplished legal enactment and it does not independently impose binding human rights obligations on addressees.[844] Even though this issue is hotly debated among scholars, the UDHR remains non-legally binding, making it essential to develop treaties out of its texts. If the UDHR were a clearly legally binding instrument, it would have resolved the business and human rights challenge because it included businesses within the set of actors that have to protect and promote human rights. It was designed as a declaration and remains non-binding.

Similarly, and just for clarification, even though the *Guiding Principles* present a definition of the human rights responsibility of businesses, and businesses as well as other stakeholders have shown tremendous support for them, they could be criticised as not legally binding for many reasons. At least, they do not include explicit commitments from businesses as parties

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[840] Makau Mutua 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 HRQ 563.
[841] UDHR (n 23).
[842] Henkin (n 132) 24-25.
[843] Cassese (n 128) 156; Martha Nussbaum, 'Capabilities, Human Rights and the Universal Declaration of Human Rights' in (Edn) Rich Claude and Burns Weston, *Human Rights in the World Community* (UPP 2006)27.
[844] Clapham (n 65) 24-82.

and other stakeholders to be bound by them and to perform their contents in good faith and do not set-up own monitoring mechanisms for individuals to complain against breaches of the terms espoused in them. Further, they do not spell out their own sanctions against breaches apart from the reference to possible cases in courts of law and to the courts of public opinion. These and many other factors indicate that the *Guiding Principles* are just in the format of such instruments that even though are not necessarily without effect, are not legally binding to ensure certainty to the claiming of human rights as entitlements.

Further, the *Guiding Principles* emanate from the UN Charter-based Special Procedures for human rights protection. The Special Procedures system is a Charter-based mechanism used to prod States' compliance with human rights obligations. Special Procedures may either be individuals or groups of experts known as 'Special Rapporteurs', 'Independent Experts' or 'Special Representative of the Secretary-General' who are given thematic or country mandates to examine, clarify, monitor, advise and publicly report on human rights situations on particular thematic issues or in specific countries.[845] Even though they are not completely devoid of legal effect, standards set by Special Procedures cannot independently be invoked for purposes of adjudicating human rights violations. They may embark on country visits and take diverse measures to bring human rights concerns to public attention including fact-finding missions, research and clarification of the international legal framework to address specific issues. The standards set by these processes are not legally binding but they do make impact in the promotion of human rights through clarification of issues and prodding States into action.[846] With specific relevance to businesses, the work of the Special Representative of the Secretary General on the issue of business and human rights (SRS-G) falls within this category and therefore it was not within the mandate of the SRS-G to develop a binding framework on business and human rights. At best, the mandate of the SRS-G was to perform the research, clarify issues, and propel the business and human rights issues into the forefront of the international scene. The mandate should be credited for that achievement but that process did not lead to the imposition of binding obligations.

Besides, the research outcomes produced by Professor John Ruggie as the author in the helms of constructing the *Guiding Principles* are significant for elucidating the various

[845] Steiner, Alston and Goodman (n 38) 737-742.
[846] ibid.

dimensions of imposing human rights obligations on businesses. According to Article 38(d) of the Statute of the International Court of Justice, such highly qualified publicists could be cited as supplementary sources for determination of rules of international law.[847] In this sense, the *Guiding Principles* are formidable authority on corporate responsibility for human rights, given the scholarly stature of John Ruggie as the author. The research, country visits, fact-finding and reports, clarification of issues and a host of other strategies adopted for constructing the *Guiding Principles* may be cited during human rights adjudication processes to back up the resolution of cases. The soft mechanisms established by the *Guiding Principles* may also have effects of changing corporate behaviour. As Elvira Domínguez-Redondo has observed of the Universal Periodic Review, non-confrontational and cooperative approaches also have the propensity to add value to the implementation of human rights.[848] This, though, does not make such mechanisms legally-binding.

Thus, the *Guiding Principles* are important for policy making and for elucidating unclear issues in this field but they can be criticised as non-legally binding as they do not establish hard law mechanisms to ensure certainly for compliance with the responsibilities of businesses. An entity that bears human rights duties requires more than voluntary and soft-law measures to perform its responsibility in a manner that reflects the essence of human rights. Declarations, guidelines, standards and other forms of non-legally binding instruments are useful, among other things, to raise awareness on, elucidate and clarify human rights issues and to sensitise significant actors towards human rights. Legally binding instruments and measures are particularly required, not only to provide certainty and heft for right-holders to claim their rights and get redress for aberrations, but also to help the duty-bearer with the modalities to demonstrate what it has done in respect of its obligations and be scrutinised by others to verify its claims. They can also make way for the issuance of general comments, advisory opinions, cases and any such instruments that are necessary to clarify and develop the obligations of businesses.

This means that businesses may use guidelines and other ‘soft’ instruments to clarify and operationalise their responsibilities for human rights but that these would be truly meaningful only in clear legal framework that sets the legal commitments that addressees

[847] UNGA, ’Statute of the International Court of Justice’ (26 June 1945) Art 38.
[848] Elvira Domínguez-Redondo, ‘The Universal Periodic Review--Is There Life Beyond Naming and Shaming in Human Rights Implementation?’ (2012) NZLR 673.

have in respect of human rights, the nature of sanctions that may arise from breaches of such obligations, avenues for victims to submit complaints for breaches of their rights and provisions that allow independent actors to scrutinise such claims under predictable terms. The *Guiding Principles* made reference to judicial mechanisms at the State and corporate levels but did not have own enforcement mechanisms in the event that States and businesses fail to honour their respective obligations assigned to them. Without these in place, the *Guiding Principles* remain essentially non-binding on the parties to whom responsibilities are assigned and as such do not fully conform to the essence of human rights as claimable entitlements. In view of this, the next section explains how the creation of legally-binding framework with a mechanism for human rights limitations would provide a better alternative to the *Guiding Principles* and help resolve the treaty debate.

5.3 Human Rights Limitations as Means to Resolve the Treaty Debate

At the onset of this study, it was stated that the *Guiding Principles* did not clarify how the human rights limitations aspect of human rights law could apply to businesses and that some analysts believe that this aspect must be clarified as part of ascribing human rights obligations to businesses.[849] This study was therefore designed to examine the applicability of human rights limitations to the human rights obligations of businesses. In chapter one, it was stated that human rights limitations are an essential part of human rights law and therefore clarifying them as part of the obligations of businesses is a necessity.[850] But what value would human rights limitations add to the debate beyond what the *Guiding Principles* have already espoused? The starting point to answer this question is to re-visit the reasons why the *Guiding Principles* 'backed off' from the imposition of legally binding obligations on businesses in other to verify the veracity of the calls for human rights limitations.

In his preliminary report submitted to the 62nd Session of the erstwhile Commission on Human Rights, John Ruggie presented the overall context within which the human rights responsibility of businesses was to be crafted and noted that considering the complexity surrounding the issue, his strategic approach to conceptualise the human rights responsibility

[849] Bilchitz (n 11) 5; Ratner (n 10) 513.
[850] See for instance Osiatyński (n 13); Smith (n 14) 176-182.

of businesses was going to be 'principled pragmatism'.[851] He defined this as "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people."[852] By his commitment to this principle, the SRS-G made it clear that the choices made in constructing the *Guiding Principles* were based on what works and can clearly be expected of businesses, considering the circumstances within which they operate, and excluding expectations that may be difficult to achieve in the context of businesses. This shows that the compromises made in the *Guiding Principles* were intended to institute some flexibility into the human rights obligations of businesses. Given the challenges and criticisms levelled against the *Guiding Principles* as the outcome of this approach, there remains another window of opportunity to incorporate flexibilities into the human rights obligations of businesses through the balance of interest formalities but without having to cast human rights responsibilities as voluntary.

This thesis suggests that subjecting human rights to permissible limitations is a better option to institute flexibilities into the human rights obligations of businesses. Sub-section 2.3.4 pointed out, through the analysis of cases, that by virtue of the limitations attached to some human rights, there is a clear difference between interference with human rights and human rights violations. With regards to certain rights, an interference with human rights amounts to human rights violation only if it is not justified. If this is well understood, clarified and incorporated into the human rights obligations of businesses, it would mean that instances of corporate interference with human rights would have to be adjudged in accordance with the modalities for assessing human rights limitations and the outcomes of such assessments may either be human rights violations or justified interferences with human rights.[853] Subjecting human rights to permissible limitations as part of the human rights obligations of businesses would serve the purpose of incorporating necessary flexibilities into such obligations, which the *Guiding Principles* sought to achieve, but without necessarily casting human rights commitments as voluntary as the *Guiding Principles* did.[854] Following the modalities for human rights limitations will help businesses in the sense that it will make it possible to determine instances where businesses clearly deserve blame for interference with human

[851] UN Doc. E/CN.4/2006/97.
[852] ibid, para 81.
[853] Refer to sub-section 2.3.4 for the discussion of this point.
[854] Cassel and O'Brien (n 206) 77.

rights and also instances where interference is justified and businesses may be exonerated from such blames for their measures that interfere with human rights.

A related value that the modalities for human rights limitations offer to the obligations of businesses is that businesses could be guided to identify instances where interferences with human rights are clearly not acceptable. The *Guiding Principles* are missing this important aspect of human rights law. To show how far this is missing in the *Guiding Principles*, it is helpful to paraphrase the core of the human rights responsibility of businesses. In totality, the *Guiding Principles* entreat businesses to exercise due diligence to ensure that they do not interfere with or cause harm to any human rights and must not be complicit in such acts, but given that "even the most concerted efforts cannot prevent all abuse", they must provide access to remedy.[855] This proposition simply presupposes that businesses must not interfere with human rights but if interference occurs, they must provide access to remedy. Whereas this may sounds good in its face value, testing it against specific human rights would reveal what is missing. Consider the following statements in light of the *Guiding Principles*:

Example 1: Articles 6, 7 and 8 of the ICCPR respectively provide that "everyone has the inherent right to life" and not be arbitrarily deprived of his life, "no one shall be subjected to torture or to cruel and inhuman or degrading treatment or punishment" and "no one shall be held in slavery" or "in servitude". Reading these provisions in light of the Guiding Principles, businesses must ensure that they do not interfere with the right to life, commit torture or hold anyone in slavery or servitude but if they do, that is, if interference with these occur, they must provide access to remedies. Example 2: Articles 18, 19 and 21 respectively provide that "everyone shall have the right to freedom of thought, conscience and religion", "everyone shall have the right to hold opinions without interference" and "the right of peaceful assembly shall be recognised". Reading these provisions in the light of the *Guiding Principles*, businesses must ensure that they do not interfere with these rights but if they do, that is, if interferences with these rights do occur, they must provide access to remedies.

Obviously, the *Guiding Principles* did not mean to suggest, as in example 1, that businesses may torture and provide remedies or may enslave and provide remedies. Otherwise, the *Guiding Principles* run directly against the absolute prohibitions on interferences with

[855] Curled from the *Guiding Principles* (n 3) para 6.

torture, slavery and other rights as listed in Article 4(2) of the ICCPR. Conversely, even though it is highly desirable that freedom of thought, religion, opinion and assembly are respected, the respective articles covering these rights also provide for circumstances under which the freedom to manifest religion, expression, and assembly may be curtailed. Yet, even in relation to such rights, interference must be guided by clearly identified procedures before they can be justifiable. Therefore, by not explicitly providing clarifications with regards to which human rights may not be interfered with, which rights may be restricted and under what conditions such restrictions may be acceptable, the *Guiding Principles* treat all human rights on equal footing with regards to interference and remedy. An application of human rights limitations to corporate responsibility for human rights would remedy this shortcoming and spell out clearly the conditions under which businesses may interfere with human rights and provide justifications for such interferences. The challenge remains, though, as to how the modalities for human rights limitations could be factored into the responsibilities of businesses. Part of this challenge has been addressed by the entire content of this study. The next section pulls together some of the findings of the study as a contribution to the clarification of human rights limitations in business contexts.

5.4 Contributions from this Study

The most significant contribution that this study makes to the debate is in respect of drawing attention to the need to incorporate human rights limitations into the development of corporate responsibility for human rights and to show that it is to a large extent possible to do so. The study has been structured with the understanding that if businesses are to be bound by human rights obligations, they must have the corresponding right to utilise the limitations that exist on human rights, in line with the concept of law, and in pursuit of legitimate interests. This, in turn, brought forth the need to examine how these conditions required for permissible limitations of human rights could be met in the context of business.

Two of these requirements have been problematised and examined from a corporate perspective. The first requirement is that any measures that interfere with human rights must be ‘prescribed by law’. Chapter three analysed this requirement closely. Given that States are ideally required to, but do not, and are encouraged not to regulate all aspects of business

activities, it found that businesses generate rules to govern their interests that are not regulated by States and such rules also serve as bases for measures that interfere with human rights.[856] This led to the question of whether and how businesses as private actors have standing to generate rules that validly serve as bases for human rights limitations without undermining State authority. The study found that by means of the doctrine of private delegation, businesses could generate rules that conform to the requirement of law for permissible limitations of human rights. Thus, if a State grants permission to a business entity to generate and deploy its own rules to take measures on issues that are not State-regulated, and such measures conflict with human rights, they could be scrutinised to determine whether the interferences are justified or amount to human rights violations.

If a binding framework on business and human rights is developed that incorporates human rights limitations, the question would arise as to how to assess interferences with human rights in contexts where States do not directly regulate businesses. This in turn would require clarification of what constitutes the legal bases for such interferences. As discussed in the previous chapters, this will raise the need to determine how rules that are generated by businesses to deal with their interests could also serve as valid bases for determining their violations of human rights. In this sense, it could be argued that a binding framework on business and human rights would face the need to clarify how businesses could play supplementary rule-making roles to serve as valid bases for human rights limitations.

This study suggests towards the clarification of this issue that States may have to expressly recognise the rule-making capacity of businesses as a matter of delegated function. This means that in those contexts where directly applicable domestic laws are non-existent to regulate specific activities of businesses, businesses themselves would need to be mandated, explicitly or implicitly, to generate operational rules which could satisfy the requirement of law for assessment of their measures that interfere with human rights. The doctrine of delegation requires that such rules be subjected to State recognition. This means that if a business entity generates its own rule to manage a specific interest and that rule is approved by a given State, that rule constitutes a 'lower-ranking' law within that context and can validly be scrutinised to determine its violation of human rights, if that rule could be said to

[856] See section 3.1 above and for more on the influence of non-state regulations on business conducts, see Cronstedt (n 70) 450; Smith (n 70) 386.

have reasonable degree of clarity and accessible to affected Stakeholders. It also means that businesses would have to be transparent and provide the necessary information on their operations so that affected stakeholders may predict the consequences of taking specific courses of action with concerned businesses.

Thus, for corporate operational rules to meet the standard required for permissible limitation of human rights, they must be transparent and give access to information on their operations that have human rights implications. Nicola Jägers made this point clear when she noted that companies are allowed and encouraged to create their own regulatory systems, including the possibility of rule-making, so long as they do so in line with international human rights standards and they do not avoid public scrutiny, adding that the best starting point for this is for businesses to give access to information in their operations.[857]

The idea that within a binding framework on business and human rights, businesses may have to play supplementary rule-making roles is not necessarily new. It is well known that States may delegate rule-making powers to any entities, whether public or private. Also, as discussed in the previous chapters, it is also acceptable that for markets to function adequately, States need to avoid over-regulating businesses. The combination of these factors within the business and human rights context indicates that there is a conceivable gap that may arise in the ability of States to make laws and regulate business in respect of human rights. Businesses may have to play supplementary rule-making roles to fill the gaps that inadequate or absent direct regulation by States may create. The business-made rules would in turn be used for the judicial assessment of corporate interferences with human rights. This would ensure that businesses bring their expertise to bear on the governance of their measures that affect human rights, while remaining subject to State control. It will maintain the regulatory flexibilities required for business growth while subjecting the rule-making tendency of businesses to State supervision and ultimately giving way for judicial scrutiny.

This proposition suggests that ‘law-like’ or *quasi* legal instruments that are authored by businesses could, upon satisfaction of the qualities of being precise and foreseeable by affected stake-holders, be used in judicial proceedings to adjudge human rights violations by

[857] Jägers (n 222) 328.

the concerned business entities.[858] Some of the cases reviewed in chapter three of this thesis provide examples of instances where the rule-making capacity of businesses was required to fill gaps in State regulations. For instance, as British Airways used its dress code in the absence of laws in the United Kingdom to regulate dressing in the work place and based on this it took measures that restricted freedom of religion, that code constituted the instrument that had the direct substantive effect of interfering with human rights and ought to have been scrutinised as part of the determination of whether the company violated human rights.[859]

Similarly, South African Airways used its own policy to create differential treatments in hiring and Wal-Mart used its internal policies to create differential treatments in assigning, rewarding and promoting employees without the respective States having any laws to regulate such measures.[860] In such instances, the courts in the respective cases could have scrutinised the said instruments as bases to assess the human rights dimensions of the measures taken by the companies without having to rely on unrelated, remote and vague laws as legal bases of the impugned measures, which posed threats of human rights violation by means of imprecise and unforeseeable laws.[861] States may use various means to express their recognition of the rule-making powers of businesses. One way is to incorporate this into negotiations and design of the legal licence, the certificate of incorporation or into any such instruments that a State may issue to businesses to operate in its territory.[862]

Another way to achieve this is by means of an international treaty in which States explicitly recognise the power of businesses to make supplementary rules where State regulations are not feasible. This is where the debate on whether to make a binding treaty on business and human rights is of great importance. Such a treaty is required to provide a uniform basis of recognition for businesses to regulate themselves in contexts where States are unwilling or unable to regulate them, or where it is counter-productive for States to regulate them. The treaty could also spell out the modalities required to make such rules, how to bring such rules under State recognition, the type of businesses that can regulate themselves, those that cannot regulate themselves and may have to 'borrow' from larger businesses, the conditions that such rules must satisfy to be valid and how they may be used in judicial proceedings.

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[858] Recalling the 'enforced self-regulation' paradigm propounded by Ayres and Braithwaite (n 235) 101-132.
[859] This case was presented in sub-section 3.2.1 above.
[860] These cases were presented in sub-section 3.2.3 above.
[861] See case in section 3.2.1 and 3.2.3 above
[862] For instance corporate licencing is one of such means as suggested by Parker (n 243) 3-4.

The other way for businesses to play a significant role in a binding framework on business and human rights is in respect of the need to clarify their interests that compete with human rights in their operations. In chapter four above, it has been found that theoretically, there are some ten core business interests that may be considered as the 'equivalents' of legitimate aims that may compete with human rights in business operations.[863] Earlier, it has been noted that businesses have a 'monopoly of knowledge' in their spheres of operation, meaning that they have better knowledge of what they do than may be accessible to external actors.[864] With this specialised knowledge, businesses are in the best position to clarify what factors matter most to them, how those factors may conflict with human rights, and what trade-offs they are able to bear in order to strike meaningful balances between these interests and human rights. If they cooperate in this regard, they may help to formulate legal framework that takes care of their interests and protect human rights as possible for business growth.

Related to this, businesses would be able to help clarify the meanings they attach to their business interests such as profit, operational efficiency, customer attraction and the others listed in chapter four as their core business interests. Without their cooperation in this regard, it may be difficult for external actors to determine the precise meanings attached to these factors and how they manifest in the different contexts of business operations. In sum, this study suggests that businesses could contribute to the generation of a binding framework on business and human rights by (i) playing supplementary rule-making roles and (ii) helping to clarify the core factors that may serve as competing claims to human rights. They could play supplementary rule-making roles by subjecting their self-generated operational rules to State authority so as to conform to the requirement of the concept of law for judicial assessment of their interference with human rights in contexts where State laws do not serve as direct bases of their measures that may interfere with human rights. Additionally, they would need to be transparent to their stakeholders by making their rules clear and accessible.

It is expected that if businesses are involved in the clarification of the concepts of law and legitimate aims as applicable in their contexts, it should, to a large extent, be feasible to apply human rights limitations in business contexts. If the framework and modalities for application of human rights limitations are clarified to suit the specific context of businesses,

[863] See section 4.3 above.
[864] This has been discussed in section 3.2 above.

this aspect of human rights law would bring further flexibilities that should make it feasible to construct a binding framework on business and human rights. The next section provides further reflections on some aspects of the claims of the thesis that need further clarification.

5.5 Further Reflections on the Thesis

This thesis has developed in chapter three what the requirement of law for permissible limitations of human rights implies in the context of businesses. It similarly developed the concept of legitimate aims in chapter four as they ought to be construed for human rights limitations in business contexts. Given that these concepts, law and legitimate aims, are different in meaning, there is a need for further reflection on how they are linked together in the context of human rights limitations. Also, given that the study leans towards the development of legally binding treaty that governs the human rights obligations of businesses, there is a need for further reflection on the potential role of the treaty, which areas and substance it ought to regulate, why it must address corporate self-regulation, how successful the treaty might be, problems it might face, what position the Working Group has taken in the treaty debate, problems it is facing and how the framework would work if businesses have binding obligations for human rights. These points are clarified in this section as an additional effort to show the impact that the incorporation of a human rights limitations framework would make in practice beyond the *Guiding Principles*.

This study envisages any emerging treaty to be in the form of a multi-faceted multilateral instrument that would seek to regulate the substance, institutions and procedures required to attribute human rights obligations to businesses and to monitor their compliances. In terms of substance, the *Framework* and *Guiding Principles* have made it clear that businesses affect the entire spectrum of human rights and as such they must have responsibility that covers all internationally recognised human rights, primarily as contained in the International Bill of Rights and the ILO core conventions.[865] The *Framework* indicated that limiting the range of human rights that businesses must address would almost certainly miss one or more human rights that may turn out to require significant attention in particular

[865] *Guiding Principles* (n 3) para 12.

instances.[866] This thesis similarly suggests that any emerging treaty must engage the responsibility of businesses for *all* human rights, due to the acknowledged interdependence of human rights as espoused in the Vienna Declaration and Programme of Action.[867] The bedrock of the need to incorporate the imperative of human rights limitations and balance of interests into the obligations of businesses rests on the fact that businesses must have obligations for all human rights, some of which are explicitly or implicitly subject to limitations and others which are not, calling for a clarity regarding this differentiation.

As argued in section 2.4.2 above, the mutuality and inter-dependence of human rights has direct implications for the nature of obligations that businesses ought to have for human rights. In the same vein as human rights are inter-dependent, the obligations required to realise them in particular contexts are also not mutually exclusive as the *Guiding Principles* suggest. As such, the entire spectrum of human rights and their dimensions of obligations as recognised in human rights law must be the substance and scope of the obligations of businesses. This does not imply that States no longer have obligations for human rights. The human rights obligations required of businesses are in respect of issues that emanate from their operations and the need to foreclose threats to human rights that may arise from such operations. States therefore preserve their entire duties for human rights as defined for them.

The treaty must as well cover the institutions and procedures required for businesses to implement and account for human rights policies and actions. In terms of institutions, supra-national human rights monitoring bodies in the likeness of the Human Rights Committee and such treaty-monitoring bodies are required to oversee corporate compliance with human rights. The form that such bodies must take would have to be decided by consensus among States and other relevant actors including businesses. However, the treaty must certainly provide procedural mechanisms for oversight, and institutions to receive and adjudicate complaints of corporate interference with human rights. It is in this context that the present study seeks to make its contribution. The study focused on two of the factors that need to be considered in developing the mechanisms for resolution of cases involving corporate interference with human rights. Primarily, the treaty must specify what constitute 'law' and 'legitimate aims' for permissible limitations of human rights within business contexts.

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[866] *Framework* (n 2) para 6.
[867] Vienna Declaration, (n 184) Art 5.

Sections 3.1 and 3.2 above argued that the question of what constitute law for such purposes cannot be limited to rules and regulations that are directly prescribed and handed down by States, but must also incorporate rules that are generated by businesses to regulate their operations in contexts where State regulations are absent or discouraged. In this sense, the treaty will not only have to address human rights limitations in light of laws that are directly prescribed by States but also how corporate self-regulatory instruments could become relevant part of the concept of law for analyses of permissible limitations on human rights in business contexts. The doctrine of private delegation, this thesis argued, provides the framework through which the treaty could clarify the rule-making capacity of businesses as part of the means to satisfy the requirement of law for purposes of human rights limitations in business operations. Thus, a treaty on business and human rights will have to regulate both corporate self-regulation and State-based prescriptive regulation as the means by which the requirement of law may be realised within the context of businesses for the purpose of human rights limitations. With regards to self-regulation, this thesis explained that the concept of 'enforced self-regulation' is the model of self-regulation that incorporates the doctrine of private delegation as a law-making mechanism and may thus be tapped to clarify how privately written rules could become enforceable by concerned States. This approach incorporates the rule-making capacity of businesses into the development of mechanisms for assessing their obligations and accountability for human rights violations.

Incorporating the rule-making capacity of businesses into the concept of law for human rights limitations could enhance certainty in the determination of their violations of human rights. This is because instruments that directly underpin corporate decisions would be easily identified and assessed for justification of specific measures that interfere with human rights. Arguably, it would be better for the protection of the interests of victims that businesses are held accountable for human rights violations on the bases of the instruments that directly prescribe their specific measures that interfere with human rights, rather than by applying remote and unrelated laws to assess cases in contexts where directly applicable laws authored by State are not available. The preceding sections provided some evidences indicating that some business decisions that affect human rights are not based on laws that are directly prescribed by States. Therefore if rules generated by businesses are not incorporated into the concept of law for assessing their violations of human rights,

uncertainties may arise in adjudicating some cases. Such uncertainties are not in the best interest of appropriate remediation of corporate infringements on human rights.

In a similar vein, the treaty would have to incorporate the core interests of businesses into the lists and definition of legitimate grounds for permissible limitations of human rights. This thesis proposed the list of factors that must be considered as legitimate interests of businesses, based on the finding in chapter four that those factors constitute the core interests that businesses would pursue in order to enhance their growth and development. Those factors thus constitute the main motivations behind corporate actions that interfere with human rights and the clearer they are understood, clarified and operationalised within the modalities for human rights limitations in businesses context, the greater the chances that the adjudication of corporate interferences with human rights can reach the core of their motives behind human rights violations. This in turn could enhance the certainty with which corporate violations of human rights are determined rather than by judging them on the bases of broad and convoluted motives that are not the direct motives behind their infringements on human rights. The concepts of law and legitimate aims as this thesis has developed are thus connected in the bid to provide better clarity and certainty for balancing business interests with human rights and are part of the broad range of issues that the treaty ought to regulate. These concepts are further connected as the two most basic tests within the established legal framework for assessing human rights violations as shown in section 1.3 above. The need to clarify these concepts is one of the problems that the treaty faces.

Other issues that require further reflection are the questions of how successful the treaty might be, the position of the Working Group on the issue, the problems it is facing, and how the human rights limitations framework would work if corporations have binding obligation for human rights. It is not yet very clear what the prospects are for a treaty to be agreed upon by States and as a consequence, how successful it may turn out to be in practice. Chapter two of this thesis noted that the contemporary lack of binding human rights obligations of businesses is a failure of international law-making rather than having to do with any special disposition of businesses that makes it impractical for them to assume legally binding obligations for human rights.[868] Rather, the failure primarily has to do with the lack of

[868] This observation has been made in section 2.2 above following an analysis of the conceptual basis for ascribing human rights obligations to businesses.

cooperation among States in regards to the assignment of human rights obligation to businesses. John Ruggie predicted that States would not cooperate effectively as needed to make the treaty work properly and listed this as one of the reasons why the development of treaty on business and human rights is not plausible.[869] This predicted lack of cooperation among States has already become evident in the treaty process as witnessed during the voting at the Human rights Council on the proposal submitted by Ecuador and South Africa to push for the treaty. Twenty countries voted in favour of the treaty, fourteen countries voted against it and 13 countries abstained.[870] The data showed that the supporting countries were mostly the developing countries, the main hosts of transnational corporate operations, and the opposing States were mostly European, the homes of most multinationals.[871]

This divided stance on the treaty process is troubling, because it may have significantly scupper effects on the prospects of the treaty. This is because the inputs of all countries would be imperative to build a strong consensus and backing for the treaty to succeed. If 'bigger' States withhold their inputs into the treaty process and deprive the process of the consensus it needs to succeed, they would not only set back the goal of demanding greater human rights compliance from businesses: they would also add to uncertainties in regulating businesses, especially those operating in challenging environments. Despite these conceivable problems, it is clear that a treaty could well be adopted on the basis of the numerical strength of the supporting States, with some persuasion of abstaining countries. If this happens, some countries will be confronted with the treaty, designed and built to bind the operations of their transnational corporations, without them being active parts of clarifying the modalities of the treaty. This is not in the best interest of any stakeholders, and more so not in the interest of advanced States and their multinational enterprises if those States stay off the process. Since international law vests the main power of regulating businesses into the jurisdictions of the host States and does not yet clearly place extra-territorial obligations on the home States to regulate the activities of businesses abroad,[872] an international treaty that fortifies the receiving States in the regulation of businesses can proceed outside the influence of home States. This suggests that if advanced countries stay

[869] Ruggie's bases for opposing the treaty have been noted in section 5.2 above.
[870] Posted by Business and Human Rights Resource Centre at http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions, accessed 14 August 2015.
[871] ibid.
[872] Bernaz (n 63) 510.

off the treaty process, they will most likely be haunted in the long run as their multinationals face international mechanisms in which they are not involved to factor in relevant concerns.

Businesses are strategic decision makers that normally look for operational efficiency and cheap costs of production, facilitated by the availability of cheap raw materials, cheap labour, vibrant emerging markets and flexible regulatory systems. Since most of these factors are exclusively found within the domain of developing countries, it is unlikely that transnational businesses will divest from those countries simply because an international treaty regulating respect for human rights comes into force. As has been noted earlier, the existence of a treaty would rather help both businesses and their stakeholders to make right assessments when the need arises to balance business interests and human rights. The treaty will achieve this by setting out clear risk parameters and clear modalities for adjudication of cases. This will eliminate prospects of costly and unforeseen litigations as the imperative of balance of interests is effectively factored into what constitutes corporate violation of human rights. In this sense, the treaty would provide a legal articulation of business obligations based on their interests, which would assist businesses in understanding the climate in which their operations need to be conducted and would also legitimately facilitate rightful attribution of blame to businesses when clear violations take place. This will help businesses to clarify, prove and communicate justifications of their interferences with human rights while victims will also be able to identify instances where their rights are truly violated. For this to happen, both advanced and developing countries need to be involved in clarifying the modalities of the treaty in the interests of States, businesses and their stakeholders.

The attitude and position of the main Working Group on Business and Human Rights, herein the Working Group, mandated to facilitate the implementation of the *Guiding Principles*, is another issue that is worth noting. There are signs that the Group is serving as a medium to build consensus among States towards the treaty process.[873] The Draft Report from the first session of the Open-ended Inter-Governmental Working Group on Transnational Corporations and other Business Enterprises, (OEIGWG), indicates that when a stalemate arose during the first session for negotiations on the treaty process, attempts were made to

[873] See para 16 of the Human Rights Council's 'Draft Report of the Open Ended Intergovernmental ….' , published on 10 July 2015 following the firsts session of the Open Ended Inter-governmental Working Group, at http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Draftreport.pdf; accessed on 19 August 2015.

get the chairman of the Working Group on the *Guiding Principles* to feature in one of the panel discussions as a means to build consensus among representatives in the clarification of a term to be inserted into the treaty.[874] This shows that one of the most profound challenges facing the OEIGWG is the lack of consensus among States. As stated above, this may affect the treaty but will not necessarily stop it.

One issue that is also of concern in the treaty process is the human rights status of States that are in the forefront of developing the treaty and how this may affect the prospects of the treaty. Some of the States are themselves bedevilled by poor human rights records and accusations of disrespect of their human rights obligations. Poor records of States that lead the formulation of human rights and their inability to ratify and comply with human rights obligations is of a major concern for the efficacy of international human rights law in general. Michael Ignatieff argued that the poor human rights records of the nations that led the foundation of human rights law is an evidence that human rights are not necessarily trumps against other interests as they are supposed to be but are rather a mere facet of international politics and idolatry.[875] In an undated post on the treaty, John Ruggie noted this as a potential problem in the treaty process, asking: "does anyone believe that the United States would impose on U.S.-based corporations the terms of human rights treaties that it has not ratified? Or that China would do so with regard to its firms?"[876]

Poor human rights records of the States that are currently leading the treaty process can thus be of real concern and challenge to the prospect of developing a viable and consensus-based treaty, and rightly so, but this does not necessarily minimise the importance of a treaty as a mechanism to regulate the human rights obligations of businesses and to demand accountability for victims. The inability of States to manage their own human rights obligations exposes their incapacity to effectively regulate businesses in respect of human rights, and indicates a need for supra-national mechanism(s) to set modalities for level-playing field for all States to address the business and human rights challenge in a concerted manner. The assumption of binding obligations for human rights would minimise this threat

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[874] ibid.
[875] Ignatieff (n 113) 20-22; 48.
[876] John Ruggie, 'Get real or we'll get nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty', at http://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty, accessed 19 August 2015.

of States inability to regulate businesses and will address the current lack of uniformity among States in terms of what they expect from businesses, how they attempt to regulate them and expose inconsistencies in the balance of business and human rights. The next section concludes the study by refreshing its core observations and contributions.

5.6 General Conclusion

In concluding this study, it is essential to reiterate a statement made by John Ruggie in his introduction to the framework that culminated into the *Guiding Principles*. Ruggie noted:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[877]

This statement points to an important fact about the business and human rights issue. It indicates that whereas businesses are primarily under State control, some of their activities take place outside the ambit and range of State regulation. The reasons for this situation have been given in sections 3.1 and 3.2 of this thesis. The preceding chapters elaborated further on this to show that the State is not the sole regulator of businesses and as such issues that need to be clarified in the business and human rights domain must cover the range of business operations outside State regulation. This understanding underpinned this study.

With this in view, this study examined the proposition that human rights limitations could form an explicit part of the human rights obligations of businesses. This proposition was based on the understanding that human rights limitations are essential components of human rights law and their applicability in business contexts needs to be clarified for the imposition of obligations on businesses to be fully meaningful.[878] This led to the question of whether

[877] Framework (n 2) para 3.
[878] Recalling the excerpts drawn in chapter one from Smith (n 14) 171-182 and Brems (n 16) 1-16.

businesses are in a position to satisfy the core conditions required for permissible limitations on human rights or how such conditions may be met in the context of businesses for permissible limitations of human rights. The study therefore focused on two of the core requirements for permissible limitations of human rights; namely, the concepts of law and legitimate aims. Thus, the study narrowed down to examine the concepts of law and legitimate aims, seeking to find out what they imply from a business perspective.

Chapter three analysed what the concept of law required for human rights limitations could imply in the context of businesses. It found that within the context of businesses, States are not the only entities that make rules that set direct bases for corporate measures that interfere with human rights; businesses also generate their own rules that are not based on public authority and they use such instruments as bases for taking measures that interfere with human rights[879], and States have reasons not to command and control businesses.[880] The context of businesses therefore involves a regulatory mix; a mixt that involves both public and private actors. In view of this regulatory mix, it became apparent that within the context of businesses, the notion of law as required for permissible limitations of human rights must incorporate the rule-making capacity of businesses, that is, the standing that businesses have to make rules, apart from laws handed down by States, to take business decisions. This lead further to the question of whether and how rules generated by businesses as private actors could validly serve as bases to subject human rights limitations and how they may attain relevance for such purposes without undermining the authority of States.

In an effort to make sense of this issue, the jurisprudence of the European Court of Human Rights has been examined. It was found that a private actor may generate rules that have significance for human rights limitations if it has recognised autonomy in society and the rule so made is backed by State recognition. In line with this, the doctrine of private delegation has been deployed to connect the rule-making capacity of businesses to State authority. It was found that by means of the doctrine of private delegation, operational rules generated by businesses could acquire relevance for such purposes if they are subject to State authority and are clear and accessible to target stakeholders.[881] This led to the question of whether business could be said to have the disposition to perform delegated rule-making

[879] Jägers (n 222) 301.
[880] Recall the discussion in section 3.1 and 3.2 above.
[881] See sections 3.3 and 3.4 above.

in conformity to the requirement of law for permissible limitations of human rights. Using literature on the doctrine of private delegation, corporate governance, regulation and other materials, it was found that businesses that may be expected to utilise corporate governance practices have recognised autonomy in society and are thus in position to generate such rules under State supervision. The study therefore came to the conclusion that within the context of business, the concept of law as required for judicial assessment of corporate interference with human rights primarily refers to directly applicable domestic laws. However, this may be lacking in certain contexts due to the various reason discussed earlier. In place of these, the requirement of law may also be satisfied by reference to applicable operational rules that are generated by businesses themselves and are subjected to State recognition as required by the doctrine of delegation. This means the concept of law is construed in two dimensions; a primary one comprising of directly applicable laws that are handed down by States to businesses, and where State laws are lacking, a supplementary dimension comprising of rules that are generated by businesses with the permission of concerned States.

It is expected that if the concept of law is conceptualised in this way, it will close any gaps that might arise in judicial assessment of corporate interference with human rights due to gaps created by the lack of directly applicable domestic laws that ought to serve as the bases for business measures that restrict human rights. It also implies that in contexts where States are discouraged, unable or unwilling to make rules that constrain businesses, the self-regulatory rules that are created by businesses could be scrutinised to determine whether specific activities that interfere with human rights amount to human rights violations. Backed by the theory of 'enforced self-regulation' as propounded by Ayres and Braithwaite and discussed earlier, this thesis also proposed a concept of 'self-regulatory accountability' suggesting that in the absence of directly applicable laws made by States, operational rules generated by businesses may serve as bases to hold them accountable for human rights violations if their rule-making capacity is construed as a matter of delegated function. This conception of the rule-making power of businesses brings them under State supervision while relaxing the risk of States having to make all laws and to control all aspects of business affairs, which as shown earlier, may be too rigid, imprecise or not well tailored enough into businesses contexts so as to foster business growth and development.

It was however emphasised in section 3.5 above that the framework of law as discussed in this chapter is geared toward ensuring that the concept of law, being one core condition required for permissible limitation of human rights, is observed in any circumstances where businesses interfere with human rights and raises the need for assessments to determine human rights violations. Thus, as emphasised earlier, the satisfaction of the requirement of law does not justify an interference with human rights, even though the lack of it amounts to human rights violation. This leads to the next level of assessment relating to legitimate aims.

Regarding the question of whether business interests could serve as permissible grounds for human rights limitations, it was found that businesses have unique interests that differ from the list of legitimate aims that human rights instruments have provided as permissible grounds for human rights limitations. Dwelling on research in business management, the core business interests which from a corporate perspective may constitute the 'equivalents' of legitimate concerns, include the shareholder value, revenue generation, operational efficiency, access to capital, customer attraction and retention, brand value and reputation management, attraction and retention of quality human capital, risks management, product invention and innovation, and the licence to operate, both the legal and the social.

Given the importance that these core factors have on business growth and profitability, it has been taken as given that they are the direct motives behind corporate decisions and operational strategies that lead them to take measures that interfere with human rights. As such, their conflicts with human rights would call for clarification of the balance of interest considerations. Two dimensions of each of these business interests have been examined in chapter four of this thesis. The first dimension was to find out whether these factors have the propensity to lead to cases against businesses, that is whether businesses actually pursue them and in the course of such pursuits, they take measures that interfere with human rights. The second dimension was whether each of these factors could pose any unique challenges that may hinder the judicial assessment of their balances with specific human rights.[882]

Cases have been examined and it was found that each of these factors has been cited in cases as the bases for businesses having taken measures that interfered with human rights, showing that in deed, they have the propensity to interfere with human rights and may give

[882] See sub-section 4.3.2 above.

rise to judicial balance of interests. With regards to whether they pose any unique challenges in judicial assessments, it was found that some of these business interests are complicated to be assessed in judicial settings. For instance, it has been asserted that it may be difficult in some circumstances to determine what constitutes innovation that a business may claim the right to protect as its intellectual property. Also, a company's claim to have taken measures that interfered with human rights in pursuit of factors such as operational efficiency, corporate reputation and risks management may be difficult to examine because these terms are so fluid and technical that they require detailed analyses to determine the veracity of the company's claims. It has been suggested that if these core business interests listed in this chapter are adopted as legitimate aims for which businesses may interfere with human rights, there would be a need of further clarifications in a separate legal framework.

As discussed in relation to the concept of law, section 4.4 above also noted that the requirement of legitimate aims, and thus the consideration of business interests as legitimate interests that call for balancing with human rights, does not necessarily mean that they trump human rights. The satisfaction of the requirement of legitimate aims would only give reason for the next higher level of analyses, i.e. the test of proportionality, to determine whether an impugned measure amounts to human rights violation. As explained in that section, the list of business interests as legitimate interests in competition with human rights does not necessarily mean that they are equal to State interests in that capacity or that they have automatic weight to trump human rights. They are considered as legitimate from the perspective of businesses as potential bearers of human rights obligations.

In conclusion, this thesis asserts that human rights limitations must necessarily form an explicit part of the obligations of businesses because it is embedded into human rights law. Also, it is possible to a large extent, to operationalise the requirements of law and legitimate aims in ways that capture the unique context of businesses. This is possible, provided that States recognise the rule-making capacity of businesses as a matter of delegated function and further efforts are made to clarify how the core interests of businesses could be addressed when in conflict with human rights. These two requirements, as noted earlier, are connected mainly in terms of being the core basic requirements that are recognised in all human rights instruments as bases for permissible limitations of human rights. The work embarked upon in this thesis also connects them in the sense that their clarification is

required to make the application of human rights limitations in business contexts more certain and to capture their specificities in corporate contexts. This conclusion gives support to the need to construct a separate binding framework on business and human rights. Since human rights limitations are essentially legal issues, a binding framework would incorporate human rights limitations into the obligations of businesses. The benefits that could flow from these are numerous but there are specific ones that are discernible from this study.

Firstly, the concept of law as it is defined for human rights limitations is State-centric and needs to be re-conceptualised to incorporate the rule-making capacity of businesses. Even though this is also not entirely detached from State authority, it can foster greater corporate accountability for human rights in contexts where States law is not directly applicable. Further, such a framework would have to clarify the list and content of legitimate aims that may have to be balanced with human rights in business contexts. If these become clear and human rights limitations are factored into the obligations of businesses, it would mean that corporate measures that interfere with human rights would not be considered as human rights violations unless they are tested judicially and the right balance is found between competing interests. This will help to ascribe blame only where it is deserved and not to consider any business measure that interferes with human rights as a human rights violation. It will also help victims of corporate interference with human rights by ensuring that businesses can be held accountable even in the situations where they are not directly regulated. In this sense, the incorporation of human rights limitations in business contexts would provide the required flexibility that businesses need for growth and will also ensure that human rights are respected and considered as required in business contexts.

5.7 Problems Encountered and Suggestions for Policy and Research

The development of this thesis has encountered some difficulties that need to be considered for further research. One main difficulty relates to the choice of terminologies. Since human rights law has not been develop with businesses in focus as addressees, certain terminologies appear to be too sensitive in application to businesses. One typical example is the concept of law. According to the analyses provided above, a rule generated by private actor in

accordance with the doctrine of private delegation also constitutes ‘law’ within the meaning of the term for purposes of human rights limitations but a new treaty on business and human rights would have to operationalise such terms more clearly in relation to businesses. Also, it appears that the expression ‘human rights limitation’ may be misleading if applied to businesses. It may create the impression that businesses are being given the chance to impede human rights or that they are being let out of the hook for accountability for their infringements on human rights. However, as noted earlier, the idea of limitations is simply an expression of appropriate balance of human rights with other legitimate interests. A new framework on business and human rights needs to clarify these issues as well.

Another problem encountered is in relation to the propensity of cases against businesses to be dismissed at jurisdictional levels without proceeding to consideration of merits. For the development of this study, a large number of cases (over one hundred cases) have been read and even though some of them would have been very relevant for clarifying the business interest issues, they were dismissed at jurisdictional levels and therefore not useful as such. In view of these, I recommend that further research on the business interest dimension of this study should take a qualitative approach so as to discuss directly with business leaders, judges, lawyers and other relevant stake-holders. Also, there is a need for further research to develop human rights limitations in emergency situations in business contexts. Lastly, the test of proportionality was not covered in this thesis for reasons spelt out in section 1.5 above, and may have to be taken in further research. These will ultimately contribute to push forward the clarification of human rights limitations in business contexts and ultimately the clarification of ascribing binding human rights obligations to businesses.

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