

**Should International Human Rights Law Be Extended
to Apply to Multinational Corporations
and Other Business Entities?**

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Thesis submitted for the Degree of Doctor of Philosophy in Political Science

September 2014

I, Sabina Anne Espinoza, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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ABSTRACT

International human rights law (IHRL) has traditionally only imposed duties on states. But as multinational corporations (MNCs) and other business entities are perceived as increasingly powerful agents in the global economy, and capable of impacting on many of the interests protected by IHRL, scholars as well as practitioners argue that IHRL should be extended to apply to these entities.

My argument in this thesis is twofold. Firstly, I make the normative case that calls for business accountability under IHRL misunderstand the particular role of IHRL, taking the point of IHRL as protecting important human interests against anyone who has the capacity to harm these interests. I argue that the role of IHRL is better understood as holding states accountable for the performance of their special institutional duties. If we were to extend international human rights duties to business entities, many of the core principles of IHRL would need to be changed which in turn would undermine the very identity of this body of law – it would no longer fulfil the distinct function of regulating political authority. I argue that it would impoverish our legal vocabulary if we were no longer able to express the distinction between state violations of human rights and harm done by private actors.

And secondly, I argue that there are a number of practical challenges to extending IHRL to business entities, and that the implementation mechanisms of IHRL are currently not well-suited to address many of the concerns that give rise to calls for business-human rights-accountability in the first place. I conclude that an extension of IHRL may therefore not be the straightforward and effective solution that it tends to be made out in the current debate and that alternative approaches to business regulation may be preferable.

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ACKNOWLEDGEMENTS

First and foremost, I am grateful to my two thesis supervisors at the School of Public Policy, University College London (UCL), Saladin Meckled-García and Başak Çalı. This PhD thesis would not have been conceivable without their invaluable guidance, feedback, and encouragement throughout.

I have benefited enormously from the discussions at the doctoral political theory seminars at UCL, and from many more, formal and informal, conversations. In particular, I would like to thank the following for their priceless thoughts and comments that helped shape the arguments in this thesis: Sara Amighetti, Richard Bellamy, Gwilym David Blunt, Chiara Cordelli, Andrew Jillions, David J. Karp, George Letsas, Julio Montero, Shin Osawa, Avia Pasternak, Coro Power, Andreea Udrea, Albert Weale, and Alice Wyss. Special thanks have to go to Andréa Sepulveda, not only for hours of interesting discussions but also for even longer hours of joint library sessions and for finding the best spots for coffee breaks, and to Teresa Curristine, Ragnheiður Jónsdóttir, Judith Neuhoff, and Sarah Schuhen for their tireless moral support and for being such great friends.

My interests in political theory and human rights were first sparked during my undergraduate days at the University of Oxford and I would like to thank Marc Stears in particular for his great teaching and encouragement.

I would also like to thank my colleagues at the United Nations Global Compact Office in New York, in particular Ursula Wynhoven, and at the Platform for International Cooperation on Undocumented Migrants in Brussels, in particular Eve Geddie and Michele Levoy, for providing me the opportunities to work with them and for great discussions on human rights from practitioners' perspectives.

Finally, I owe the greatest thanks to my family – to my parents for their love and generous support for this project, to my brother for his humour and unmatched ability to put all things into perspective, to my *beaux-parents* for their admirable dedication to academic research which provided much-needed inspiration on many occasions, and of course to Raphaël, Henri and Samuel, my greatest love and joy in life.

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LIST OF ABBREVIATIONS

ACHPR - African Charter on Human and People's Rights

ACHR - American Convention on Human Rights

CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

CESCR – United Nations Committee on Economic, Social and Cultural Rights

CMW - International Convention on the Protection of All Migrant Workers and Members of Their Families

CRC - Convention on the Rights of the Child

CRPD - Convention on the Rights of Persons with Disabilities

ECHR - European Convention on Human Rights and Fundamental Freedoms

ECmHR – European Commission of Human Rights

ECSR – European Committee of Social Rights

ECtHR – European Court of Human Rights

ESC – European Social Charter

IACtHR – Inter-American Court of Human Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICCPR - International Covenant on Civil and Political Rights

ICERD - International Convention on the Elimination of all Forms of Racial Discrimination

IHRI – International Human Rights Institutions

IHRL – International Human Rights Law

MNC – Multinational Corporation

TNC – Transnational Corporation

UDHR – Universal Declaration of Human Rights

UN HRCttee – United Nations Human Rights Committee

CHAPTER 1: SHOULD INTERNATIONAL HUMAN RIGHTS LAW BE EXTENDED TO APPLY TO MNCs AND OTHER BUSINESS ENTITIES?

1. INTRODUCTION

International human rights law (IHRL) has traditionally only imposed duties on states.¹ In a nutshell, international human rights law is an area of international law that sets out a broad range of entitlements individuals hold against governments, ranging from so-called civil and political rights, such as the rights to be free from arbitrary deprivation of life, torture and other ill-treatment, or to freedom of thought, conscience and religion, to social and economic rights such as the rights to health, to education or to an adequate standard of living. IHRL is laid down in a number of different international treaties - broadly, we can distinguish between United Nations human rights treaties on the one hand, and the human rights treaties of regional organizations on the other.²

¹Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), p.78. Note that some authors have made the argument that IHRL can already be interpreted as imposing duties on private actors like business entities; I will address this argument in chapter 4B, section 5 below.

² The different international human rights treaties will be discussed in more detail in chapter 4. The eight core UN human rights treaties are the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD), the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Rights of the Child* (CRC), the *International Convention on the Protection of All Migrant Workers and Members of Their Families* and the *Convention on the Rights of Persons with Disabilities*. At the regional level, there are the *European Convention on Human Rights and Fundamental Freedoms*, the *European Social Charter*, the *American Convention on Human Rights*, the *African Charter on Human and People's Rights* and the *Arab Charter on Human Rights*. For a discussion of the interaction of national, regional and global legal human rights provisions see Stephen Gardbaum, 'Human Rights as International Constitutional Rights', *European Journal of International Law*, 19.4 (2008), 749-768.

1.1 DEFINING MULTINATIONAL CORPORATIONS AND BUSINESS ENTITIES

As multinational corporations (MNCs) and other business entities are perceived as increasingly powerful agents in the global economy, and consequently capable of impacting on many of the interests protected by IHRL, scholars as well as practitioners have called for an extension of international human rights law to businesses. In other words, it has been argued that IHRL should apply directly to business entities, that these entities should be duty bearers under IHRL.³

Multinational corporations have been defined as such business entities which have their home in one country but which operate in other countries as well and thereby also live under the laws of countries other than their home countries.⁴ In other words, multinational corporations (they are also interchangeably referred to as ‘transnational corporations’ or ‘TNCs’ in the contemporary business-and-human rights debate) exist simultaneously in a number of different sovereign

³ Chris Jochnick, ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’, *Human Rights Quarterly*, 21.1 (1999), 56-79; Mahmood Monshipouri, Welch, Claude E. and Kennedy, Evan T., ‘Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities’, *Human Rights Quarterly*, 25 (2003), 965-989; David Weissbrodt and Muria Kruger, ‘Current Developments: Norms on the Responsibilities of TNCs and Other Business Enterprises with Regard to Human Rights’, *American Journal of International Law*, 97.4 (2003), 901-922; David Kinley and Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’, *International Law*, 44.4 (2003-2004), 931-1023; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), pp.195-270; Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005); Francesco Francioni, ‘Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations’, in *Economic Globalisation and Human Rights*, ed. by Wolfgang Benedek, Koen de Feyter, and Fabrizio Marrella (Cambridge: Cambridge University Press, 2007), pp.245-265; Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability* (2004),

<http://www.amnesty.org/en/library/asset/IOR42/002/2004/en/c17311f2-d629-11dd-ab95-a13b602c0642/ior420022004en.pdf>.

⁴ Stephen J. Kobrin, ‘Sovereignty@Bay: Globalization, Multinational Enterprise, and the International Political System’, in *The Oxford Handbook of International Business*, ed. by Alan M. Rugman and Thomas L. Brewer (Oxford: Oxford University Press, 2001), pp.183-204 (p.183).

jurisdictions.⁵ Business entities can be defined, for the purposes of this thesis, as any private, non-state, and for-profit entity.

For the most part, I will refer to multinational corporations as well as other business entities jointly as ‘businesses’, ‘business enterprises’, ‘business entities’, ‘companies’, or ‘corporations’ interchangeably as the arguments concerning a possible extension of IHRL to these respective agents that I present in this thesis are for the most part the same. In some passages, I will explicitly talk about multinational corporations (MNCs) as they pose particular challenges in some ways. In these instances, I will clearly indicate the particular issue at stake due to the multinational nature of such entities.

1.2 SOME EXAMPLES OF ‘CORPORATE HUMAN RIGHTS HARM’

To name only some of the examples in which corporations have come under scrutiny from a human rights perspective: particularly (but certainly not only) in the footwear, clothing and sporting goods industries, violations of basic labour standards are routinely brought to light. Common allegations include, for instance, that companies use child or forced labour, pay inadequate wages, or do not provide decent working conditions, which may include not adhering to basic health and safety standards.⁶ Corporations have also been known to withhold

⁵ David J. Karp, *Responsibility for Human Rights – Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014), p.28.

⁶ Cristina Baez, Michele Dearing, Margaret Delatour, and Christine Dixon (1999/2000) ‘Multinational Enterprises and Human Rights’, *University of Miami International and Comparative Law Review*, 8 (1999-2000) 183-249 (pp.244-246); quoted after Kinley and Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’, p.933. In the summer of 2014, some major global supermarkets chains made the headlines for sourcing prawns from Thailand produced with slave labour. Companies involved included, for instance, Tesco, Walmart, Costco and Carrefour. See, for instance, <http://www.theguardian.com/business/2014/jun/25/government-uk-retailers-ordered-improve-human-rights> .

workers' identity papers in order to force them into abusive contracts.⁷ They have been found to fail to provide safety training or safety equipment for hazardous jobs,⁸ or to prevent workers from organizing and bargaining.⁹

Companies particularly in the agricultural and mining sectors have also been criticized for causing large scale resettlements, resulting not only in material losses but also forcefully expelling individuals or entire communities from lands that have cultural or religious value. Corporations in the oil, gas or mining industries have been reported to engage in environmentally degrading practices affecting the livelihoods and health of indigenous people. So for instance, the U.S. petrochemical corporation Chevron's drilling practices in the Ecuadorian Amazon have been related to severe pollution and health problems of the local population.¹⁰ In the Niger Delta, oil spills by the Royal Dutch Shell company have resulted in ongoing damage to fisheries and farm lands. This, in turn, has had negative impacts on people's livelihoods in a number of ways – to name just

⁷ The case of private companies in Qatar (and other Gulf countries), where under the *kafala* system employees depend for their work permit on a sponsor who is often the employer, has attracted particular attention in the current debate. See for instance, Special Rapporteur on the Human Rights of Migrants, 'Report on Mission to Qatar', A/HRC/26/35/Add.1.

⁸ In Bangladesh, an eight-story garment factory producing clothes for many European and US brands (including, for instance, Benetton, Bonmarché, El Corte Inglés, Monsoon Accessorize, Mango, Primark, and Walmart) collapsed after a fire in April 2013, killing and injuring thousands of employees. See, for instance, <http://www.business-humanrights.org/Search/SearchResults?SearchableText=rana+plaza&x=6&y=11>. Surviving employees later reported that employers had not only failed to comply with any acceptable fire and safety standards, but actively prevented workers from leaving the building once the fire broke out.

⁹ See Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', p.934, on cases of suppression, systematic intimidation, torture, kidnapping, or murder of trade unionists as in the cases of Coca Cola in Colombia or Phillips-Van Heusen in Guatemala. Also see Human Rights Watch, *A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations* (2010) on the actions of a range of European companies like Deutsche Telekom, T-Mobile, Tesco, Robert Bosch, and Siemens in the US, against trade unionists at <http://www.hrw.org/en/reports/2010/09/02/strange-case-0>

¹⁰ See, for instance, the report at <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/oil-gas-and-mining-industries/chevron-corp> ; for an account of related law suits see <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c9332> .

a few of the consequences critics have pointed out, people who worked as fishermen and farmers have largely lost their jobs, food prices have risen significantly, and drinking water has been contaminated which causes cancer and other serious health problems to the population who consumes the water.¹¹

Companies have also been found to employ repressive security forces against local communities in order to protect their plants, and to be implicated in violent clamp-downs of protests against their operations, resulting in severe physical harm to or even death of protesters. The case of the oil company Royal Dutch Shell in Nigeria figures among the most well-known in this respect: Ken Saro Wiwa, a member of the Ogoni people whose lands in the Niger Delta were the site of crude oil extraction, had led a non-violent campaign against environmental degradation through the oil industry, and in particular, against Royal Dutch Shell. He was arrested for this campaign and hanged in 1995 after a hasty military trial. Other leaders and members of the protest were also killed. Shell was accused of having requested Nigerian soldiers and police to clamp down on the protests, and of having provided monetary and logistical support to the Nigerian state forces, even though they were aware of the brutal methods of the Nigerian forces.¹²

Corporations have also been implicated in human rights violations of governments. So for instance, several multinational oil companies undertook a joint venture with the Burmese state-owned oil company Myanma Oil and Gas

¹¹ Among other, the petroleum hydrocarbons which enter people's bodies are thought to cause cancer and neurotoxicity over the medium and long run. See Amnesty International, *The True 'Tragedy' – Delays and Failures in Tackling Oil Spills in the Niger Delta* (2011), pp.11-12, at <http://www.amnestyusa.org/research/reports/the-true-tragedy-delays-and-failures-in-tackling-oil-spills-in-the-niger-delta>.

¹² In 1996, the US NGO *Center for Constitutional Rights* and *Earth Rights International* (ERI) and a group of human rights attorneys brought a series of cases under the Alien Tort Statute and the Torture Victim Protection Act; however, before the scheduled trial in the United States District Court for the Southern District of New York, the company Shell agreed to pay an out-of-court settlement of \$15.5 million to victims' families in June 2009.

Enterprise (MOGE). MOGE was in charge of providing labour and security for the construction of a gas pipeline as part of the joint project. It later emerged that MOGE had employed forced and child labour to build the pipeline, and that other violations like torture and forced relocation were committed in clearing and ‘securing’ the area. In this case, the main Western partner, UNOCAL, did not directly carry out violations however benefitted from cheap labour and the ‘security’ granted for the plant.¹³

In some instances, companies have supplied regimes with the materials and services needed to commit killings – as in the case of *van Anraat*,¹⁴ a Dutch manufacturer who directly and knowingly delivered the chemicals required to produce mustard gas to Saddam Hussein.

Corporations have also been criticised for operating in countries with abusive governments, and for fuelling abusive regimes or ongoing violent conflicts. So for instance, US and European companies have been criticized for trading weapons, diamonds and timber from conflict states like Angola, the Democratic Republic of Congo (DRC), Sierra Leone, Côte d'Ivoire and Liberia.¹⁵ Similarly, the diamond industry has been criticized for financing violent conflict in some African countries as warlords use their revenues for armed operations.

¹³ Danish Centre for Human Rights, ‘Defining the Scope of Responsibility for Human Rights Abroad’ (2000), <http://business-humanrights.org/en/danish-centre-for-human-rights-business-project-1#c18936> .

¹⁴ *Public Prosecutor v Frans Cornelius Adrianus van Anraat*, District Court of The Hague, 23 December 2005, Case No. AX6406 and Court of Appeal of The Hague, 9 May 2007, Case No. BA6734.

¹⁵ Wolfgang Kaleck and Miriam Saage-Maass, ‘Corporate Accountability for Human Rights Violations Amounting to International Crimes: the Status Quo and Its Challenges’, *Journal of International Criminal Justice*, 8.3 (2010), 699-724.

Pharmaceutical companies have come under scrutiny for the way in which they protect their patents, driving up the price of life-saving medicines for millions of people in the developing world.¹⁶

Commentators have also called for business-human rights-accountability where corporations take on functions that have traditionally been the exclusive domain of states.¹⁷ A commonly cited type of example in this context concerns abuses by private military and security companies (PMSCs) that play an increasing role in providing services to states in conflict zones around the world.¹⁸ One case that gained particular attention by human rights activists and other commentators was the ill-treatment and torture of inmates of Abu Ghraib prison in Iraq in which contractors from two companies, Titan Corp. and CACI, were deeply implicated.¹⁹ And businesses have not only assumed state-like functions in conflict contexts. Private companies have been charged by governments to fulfil functions ranging from the provision of health care, education, or the operation of detention facilities.²⁰ In the United States, in some private residential areas (so-called ‘common-interest developments’) local government and police functions are effectively privatized and no longer exercised by the state.²¹ These

¹⁶ See <http://www.business-humanrights.org/Home> for a comprehensive resource centre for reports and news items about companies’ human rights impacts worldwide.

¹⁷ Philip Alston, ‘The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’’, in his *Non-State Actors and Human Rights*, pp.9-10.

¹⁸ Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2003).

¹⁹ Alston, ‘The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’’, p.9. Also see the following reports of the events, by the NGOs *Amnesty International* at <http://www.amnestyusa.org/military-contractors/page.do?id=1101665> and *Truthout* at <http://www.truth-out.org/opinion/item/23362-abu-ghraib-10-years-later-challenging-corporate-impunity-for-torture>; and by the US independent news program *Democracy Now* at http://www.democracynow.org/2014/5/5/10_years_after_abu_ghraib_ex

²⁰ Clapham, *Human Rights Obligations of Non-State Actors*, p.8.

²¹ Evan McKenzie, *Privatopia* (New Haven: Yale University Press, 1994), pp.15-16; quoted after Clapham, *ibid.*, pp.10-11.

are just a few of the most common examples that have attracted calls for business-human rights accountability.

The debate surrounding the human rights obligations of business enterprises is very topical and has not only been of interest to scholars and human rights activists, but also been high up on the international policy agenda for a number of years. Perhaps most prominently in the last decade, John Ruggie was appointed as Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises²² in 2005 and mandated to elaborate on the responsibilities of MNCs and other business entities. The United Nations (UN) Human Rights Council endorsed the resulting UN Guiding Principles on Business and Human Rights (also the ‘Guiding Principles’ in the following) in 2011. While these Guiding Principles are not themselves legally binding, in the wake of their endorsement by the UN Human Rights Council there is currently an ongoing debate whether IHRL should be extended to directly apply to MNCs and other business entities,²³ and some commentators have even called for the creation of a new world court of human

²² He was first appointed by the UN Commission on Human Rights, UNCHR Res 69 (2005) UN Doc E/CN.4/RES/2005/69, ‘Human rights and transnational corporations and other business enterprises’. His mandate was renewed by the UN Human Rights Council in 2008, UNHRC Res 8/7 (2008) UN Doc A_HRC_RES_8_7, ‘Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’.

²³ In June 2014, two resolutions were adopted by the Council: one requesting to “*establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*” – UNHRC Res (2014) A/HRC/26/L.22/Rev.1, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ and a second one “*to launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument, and to prepare a report thereon and to submit it to the Human Rights Council at its thirty-second session*” - UNHRC Res (2014) A/HRC/26/L.1, ‘Human rights and transnational corporations and other business enterprises’.

rights that would enforce human rights obligations not just for states, but also for non-state actors like businesses.²⁴

I argue in this thesis that despite much interest and attention, there are important issues which the current debate has not, or not sufficiently, addressed. In particular, I argue that commentators have tended to *assume* that the extension of IHRL to apply to MNCs and other business entities would be a natural and appropriate response to the growing influence of business enterprises, without considering

- (1) What implications the extension of IHRL to business entities would have for the role that IHRL currently plays as a specific area of international law; and
- (2) Whether IHRL would be a suitable tool to regulate businesses. Firstly, the question here is whether existing human rights standards would be suitable to be applied to business entities; and secondly, whether an extension of IHRL to business entities would indeed address the concerns that motivate calls for such an extension in the first place.

I argue that these two questions are crucial to addressing the overarching question of this thesis, ‘Should international human rights law be extended to apply to multinational corporations and other business entities?’ – a question that I argue lies at the heart of the contemporary business–and–human rights debate.

²⁴ Martin Scheinin, ‘Towards a World Court of Human Rights’ (2009), http://www.udhr60.ch/report/hrCourt_scheinin0609.pdf.

2. THE ‘BUSINESS – AND - HUMAN RIGHTS DEBATE’ IN POLICY AND LITERATURE

In the following, I provide an overview of what, as shorthand, I will also refer to as the ‘business-and-human rights debate’ in policy making and the scholarly literature in the past decades. Current developments toward legal duties for businesses, and more particularly for corporate duties under IHRL, are best understood in the context of a debate that has been ongoing for several decades and which not always focused on *legally binding* rules. However, it is nevertheless important to stress from the outset that in this thesis I am specifically concerned with the question of whether IHRL, as a distinct area of international law (defined in more detail in chapter 4A) should be extended.

2.1 HISTORY AND DEVELOPMENTS OF THE POLICY DEBATE

As early as the 1970s, there were some movements towards developing binding international rules to regulate the activities of transnational corporations. Triggered by the ‘ITTC case’ where the representative of Chile denounced the US International Telephone and Telegraph Company (ITTC) for having interfered in Chilean internal politics at the 1972 meeting of the United Nations Economic and Social Council (ECOSOC), the ECOSOC passed a resolution to appoint a group of experts to study the impact of multinational corporations. In the following, the UN Intergovernmental Working Group on a Code of Conduct elaborated a draft UN Code of Conduct on Transnational Corporations in the 1970s and 1980s, presenting its final draft in 1990.²⁵ While this Code of Conduct did not explicitly refer to human rights, the underlying concerns were already quite similar to some of the concerns that motivate calls for human rights accountability in the current debate – the Code aimed to “maximize the

²⁵ ECOSOC, E/1990/94 (1990) ‘Proposed Text of the Draft Code of Conduct on Transnational Corporations, U.N.’, quoted after Helen Keller, ‘Corporate Codes of Conduct and their Implementation: The Question of Legitimacy’, in *Legitimacy in International Law*, ed. by Rüdiger Wolfrum and Volker Röben (Berlin: Springer, 2008), pp.219-289 (p.227).

contributions of transnational corporations to economic development and growth and to minimize the negative effects of the activities of these corporations.”²⁶ While the Soviet Bloc supported the draft, most industrialized countries did not and the negotiations were formally abandoned in 1992.²⁷

Early voluntary initiatives

In the following decades, a number of soft law or voluntary initiatives were adopted to guide the activities of multinational corporations: in 1976 the Organization of Economic Cooperation and Development (OECD) adopted its Guidelines for Multinational Enterprises²⁸ and in the following year the International Labour Organization (ILO) adopted a Tripartite Declaration of Principles concerning Multinational Enterprises.²⁹ The OECD Guidelines were aimed, among others, at “encouraging the positive contributions of multinational enterprises to economic and social progress and minimizing or resolving difficulties that may result from their activities”.³⁰ While these early initiatives did not propose an extension of international human rights duties as such,³¹ they already addressed several of the topics that would later be referred to as

²⁶ Ibid. (p.227).

²⁷ Ibid.; also see John G. Ruggie, ‘Business and Human Rights – the Evolving International Agenda’, *American Journal of International Law*, 101.4 (2007), 819-840 (at p.821).

²⁸ <http://www.oecd.org/corporate/mne/>

²⁹ Both documents have since been revised; the most recent version of the ILO Declaration was adopted in 2006 (ILO) and the latest version of the OECD Guidelines dates from 2011. http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

³⁰ At p.5, available at <http://www.oecd.org/daf/inv/mne/50024800.pdf>. For subsequent versions from 1979, 1984, 1991, and 2000, see <https://mneguidelines.oecd.org/text/>.

³¹ The OECD Guidelines did not mention the concept of ‘human rights’ at all, whereas the ILO Tripartite Declaration, in para 1, observed that multinational enterprises could “*make an important contribution to [...] the enjoyment of basic human rights, including freedom of association*” and in para 8 stipulated that “[*a*]ll the parties concerned by this Declaration should [...] respect the Universal Declaration of Human Rights”. However, while the ILO Tripartite Declaration thereby made reference to human rights, it did not frame the specific guidance for businesses in terms of ‘human rights obligations’. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), 17 I.L.M.422, para 6 (1978), available at <http://www1.umn.edu/humanrts/links/tripartite.html>

‘business-and-human rights issues’, such as the recommendation to respect the rights of their employees to be represented by trade unions and engage in collective bargaining, to observe standards of employment and industrial relations, including security of employment for employees, the provision of adequate wages, the observance of health and safety standards and provision of adequate conditions of work, to avoid discrimination based on race, colour, sex, religion, political opinion, nationality or social origin in hiring, discharge, pay, promotion or training, and to “consider[...] changes in their operations which would have major effects upon the livelihood of their employees”.³²

In 2000, the United Nations Global Compact (UNGC),³³ a voluntary initiative by the United Nations to engage with companies and civil society groups that are “committed to aligning their operations with [...] human rights principles”, started functioning.³⁴ The objective of the UNGC is to diffuse norms and disseminate practical tools or know-how to companies and civil society to help in the implementation of the principles; and it currently is the largest corporate social responsibility initiative in the world.³⁵

Around the same time, major international human rights organizations, such as Human Rights Watch (HRW)³⁶ and Amnesty International,³⁷ also started taking an interest in the activities of multinational corporations and other business

³² Guidelines for Multinational Enterprises (1976), pp.16-17; Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), paras 13-55.

³³ <http://www.unglobalcompact.org/>

³⁴ In addition to ‘human rights principles’, other areas of engagement include labour standards, environmental and anti-corruption standards. See www.unglobalcompact.org/aboutthegc

³⁵ With more than 10,000 participants, including over 7,000 businesses in 145 countries around the world - <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>

³⁶ For Human Rights Watch’s website related to business activities, see <http://www.hrw.org/topic/business>

³⁷ For Amnesty International’s website dedicated to corporate abuses, see <http://www.amnesty.org/en/business-and-human-rights>

entities and started researching and “highlight[ing] human rights abuses in which companies are implicated”³⁸ and in 2003 the Business & Human Rights Resource Centre was established as an NGO explicitly dedicated to growing awareness of “human rights responsibilities of business” and to “promote human rights in business”.³⁹ The Business & Human Rights Resource Centre documents abusive behaviour of businesses drawing on a range of sources worldwide, including reports of NGOs and community groups, journalists, companies, international agencies, academics and governments and reports them on its website.⁴⁰

Towards an extension of IHRL - the UN Draft Norms

After a mounting number of reports documenting abusive corporate behaviour, not least in the extractive sector and the footwear and apparel industries, the UN Sub-Commission on the Promotion and Protection of Human Rights⁴¹ (also the Sub-Commission in the following) established a working group on business and human rights in 1998, “to establish, for a three-year period, a sessional working group of the Sub-Commission, composed of five of its members [...] to examine the working methods and activities of transnational corporations”.⁴² The first

³⁸ See ‘Business and Human Rights – What is Amnesty International doing?’, at <http://www.amnesty.org/en/business-and-human-rights>; relatedly also see the website of Human Rights Watch on business-related abuses at <http://www.hrw.org/topic/business>.

³⁹ See ‘Message from Phil Bloomer and Chris Avery’ (2013), at <http://business-humanrights.org/sites/default/files/media/documents/message-from-phil-bloomer-and-chris-avery.pdf>

⁴⁰ This website constitutes perhaps the most comprehensive database on business activities criticized by human rights critics in the contemporary debate <http://business-humanrights.org/>

⁴¹ The UN Sub-Commission on the Promotion and Protection of Human Rights was a subsidiary body of the Commission on Human Rights which was replaced in 2006 by the United Nations Human Rights Council.

⁴² UNSUBCOM E/CN.4/Sub.2/Res/1998/8 (1998) ‘The relationship between the enjoyment of economic, social and cultural rights and the right to development and the working methods and activities of transnational corporations’.

The mandate for the working group was renewed in 2001 for three additional years, UNSUBCOM E/CN.4/Sub.2/Res/2001/3 (2001) ‘The effects of the working methods and

explicit step in the international policy debate towards an extension of IHRL as such was taken with the so-called Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (also referred to as Draft Norms in the following).

Issued in 2003, the Draft Norms suggested a full extension of IHRL to business entities, in other words, that corporations should essentially be assigned the same legal human rights duties that currently fall on states. While the Draft Norms observed that the primary responsibility for the realization of human rights rested with states,⁴³ they made no principled distinction between the nature and content of the duties of states and the duties of business enterprises for human rights, and stipulated that business entities had the same duties to “promote, secure the fulfilment of, respect, ensure respect of, and protect human rights”⁴⁴ that have traditionally only applied to states. The only difference between state and business duties, according to the Draft Norms, would have been that business obligations would be delineated by their “respective spheres of activity and influence”⁴⁵ - although the Draft Norms did not define the spheres of activity and influence of business further, leaving the intended scope of business obligations vague.

activities of transnational corporations on the enjoyment of human rights’, among others to “[c]ontribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights”.

For a very detailed drafting history of the Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, see Weissbrodt and Kruger, ‘Current Developments: Norms on the Responsibilities of TNCs and Other Business Enterprises with Regard to Human Rights’, pp.901-922.

⁴³ UNSUBCOM, E/CN.4/Sub.2/2003/12/Rev.2 (2003), ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, Preamble §3.

⁴⁴ Ibid.

⁴⁵ Ibid. (para A.1).

While the Draft Norms were greeted enthusiastically by the NGO community and other commentators in the debate, they met a lot of resistance not only from the business community but also by states who for the most part expressed reservations and stressed that the Draft Norms departed too radically from the traditional, state-centred framework of international law.⁴⁶

The search for consensus - the UN Guiding Principles on Business and Human Rights

After a period of controversy, the Draft Norms were therefore abandoned and John Ruggie was appointed, following a request from the UN Commission on Human Rights, as the UN Secretary General's Special Representative for Business and Human Rights in 2005. Ruggie's mandate included the task "to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights".⁴⁷

In March 2011, Special Representative Ruggie and his team issued the final text of the Guiding Principles on Business and Human Rights⁴⁸ for the consideration

⁴⁶ For a discussion of the reasons why the *Draft Norms* failed to win approval by the then UN Commission on Human Rights, see Ruggie, 'Business and Human Rights – the Evolving International Agenda', pp.819-840; Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' - A Requiem', *Deakin Law Review*, 17.1 (2012), 5-41; John G. Ruggie, *Just Business – Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), p.xvii.

⁴⁷ For the full text of the mandate, see the resolution by the *UN Commission on Human Rights*, UNCHR Res 69 (2005) UN Doc E/CN.4/RES/2005/69, 'Human rights and transnational corporations and other business enterprises'. In June 2008, the UN Human Rights Council (which had succeeded the UN Commission on Human Rights in 2006) renewed Ruggie's mandate for three years, requesting him "[t]o elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders". UNHRC Res 8/7 (2008) UN Doc A_HRC_RES_8_7, 'Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises'.

⁴⁸ UNHRC (2011) A/HRC/17/31, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John

of the UN Human Rights Council; and the Council endorsed them in June 2011, signaling its political support of the Guiding Principles.⁴⁹ The Guiding Principles have since been much cited and discussed in international policy debates; among others, they were incorporated in the 2011 update of the OECD Guidelines for Multinational Enterprises,⁵⁰ in 2011 the European Commission endorsed the UN Guiding Principles in its new corporate social responsibility strategy,⁵¹ and in the following, a number of EU member states have adopted so-called national action plans to implement the GPs domestically.⁵²

While the Guiding Principles on Business and Human Rights suggest that all human rights might potentially be ‘impacted’ by business enterprises,⁵³ they also stress that not all the duties that IHRL gives rise to should apply to business corporations. The Guiding Principles explicitly emphasize that the duties that business has with regard to human rights are complementary to state duties, and that business duties should be limited to what the Principles call the ‘responsibility to respect’ – they suggest only applying negative human rights

Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’.

⁴⁹ UNCHR Res (2011) A/HRC/17/L.17/Rev., ‘Human rights and transnational corporations and other business enterprises’.

⁵⁰ Organization for Economic Co-Operation and Development, ‘OECD Guidelines for Multinational Enterprises’ (2011 edition), ch. IV.

⁵¹ European Commission COM (2011) 681 final, ‘A renewed EU strategy 2011-2014 for Corporate Social Responsibility. The EU also officially “*encourages and contributes to [the] implementation of the UN Guiding Principles*” – see website of the European Commission, Directorate General for Enterprise and Industry at <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/>

⁵² For the UK, Dutch, Italian, and Danish national action plans, see <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/>.

⁵³ UNHRC (2011) A/HRC/17/31, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, p.13.

duties to business entities, i.e. such duties that are about not harming important interests. In the wording of the GPs,

“[Business enterprises] should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁵⁴

I should also mention that the Guiding Principles are not in effect legally,⁵⁵ nor do they explicitly suggest, at least for the time being, an extension of direct human rights duties for business under international human rights law. They state that “[n]othing in these Guiding Principles should be read as creating new international law obligations [...]” and note that “[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.” Instead of proposing the extension of legal obligations to business, the Guiding Principles describe the responsibility to respect human rights as “a global standard of expected conduct”⁵⁶ for business corporations.

However, even if the GPs currently do not purport to legally extend IHRL, it is not too far-fetched to assume that they may at some point provide the basis for such an extension. In a written statement from January 2014,⁵⁷ John Ruggie, the principal author of the Guiding Principles, strongly suggests that it was for pragmatic, rather than principled, reasons that he did not propose an extension of

⁵⁴ The Principles further stipulate that “[t]he responsibility to respect human rights requires that business enterprises (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” Ibid, p.14.

⁵⁵ They explicitly state that “[n]othing in these Guiding Principles should be read as creating new international law obligations”. Ibid., p.6.

⁵⁶ Ibid., p.13.

⁵⁷ John G. Ruggie, ‘A UN Business and Human Rights Treaty? An Issues Brief’ (2014), <http://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.

direct legal obligations to business. He writes that his reasons for not proposing new international legal obligations for business enterprises were that on the one hand, this was not part of his mandate, and on the other hand, it may have undermined the consensus of stakeholders, and in particular states and business entities, for the Guiding Principles. He therefore preferred to “emphasiz[e] measures that states and businesses could adopt relatively quickly”.⁵⁸

Current developments towards an extension of IHRL

And – despite Ruggie’s affirmations to the contrary - the endorsement of the Guiding Principles by the UN Human Rights Council has, if anything, further fuelled the debate about an extension of IHRL to business entities. At the UN Human Rights Council session of September 2013, the government of Ecuador led a number of governments⁵⁹ in issuing a statement in favour of a legally binding international instrument on business and human rights to be concluded within the UN system. Such an instrument would “clarify the obligations of transnational corporations in the field of human rights” and “provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to” provide them.⁶⁰ The initiative was supported by more than a hundred civil society organisations and social movements that issued a joint public statement on the eve of the UN Forum on Business & Human Rights in December 2013, calling for states to start taking concrete steps towards establishing a binding international treaty to deal with corporate human rights abuses.⁶¹

⁵⁸ Ibid.

⁵⁹ Including the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador.

⁶⁰ See Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, ‘Transnational Corporations and Human Rights’ (2013), <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf>

⁶¹ <http://www.business-humanrights.org/media/call-for-binding-instrument.pdf>

And, even more recently, at the June 2014 session of the UN Human Rights Council, two resolutions were adopted: the first one was a resolution drafted by Ecuador and South Africa and co-signed by Bolivia, Cuba and Venezuela, requesting "to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights."⁶²

The other resolution was led by Norway and supported by 22 other countries from all regions, requesting the UN Working Group to draft a report considering, among other things, the benefits and limitations of legally binding instruments.⁶³ So in other words, the debate over a possible extension of IHRL to MNCs and other business entities is – despite the approach of the Guiding Principles which constituted somewhat of a step back compared to its predecessor, the Draft Norms – again high up on the international policy agenda.

The policy debate over an extension of international human rights law has not just been led at UN level - in 2011 a group of human rights lawyers and specialists had already put forward a proposal that was sponsored by the Swiss government and advocated for the creation of a world court of human rights which could take binding decisions on human rights violations committed by state as well as non-state actors, including corporations.⁶⁴

⁶² UNHRC Res (2014) A/HRC/26/L.22/Rev.1, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'.

⁶³ UNHRC Res (2014) A/HRC/26/L.1, 'Human rights and transnational corporations and other business enterprises'.

⁶⁴ Swiss Confederation, Federal Department of Foreign Affairs and Geneva Academy of International Humanitarian Law and Human Rights, *Protecting Dignity: An Agenda for Human Rights* (2011), http://www.udhr60.ch/docs/Panel-humanDignity_rapport2011.pdf. For a critical discussion, see Philip Alston, 'Against a World Court of Human Rights', *Ethics and International Affairs*, 28.2 (2014), 197-212.

2.2 THE 'BUSINESS-AND-HUMAN RIGHTS DEBATE' IN THE LITERATURE

Alongside calls for non-state actor responsibility by practitioners, such as representatives of the UN, civil society organizations, and international lawyers, the topic of human rights obligations for businesses has also been discussed by authors from different scholarly backgrounds. In particular, the subject has been discussed in the disciplines of international law and international legal theory on the one hand, and moral-political theory on the other hand.

Arguments in international legal theory

Discussions of international legal scholars have classically centred on the legal-doctrinal implications that an extension of international human rights law to MNCs and other business entities would have. International human rights law, as an area of public international law, has traditionally only applied to states, and so one question has concerned whether corporations can be thought of as having the required 'international subjectivity'. Subjectivity, for the purposes of international law, has classically been defined as the capability of an entity to possess international rights and duties and of having the capacity of bringing international claims to maintain its rights.⁶⁵ Whether or not business entities are international subjects in this way has been a topic of much controversy;⁶⁶ while business entities are recognized to have at least some international *rights* it has been more contested whether they can also be assigned direct *duties* and if so, what the consequences of this would be from a legal-doctrinal standpoint. One

⁶⁵ Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1999), pp.57; cited after Merja Pentikäinen, 'Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations', *Utrecht Law Review*, 8(1) (2012), 145-154 (p.145).

⁶⁶ Brownlie, *ibid.*, p.66; Menno Kamminga and Saman Zia-Zarifi (eds.) *Liability of Multinational Corporations under International Law*, ed. by (The Hague: Kluwer Law International), p.4. Stephen Tully, *Corporations and International Lawmaking* (Leiden: Martinus Nijhoff, 2007), p.323. All cited after Pentikäinen, *ibid.*, p.147. Note that there have been parallel discussions regarding other non-state actors and inter-governmental organizations, including actors as diverse as UN bodies, the IMF and World Bank, the WTO, and armed rebel groups or insurgents, see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, in particular chapters 4, 5, and 7 for an extensive discussion.

argument that has been made, for instance, is that an expansion of direct duties under international law to business entities (or other non-state actors for that matter) would entail a recognition of these entities as potential authors of international law and thereby accord them undue powers in the international system.⁶⁷ This line of argument, and indeed the usefulness of the concept of ‘subjectivity’, has been criticized by other scholars.⁶⁸

There have also been discussions beyond the question of the possible international subjectivity of business entities that have addressed whether international human rights law could perhaps already be interpreted as imposing obligations on non-state actors like companies.⁶⁹ While I will briefly address this debate,⁷⁰ this thesis does not propose a classic legal analysis of whether IHRL can properly be interpreted as imposing duties on business entities or not. While the overarching question I address in this thesis is whether international human rights law should be extended to MNCs and other business entities, the answer to this question will turn on normative considerations concerning the purpose, or role, of IHRL as an area of law. One specific contribution that this thesis offers to the current debate is of a methodological nature - in chapter 2, I will put forward what I call the ‘functional role’ approach to thinking about the role of an area of law, and in particular IHRL. I will also address some pragmatic considerations regarding the effectiveness of such an extension.

Given these normative and pragmatic considerations, I will make an argument as to whether an extension of IHRL to business entities would be desirable. I will

⁶⁷ See, for instance, Antonio Cassese, *International Law in a Divided World* (Oxford: Oxford University Press, 1987); Peter Muchlinski, ‘Human Rights and Multinationals: Is there a Problem?’, *International Affairs*, 77.1 (2001), 31-48 (p.41).

⁶⁸ Clapham, *Human Rights Obligations of Non-State Actors*, pp.60-62 and pp.68-69 in particular.

⁶⁹ For a comprehensive discussion, see Clapham, *ibid.*

⁷⁰ In chapter 4B, section 5 below.

not, by contrast, take a stand on whether, *legally speaking*, IHRL can or cannot be interpreted as imposing obligations on business entities directly.

I should stress that discussions of ‘business-human rights-responsibility’ by international legal scholars have not always focused on international human rights law as such. The term ‘human rights duties’ or ‘human rights responsibility’ has often been used more broadly and there have been different debates that have focused on other legal accountability mechanisms for businesses. Most commonly, these debates include the debate of the application of extraterritorial tort legislation,⁷¹ or the extension of international criminal law⁷² to business enterprises⁷³ and to what extent these bodies of law can be

⁷¹ This debate has largely been led in the United States, where the existence of the so-called Alien Tort Claims Act has allowed for civil suits to be brought for abuses perpetrated overseas by US-based companies. See, for instance, Beth Stephens, ‘Human Rights Accountability: Congress, Federalism and International Law’, *ILSA Journal of International and Comparative Law*, 6 (1999-2000), 277-294; Michael D. Ramsey, ‘Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns’, *Hastings International and Comparative Law Review*, 24 (2000-2001), 361-380; Terry Collingsworth, ‘Separating Fact from Fiction in the Debate over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations’, *University of San Francisco Law Review*, 37 (2002-2003), 563-586; Tina Garmon, ‘Domesticating International Corporate Responsibility: Holding Private Military Forms Accountable Under the Alien Tort Claims Act’, *Tulane Journal of International and Comparative Law*, 11 (2003), 325-354; Jordan J. Paust, ‘The History, Nature, and Reach of the Alien Tort Claims Act’, *Florida Journal of International Law*, 16 (2004), 249-266; James Goodwin and Armin Rosencranz, ‘Holding Oil Companies Liable For Human Rights Violations In A Post-SOSA World’, *New England Law Review*, 42 (2007-2008), 701-741; Wesley V. Carrington, ‘Corporate Liability for Violations of Labor Rights Under the Alien Tort Claims Act’, *Iowa Law Review*, 94 (2009), 1383-1418; Igor Fuks, ‘*Sosa v. Alvarez-Machain* and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability’, *Columbia Law Review*, 106 (2006), 112-143; Shelley Buchanan, ‘Questioning the Political Question Doctrine: Inconsistent Applications in Reparations and Alien Tort Claims Act Litigation’, *Cardozo Journal of International and Comparative Law*, 17 (2009), 345-373.

⁷² International criminal law (ICL) is that body of international law which criminalizes a number of categories of conduct, including in particular war crimes, crimes against humanity, genocide and torture and the rules of ICL authorize states to prosecute and punish such criminal conduct by individuals. The most important sources of international criminal law are the statutes of international courts and tribunals, including in particular the *1945 London Agreement* which sets out the substantive and procedural law of the *International Military Tribunal of Nuremberg* and the *1998 Statute of the International Criminal Court* (the so-called *Rome Statute*). The Statutes of the *Special Court for Sierra Leone* (SCSL), of the *Special Tribunal for Lebanon* (STL), and the respective UN Security Council resolutions adopting the *Statutes for the International Criminal Tribunal for the Former Yugoslavia* (ICTY) and the *International Criminal Tribunal*

used to hold business entities to account for abusive behaviour. Commentators sometimes explicitly consider extra-territorial tort law or international criminal law as part of ‘international human rights law’.⁷⁴ I call such views ‘contribution

for Rwanda (ICTR) are also important sources of ICL. See Antonio Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008), p. 3 and pp.15.

⁷³ See, for instance, Juan Pablo Bohoslavsky and Mariana Rulli, ‘Corporate complicity and finance as a “killing agent”: the relevance of the Chilean case’, *Journal of International Criminal Justice*, 8.3 (2010), 829-850; Norman Farrell, ‘Attributing criminal liability to corporate actors: some lessons from the international tribunals’, *Journal of International Criminal Justice*, 8.3 (2010), 873-894; Julia Geneuss, Jan Philipp Book, Boris Burghardt and Oliver Schuttpelz, ‘Core Crimes Inc. Panel Discussion Reports From the Conference on “Transnational Business and International Criminal Law”’, *Journal of International Criminal Justice*, 8(3) (2010), 957-977; Wim Huisman and Elies Van Sliedregt, ‘Rogue traders: Dutch businessmen, international crimes and corporate complicity’, *Journal of International Criminal Justice*, 8(3) (2010), 803-828 (p.804); Mordechai Kremnitzer, ‘A possible case for imposing criminal liability on corporations in international criminal law’, *Journal of International Criminal Justice*, 8.3 (2010), 909-918; Volker Nerlich, ‘Core crimes and transnational business corporations’, *Journal of International Criminal Justice*, 8.3 (2010), 895-908.

⁷⁴ Consider, for instance, the following quotes:

“In confronting violations of internationally guaranteed human rights, the international community has traditionally focused on holding governments rather than individuals internationally responsible. [...] This situation has changed in the past few years with the establishment by the United Nations of the International Tribunals for the Former Yugoslavia and for Rwanda with jurisdiction over crimes against humanity, genocide, and war crimes committed in those territories.” by Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’, *Human Rights Quarterly*, 19.4 (1997), 703-723 (pp.717-718); or

“The present study takes a fresh look at the scope of human rights law today. [...] The adoption in 1998 of the Rome Statute for an International Criminal Court has clarified the international obligations that attach to individuals, from both the government side and from the non-state actor side, in different types of armed conflict. [...] [T]hese definitions have dissipated much of the confusion and doctrinal debate which surrounded the issue of international human rights obligations of non-state actors in conflict and non-conflict situations.” by Clapham, *Human Rights Obligations of Non-State Actors*, p.2); or

Paust’s argument that “*human rights law can reach private corporations*” insofar as “*private corporations and entities are bound by international laws applicable to individuals*”, thus equating international criminal rules with international human rights obligations. Jordan J. Paust, ‘Human Rights Responsibilities of Private Corporations’, *Vanderbilt Journal of Transnational Law*, 35 (2002), 801-825 (p.802).

Sometimes, *domestic* legal provisions have also been seen as part of “international human rights law” – consider the following quote by Luban: “[...] *have we come to think of ICL as the use of criminal law to enforce basic human rights. [...] [This] has become the dominant conception of ICL, and today we take it for granted that ICL aims to mobilize international institutions against gross human rights violations, just as domestic criminal law mobilizes governmental institutions against domestic rights violations*”. David Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’, in *The Philosophy of International Law*, ed.

views' of international human rights law because they consider *any* area of law that somehow contributes to the protection of important human interests as 'human rights law'. It should become clear throughout this thesis why I reject such a view of IHRL which conflates this area of law with other areas of law like ICL or extra-territorial tort legislation: this thesis develops an account of the *distinct* role of IHRL and why there is a value in keeping areas of law separate when they can be understood to play distinct and valuable roles. I argue against thinking of areas of law solely in terms of the consequences they promote, and the contribution view does exactly that.⁷⁵

But while I reject this broader view of IHRL proposed by the contribution view, it nevertheless needed to be mentioned here to clarify that in the current debate on 'business-and-human rights', the usage of 'human rights' and 'human rights responsibility' is not always confined to IHRL. In this thesis, however, the particular focus is on whether IHRL proper⁷⁶ should be extended to business entities, and not on whether business entities should have international criminal responsibilities, whether they should be held accountable under extra-territorial tort provisions, or whether they should have *any* legal obligations at all. While I will draw on these debates in the concluding chapter 7 when discussing possible alternatives to an extension of IHRL, the explicit focus of this thesis is on the question regarding an extension of IHRL as a distinct area of international law.

by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp.569-588 (p.574).

⁷⁵ This will also be argued in more detail in chapter 2, section 2.2-2.5 below.

⁷⁶ I will define IHRL in more detail in chapter 4A below.

Arguments in moral and political theory

The question whether business entities, and indeed any non-state actor (including individuals), have duties correlating to human rights has also been a topic in moral-political theory. Questions here have been, for instance, about whether human rights are fundamentally about the state-citizen relationship (such views are known as political conceptions of human rights) or whether human rights are universal claims that individuals hold against any actor.⁷⁷ Among others, the differences between political and non-political conceptions of human rights turn on methodological disagreements between theorists as to the general objective of human rights theory and what role, if any, ‘human rights practice’ plays in it.⁷⁸ Theorists who argue that our understanding of the concept of ‘human rights’ should be developed by observing how human rights are used in contemporary discourse and practice – of which international human rights

⁷⁷ A political theory of human rights (in the sense that human rights are understood as standards that apply primarily to state entities and which can trigger legitimate response/intervention at the international level) was perhaps most famously put forward by John Rawls, *The Law of Peoples with The Idea of Public Reason Revisited* (Cambridge, MA: Harvard University Press, 1999), pp.81. For political theories of human rights also see Joseph Raz, ‘Human Rights Without Foundations’, in *The Philosophy of International Law*, ed. by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp.321-337.; Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); Joshua Cohen ‘Is there a Human Right to Democracy’, in *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, ed. by Christine Sypnowich (Oxford: Oxford University Press, 2006).

For criticisms of political theories of human rights, see John Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention’, *Philosophy Compass*, 4.6 (2009), 938-950; Pablo Gilabert, ‘Humanist and political perspectives on human rights’, *Political Theory*, 39.4 (2011), 439-467; also see James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) for a theory of human rights that traces the origins of human rights to natural rights rather than to their political role.

For overviews of the debate between political theories and critics, see S. Matthew Liao and Adam Etinson, ‘Political and naturalistic conceptions of human rights: a false polemic?’ *Journal of Moral Philosophy*, 9.3 (2012), 327-352; Laura Valentini, ‘In What Sense Are Human Rights Political’, *Political Studies*, 60 (2012), 180-194; Section I on ‘Human Rights: Moral or Political?’ in Gerhard Ernst and Jan-Christoph Heilinger, *The Philosophy of Human Rights - Contemporary Controversies* (Boston: Walter de Gruyter & Co., 2012), pp. 3-106.

⁷⁸ Beitz, for instance, suggests to develop an understanding of human rights by “attend[ing] to the practical inferences that would be drawn by competent participants in the practice from what they regard as valid claims of human rights. An inventory of these inferences generates a view of the discursive functions of human rights and this informs an account of the meaning of the concept.” *Ibid.*, p.102.

law is arguably a significant part – are more likely to consider human rights as particularly concerned with state-citizen relationships than those who argue that human rights theory, as a matter of principle, should be independent of practice. I should emphasize that while the political views of human rights mentioned focus exclusively on *state* obligations, they do so principally from the perspective of other states in the international sphere deciding whether or not to intervene in the internal affairs of another state. In my analysis of IHRL standards, by contrast, there will be nothing inherent to those standards that necessitates that they are about other states intervening. IHRL jurisprudence and principles entail international human rights institutions that hold states accountable to their citizens (*how* these institutions hold states accountable will be the subject of more detailed discussion in chapter 6, section 3) but the jurisprudence of IHRL as defined in this thesis never asks whether the human rights standards in question would be sufficient for other states to intervene as a test for whether there has been a violation.⁷⁹

While I argue in this thesis that the legal project of extending, or not, IHRL to apply to business entities should be informed by normative considerations as to the role of that area of law, and so make the case for a contribution that normative theory can make to legal practice, I do not take a stand on the relationship between moral theories of human rights and (international) human rights law more generally,⁸⁰ nor do I engage with discussions on what is the best moral account of human rights.

⁷⁹ It could be argued that the views taken by scholars like Raz, ‘Human Rights Without Foundations’, or Beitz, *ibid.*, imply this.

⁸⁰ For such discussions, see, for instance, Part I on ‘The Limits of Law’ in Saladin Meckled-García and Başak Çalı (eds.) *The Legalisation of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*, (Oxford: Routledge, 2006), pp.9-59.

Triggered by the observation that there has been a proliferation of the use of human rights language in international discourse and practice in past years, there has also recently been an increased interest by moral and political theorists in the question of who bears the corresponding duties for human rights,⁸¹ including as to what duties, if any, business entities have in this regard. These debates focus on the substantive moral duties that business enterprises have with regard to fundamental human interests, and on what, as a matter of justice, they owe to individuals.⁸² One related question here is what role an agent's capacity should play when determining his or her human rights duties. This is a question that is also at the core of the contemporary debate on business entities and human rights. As I argue in more detail in section 3 below, both moral theorists and practitioners have been motivated by the observation that MNCs and other business entities as one type of non-state actor, are increasingly capable of affecting important human interests, both positively through their immense wealth, but also negatively through their increasing powers and reach worldwide.⁸³

While moral and political theorists have primarily been concerned with developing principles for allocating responsibilities, if any, to non-state actors

⁸¹ Andrew Kuper (ed.) *Global Responsibilities: Who Must Deliver on Human Rights?*, (Oxford: Routledge, 2005), p.ix.

⁸² In Kuper's words, they address the overarching question of "Who must do what, and for whom?" Andrew Kuper, 'Introduction: The Responsibilities Approach to Human Rights', in *ibid.*

⁸³ Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', pp. 931-1023; International Council of Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (2002), p.10, <http://business-humanrights.org/en/new-report-by-intl-council-on-human-rights-policy-beyond-voluntarism-human-rights-and-the-developing-international-legal-obligations-of-companies#c19002> ; Swiss Confederation et al., *Protecting Dignity: An Agenda for Human Rights* (2011), p.15; www.amnestyusa.org/our-work/issues/business-and-human-rights/corporate-accountability

like businesses,⁸⁴ in this thesis I am not concerned with the precise substantive responsibilities that business entities do or do not have with regard to important human interests. I take it as a given that business entities have more than just responsibilities to make profit for their shareholders⁸⁵ - they certainly do have moral responsibilities not to harm important human interests and in many situations a plausible argument can surely be made that they also have responsibilities to positively contribute to the realization of important human interests.⁸⁶ However, I also argue in this thesis that states, given their particular institutional role, have duties that are relevantly different from those than businesses have.⁸⁷ Rather than making a case for or against a particular division of labour between states and business entities, that is, rather than trying to determine the substantive content of responsibilities that states and business entities have with regard to important human interests, I am interested in this thesis in the form that duties should take, and more precisely, with whether an extension of direct duties for business entities under IHRL would be a desirable development.

⁸⁴ See the following chapters, all in *Global Responsibilities: Who Must Deliver on Human Rights?*, ed. by Kuper: Onora O'Neill, 'Agents of Justice', pp. 37-52, for a critique of the view that states are primary agents of justice and an argument that non-state actors may have significant capabilities and therefore duties to contribute to justice; Kuper, 'Introduction: The Responsibilities Approach to Human Rights'; Michael Green, 'Institutional Responsibility for Moral Problems'; and Thomas Pogge 'Human Rights and Human Responsibilities', pp. 3-35, for an argument in favour of individual duties to realize human rights;

⁸⁵ Contrary to the famous argument by Milton Friedman, that is summarised in a nutshell in the title of his article, that 'The Social Responsibility of Business is to Increase its Profits', *The New York Times Magazine*, September 13, 1970.

⁸⁶ Note that Friedman (ibid.) did not dispute that governments could regulate businesses so as to further different purposes than 'profit', however, he argued that in the absence of legislation to that extent, any decision by corporate actors to act in line with 'social responsibilities' other than making profit would amount to "*spending someone else's money for a general social interest*" and indeed to usurping a political role of "*in effect imposing taxes, on the one hand, and deciding how the tax proceeds shall be spent, on the other*". While I agree in this thesis (and argue in chapter 5, section 3.3) that decisions regarding how to realize human rights should not be left to business entities as they lack the appropriate accountability mechanisms that states have, this is different from saying that businesses, or individual businessmen, cannot have moral responsibilities to conduct their business in a certain way in the absence of government regulation.

⁸⁷ See in particular the discussion in chapter 4B, section 2.1 below.

3. WHY EXTEND IHRL TO BUSINESSES?

The preceding sections have highlighted some of the most prominent policy initiatives on business and human rights, and debates in moral-political theory and international law. What has motivated these initiatives, and in particular, what motivates current calls for an extension of IHRL to business?

3.1 THE CAPACITY VIEW OF BUSINESS RESPONSIBILITY

Commentators, from scholars to activists, civil society representatives and policy makers, share a common starting point: when making the case for an extension of IHRL to business entities, they all tend to affirm that what necessitates human rights obligations for businesses are the significant, and increasing, capacities of business entities to impact on the interests protected by IHRL. The following quotes are only a small selection of manifestations of the capacity view in the literature:

“The economic power of transnational corporations (TNCs) is undoubted. They are the driving agents of the global economy, exercising dominant control over global trade, investment, and technology transfers. Flowing directly from such positions of economic influence, TNCs also manage to exercise considerable political leverage in both domestic and international spheres. [...] By virtue, specifically, of their economic and political muscle, TNCs are uniquely positioned to affect, positively and negatively, the level of enjoyment of human rights. On these bases there are abundant reasons why the legal regulation of TNC’s activities at all levels of impact is sought, ought to be sought, and is sometimes achieved. This article is concerned with developing the arguments for [...] such regulation with respect to the human rights obligations of corporations at the level of international law.”

“Today, however, at least a subset of non-state actors has suddenly become a force to be reckoned with and one which demands to be factored into the overall equation in a far more explicit and direct way than has been the case to date. As a result, the international human rights regime’s aspiration to ensure the accountability of all major

actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors.”⁸⁸

“[W]e definitely need to reorient duties and duty holders in view of the pervasive role of, and extensive power enjoyed by, companies in society at this point of time. In fact, from a human dignity point of view, every entity that could violate human rights ought to have corresponding obligations – the focus should be on the bearers of rights and not on violators, because it matters little for victims whether their rights and their dignity are infringed by states or other non-state actors.”⁸⁹

“This traditional (i.e. state-focused) human rights law approach no longer responds to the actual threats to human rights in the globalized world of the 21st century. There are many reasons why human rights abuses by non-state actors are on the increase. Policies of deregulation and privatization have led to an erosion of governmental power and responsibilities and the taking over of essential governmental functions by private business, such as in the fields of education, health services, water management, social security, internal security, policing or prison administration. Transnational corporations operate on budgets which by far exceed those of smaller states and are so powerful that they can no longer be effectively controlled by governmental authorities of the home state or the states in which they operate. [...] International [human rights] law, therefore, must move from the model of exclusive state responsibility to a 21st century approach of shared responsibility. Shared responsibility means, first of all, that non-state actors can be held directly accountable for actions that violate human rights. If a transnational corporation, for example, violates international labour standards, resorts to forced labour, child labour, forced evictions of the local population or arbitrary killings by private security forces, it should be held directly accountable, not only under international criminal law, but also under other fields of international law. [...] But responsibility also includes positive actions aimed at progressively

⁸⁸ Philip Alston, ‘The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’’, pp.5-6.

⁸⁹ Surya Deva, ‘The Human Rights Obligations of Business: Reimagining the Treaty Business’ (2014), p.5, <http://business-humanrights.org/en/pdf-the-human-rights-obligations-of-business-reimagining-the-treaty-business>; also see Swiss Confederation et al., *Protecting Dignity: An Agenda for Human Rights*, p.15; Christopher Albin-Lackey, *Without Rules – A Failed Approach to Corporate Accountability* (2013), <http://www.hrw.org/world-report/2013/essays/without-rules?page=1>.

*fulfilling human rights. If a transnational corporation engages in business in an area where the local population is starving and living under conditions of extreme poverty, it has a responsibility to address this situation. This could be done, for example, by means of community development projects in the fields of education, health care or food production.*⁹⁰

It is argued that business entities can increasingly *impact* on fundamental human interests. I call this the ‘capacity argument’ for an extension of IHRL to MNCs and other business entities as the capacities of businesses to affect the interests protected by IHRL are taken to justify an extension of international human rights law to those entities.

I should say that the capacity view is of course only a core account of what motivates commentators to call for business duties under IHRL rather than a comprehensive or detailed one. In other words, the capacity view is an account of the central rational commitment that leads commentators to argue in favour of human rights obligations for business entities. However, in addition to the observation that business enterprises increasingly have capacities to harm, there is a sense that national governments have failed or not been able to regulate businesses,⁹¹ and that voluntary codes of business conduct have not had the desired effect either and that we therefore need ways of more directly addressing violations of private actors like business entities.⁹² I will discuss the underlying motivations for extending IHRL to business entities in more detail in chapter 6. However, the argument from capacity generally lies at the heart of arguments in

⁹⁰ Swiss Confederation et al., *ibid.*, p.15.

⁹¹ Buergethal, ‘The Normative and Institutional Evolution of International Human Rights’, p.718; Eric De Brabandere, ‘Human Rights and Non-State Actors in a State-Centric Legal System’, *Leiden Journal of International Law*, 22 (2009), 191-209 (p.2); Amnesty International, *The True ‘Tragedy’ – Delays and Failures in Tackling Oil Spills in the Niger Delta*, p.28.

⁹² Steven Ratner, ‘Business’, in *Oxford Handbook of International Environmental Law*, ed. by Daniel Bodansky, Jutta Brunnée and Ellen Hey (Oxford: Oxford University Press, 2007), pp.807-828.

favour of an extension of IHRL, and as I argue in the following, it has important implications for the understanding of the role of IHRL and the view that we take on whether or not IHRL should be extended to business entities.

3.2 *THE INTEREST VIEW OF IHRL*

More or less implicit in arguments from capacity is a particular understanding of IHRL: the assumption is that the function of IHRL is to ‘protect important human interests against anyone who can significantly affect these interests’. This view is of course at odds with the current *legal* state of IHRL - since the first legally binding IHR treaties came into effect after World War Two, IHRL has only directly applied to states.⁹³ However, the argument commonly made by proponents of the capacity view is that there never was a *principled* reason to limit the applicability of IHRL to states in the first place. They argue that the fact that IHRL only applies to states is a matter of historical contingency: at the time that the first IHRL treaties were conceived and drafted, that is in the wake of World War II, states seemed to pose the most immediate and obvious dangers to the important interests protected by IHRL and so it seemed to make sense to concentrate international legal obligations for human rights on states.⁹⁴ We can call this the ‘argument from historical contingency’. In a similar vein, commentators also often refer to the Universal Declaration of Human Rights that

⁹³ Kälin and Künzli, *The Law of International Human Rights Protection*, p.78.

⁹⁴ See, for instance, Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’, pp.703-723; International Council of Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, pp.9-10, states “International human rights law developed after the Second World War to protect the individual from abuse by the state. [...] The focus at that time was on states because the state was perceived to be the entity that had most effect on people’s lives.” and at that “now there is a need to respond to the growing powers of private enterprise, which affects the lives of millions of people around the world.” Also see Amnesty International, *The True ‘Tragedy’*, 25.

preceded the first legally binding international human rights treaties⁹⁵ and that did not seem to limit human rights duties to states.⁹⁶

Today, the argument continues, we live in a world where non-state actors, including in particular MNCs and other business entities, exercise much greater powers and have much greater capacities than they used to. In some contexts, business enterprises have budgets that exceed those of states.⁹⁷ And in some cases, businesses are even taking over functions that states originally fulfilled, such as the provision of military and security services or the running of hospitals and prisons.⁹⁸ In this current context, the argument from historical contingency concludes, it only makes sense to impose direct international human rights duties on business entities. In other words, the traditional state-focus of IHRL is described as rendered obsolete by the current realities where MNCs and other business entities have the powers that they do.

I call this view of IHRL, i.e. the view that the function of this area of international law is to protect important human interests against anyone who can

⁹⁵ The *Universal Declaration of Human Rights* (UDHR) was adopted by the UN General Assembly on 10 December 1948. It is not itself legally binding.

⁹⁶ In particular, see the *Preamble* of the UDHR that states that “*every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights*” and Article 30 that stipulates that “[*n*]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.” Note that all the legally binding international human rights treaties that followed the UDHR have, however, focused on states.

⁹⁷ Kinley and Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’, pp.931-1023; *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, p.10; Swiss Confederation, Federal Department of Foreign Affairs and Geneva Academy of International Humanitarian Law and Human Rights, *Protecting Dignity: An Agenda for Human Rights*, 15; www.amnestyusa.org/our-work/issues/business-and-human-rights/corporate-accountability.

⁹⁸ See, for instance, Philip Alston, ‘The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’’, pp.9-10.

significantly affect these interests, the ‘interest view’ of IHRL.⁹⁹ On this view, it seems only logical to extend IHRL to corporations and business entities (or indeed any other actor) if they have significant capacities to harm the interests protected by IHRL.

In this thesis, I will argue that the interest view of IHRL, which implicitly or explicitly underlies most arguments in favour of an extension of IHRL to MNCs and other business entities, is problematic. The interest view is what we can call a consequence-based, or consequentialist, understanding of IHRL. If the sole point one attributes to a body of law is protecting and advancing certain interests (i.e. promoting certain consequences) then there is no principled basis for limiting that body of law to regulating only one kind of agent. It would, if it were consistent, regulate any and all agents affecting such interests that it practicably can. It would, of course, regulate such agents in light of their capacities to affect such interests. So the capacity view follows from the interest view.

In chapter 2, I make the general case for why we should not, or not *only*, think of areas of law in terms of the consequences they bring about. I will argue why,

⁹⁹ There are some obvious parallels with so-called ‘interest theories’ of human rights, or of rights more generally, in moral-political theory. Proponents of interest theories of (human) rights hold that the function of a (human) right is to further the interests of the person who holds the right – see, for instance, Neil MacCormick, ‘Rights in Legislation’, in *Law, Morality and Society: Essays in Honour of H.L.A Hart*, ed. by Peter Hacker and Joseph Raz (Oxford: Oxford University Press, 1977), pp. 189–209; Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p.166; Leif Wenar, ‘The Analysis of Rights’ in *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy*, ed. by Matthew Kramer, Claire Grant, Ben Colborn and Antony Hatzistavrou (Oxford: Oxford University Press, 2008), pp.251-273; Matthew Kramer, ‘Getting Rights Right’, in *Rights, Wrongs, and Responsibilities*, ed. by Matthew Kramer (London: Macmillan, 2001), pp. 28–95.

However, as my discussion is specifically of the view as an account of the special role of IHRL, rather than as a political theory *tout court*, I will not need to discuss the cogency of the moral theory as such. In other words, I will not discuss the general merit of interest theories of rights in explaining the function of rights here – my discussion will be limited to a more narrow analysis of whether understanding IHRL as protecting important interests against anyone is a good understanding of IHRL, and whether we should therefore extend IHRL to non-state actors like business enterprises.

before advocating an extension of IHRL to business entities, we should ask whether there is a principled reason that IHRL has only applied to states and consequently, whether anything of value might be lost if IHRL was extended to non-state actors like business entities.

4. THESIS OUTLINE

In this thesis, I take an inter-disciplinary approach: I draw on legal and political theory, but also engage with the pragmatic question of what would be some of the practical challenges and implications of extending international human rights law to business enterprises. My argument in this thesis is twofold. I first make the case that calls for business accountability under IHRL misunderstand the role of IHRL. Most proponents of an extension of IHRL to businesses suggest that the point of IHRL is to protect important human interests against anyone who has the capacity to harm these interests. Drawing on political and legal theory literature, I argue that such an understanding of IHRL is problematic, and why we need a more principled understanding of the role that IHRL plays. I propose a methodology for how to think about the role of IHRL, and applying this methodology, I then argue that IHRL is best understood as holding states accountable for the performance of their institutional duties. In other words, I argue that IHRL should be understood as distinctly concerned with the regulation of political authority, with regulating the relationship between individuals and the governments under whose jurisdiction¹⁰⁰ they find themselves.

¹⁰⁰ The concept of 'jurisdiction' is a contested one. For the purposes of this thesis, I will understand 'jurisdiction' to denote the *de jure* and *de facto* control or authority of a state – in other words, an individual is under the jurisdiction under a certain state if that state exerts effective control over that individual. Typically, this will be the case if the individual finds herself in the territory of that state although there are cases where states exercise extra-territorial jurisdiction, such as when a state exercises effective control over an area outside its national territory as a consequence of (lawful or unlawful) military action.

On the one hand, what this means is that an extension of IHRL to non-state actors like business enterprises would undermine the specific focus of IHRL on regulating political authority. Currently, the judgment that a human rights violation has taken place not only implies that an important interest has been harmed, but that in addition this harm was either done by a state agent directly or that the state did not meet its institutional duties to either prevent or respond appropriately to the harm. In other words, it signifies not only that harm was done, that an interest was infringed, but that there was an additional element of *official disregard* for the victim, or that the violation was even done *under the colour of law*. If business entities became potential human rights violators under international law, the finding of a *human rights violation* would no longer connote that the harm was done by, or with the acquiescence of, the state. Instead, it would be reduced to a statement about negative consequences. I argue that given the particular normative status and responsibilities of states and individuals, it would impoverish our legal vocabulary if we were no longer able to express the distinction between state harm and harm done by private actors.

And on the other hand, the fact that the state-focus has shaped many principles and features of IHRL means that IHRL would need to be profoundly changed to be applicable to business entities. I argue that currently, IHRL is not suitable to address businesses: the ways in which responsibility is established, what duties correspond to each right, and how responsibility is implemented are three areas in which profound changes would have to be made in order for IHRL to be applicable to business enterprises. This, in turn, would threaten the very identity and coherence of IHRL as a distinct body of law; IHRL would no longer be able to play the distinct role that it can currently be understood to play.

I will then address the pragmatic question of whether an extension of IHRL to corporations would indeed be able to contribute to the regulation of business enterprises. I argue that while we clearly need much better accountability mechanisms, including *legal* accountability mechanisms, for businesses for the kind of harmful behaviour described by proponents of business human rights accountability, the contribution that IHRL – at least in its current form – can make to this end is limited. I identify some of the primary concerns, or motivations, that underlie calls for business HR accountability. I then argue that IHRL is not well-placed to respond to many of these motivations. In sum, I argue that an extension of IHRL would not be, both for principled and for pragmatic reasons, the solution that it is taken to be by many commentators in the current debate. In the following, I provide a more detailed outline of the arguments made chapter by chapter.

In chapter 2, I develop a methodology for thinking about what distinctive role is played by international human rights law, if any. I argue that the view that underpins much of the business-and-human rights debate is that business organisations should become direct duty bearers under IHRL because of their (increasing) capacities to impact, or harm, the interests protected by IHRL (I called this the capacity view above). As I argued, this view implies a specific view of IHRL: the interest view that holds that the point of international human rights law is to protect those interests that give rise to rights under IHRL against anyone who may affect them. In chapter 2, I make the case for *not* thinking about areas of law only in terms of the interests they seek to further, that is, in terms of the consequences they aim to bring about – as suggested by the interest view of IHRL. All legal regulation is of course also about bringing about certain consequences – the reason for having law at all is to guide or control how individual actors act and interact in society. However, I argue that *beyond* that, the existence of different areas of law allows us to differentiate between different

ways that agents can be responsible, and between distinct reasons for holding agents responsible. In other words, different areas of law can play distinct functional roles in the legal regulation of agents, and in particular, they can express different types of agent liability.

Call these two ways of thinking about areas of law ‘consequence-based approach’ and the ‘functional role approach’. I explain why it is not only *possible*, but indeed *valuable*, to understand areas of law in terms of the particular type of responsibility they establish, rather than merely in terms of the types of interests they protect. To do so, I draw on domestic legal theory, which has a stronger tradition of theorizing of specific areas of law than international law does and, I argue, holds some insights for thinking about international law and international human rights law in particular.

Having made the case for a functional role approach to thinking about areas of law, I will provide a methodology for how to determine the functional role of an area of law. I will then argue that before extending IHRL duties to business organisations, we need to have a better understanding of the functional role of IHRL: of whether IHRL can be understood as establishing a distinct type of agent responsibility that would be rendered incoherent or undermined by extending it to different kinds of agents.

In chapter 3, I will discuss and refute a number of possible objections to the functional role approach that I proposed in the previous chapter. Firstly, I will consider the objection from a consequence-based approach to law which agrees in principle that we can think of areas of law in terms of particular purposes but rejects the idea that different areas of law should be understood as establishing distinct kinds of agent responsibility, as the functional role approach suggests. I will then consider six possible objections that reject the very idea that we can

sensibly think of areas of law in terms of particular ‘roles’ or ‘purposes’ at all: the objection from arbitrariness, which argues that areas of law come about by such arbitrary processes of law-making that it is futile to try and make sense of areas of law in terms of the distinct role(s) they play; and the related objection from disagreement, which rejects the idea of functional role because theorists are unlikely to ever agree on the respective functional roles of areas of law. In response, I argue that despite some degree of ‘messiness’ of the law we can nevertheless make sense of (at least some) areas of law in terms of distinct functional roles and that in order to engage critically with the law we must appeal to these functional roles. I will clarify that the functional role approach is neither committed to the view that all moral categories of responsibility are captured in different areas of law, and neither to the view that the answer to the question of what role an area of law plays needs to necessarily turn on morality at all.

I will then address three different objections that take issue with the methodology I propose for arriving at an interpretation of the functional role of an area of law. The objection from moralising the law stems from a positivist understanding of the law and is concerned that the functional role approach unduly imposes moral values on the law. In response, I argue that the interpretivist account of the functional role is reconstructive of what laws and principles are in place, and does not prescribe what the law *should* look like. The ideal world objection is diametrically opposed to the positivist objection and holds that the problem with the interpretivist approach is that it is too constrained by actual legal practice. Without taking a stand on the merit of ideal world approaches to legal (or moral) theory in general, I argue that given this thesis’ interest in a question about reform of existing IHRL – namely the question of whether IHRL should be extended to business entities – it is most appropriate to ask what functional role, if any, IHRL plays as it currently stands

and whether this role might be threatened by an extension of this area of law to businesses. Finally, I address the objection from human rights discourse which proposes to interpret the role of IHRL based on current discourse about business responsibility for human rights. I argue that this method does not offer a viable way of resolving disagreement in current discourse.

Chapter 4 has two parts, A and B. In 4A, I define ‘international human rights law’ for the purposes of this thesis. The terms ‘human rights law’ or ‘international human rights law’ are not always used consistently. Firstly, there is no *one* overall regime of human rights obligations at the international level as international human rights law comprises a number of different regional and global regimes based on distinct treaties and implemented by distinct institutions. And secondly, in particular in the current business-and-human rights debate, commentators sometimes include international criminal law and extraterritorial tort mechanisms in their understanding of (international) human rights law. To avoid confusion, chapter 4A will clarify the understanding of IHRL that this thesis relies on and outline the different sources of IHRL that this thesis will draw upon in its interpretation of the functional role of IHRL.

Chapter 4B applies the methodology proposed in chapter 2 to the particular case of IHRL and develops an interpretation of the role of international human rights law. Starting from the existing practice of IHRL (as defined in 4A) I will identify some of the core principles that I take to be paradigmatic of IHRL and develop a theory of what normative values, if any, make sense of international human rights law.¹⁰¹ I will argue that a consequentialist understanding of IHRL as proposed by the interest view cannot make sense of these norms. IHRL, I argue, has not simply been about ‘protecting important interests’. I will argue that given how the scope of human rights duties has been interpreted in

¹⁰¹ For a more detailed discussion of my method, see chapter 2 below.

international human rights law and jurisprudence, and given how responsibility for human rights violations is generally determined, IHRL is best understood as distinctly concerned with the regulation of political authority; with regulating the relationship between individuals and the governments under whose jurisdiction they find themselves.

This argument goes beyond the descriptive observation that states have been the sole duty-bearers under IHRL to date. Not only have states been the sole duty-bearers of IHRL, but this focus on states has profoundly shaped the identity of IHRL: firstly, it has shaped the content of human rights duties – in other words, it has determined how human rights duties have been interpreted by international human rights institutions. Secondly, it has also shaped some of the core substantive principles of IHRL, including the rules on how responsibility is established under international human rights law.

Chapter 5 asks whether there are any good reasons to keep the state focus of IHRL described in chapter 4. I will present both a principled and a pragmatic argument against extending international human rights law to business entities. Firstly, I will argue that an extension of human rights duties to corporations would undermine the distinct identity of IHRL – I call this the principled case against direct duties for business under IHRL. This argument draws on chapter 2, where I argued for the value of having distinct areas of law to reflect distinct types of responsibility, and against a view of areas of law that understands it merely in terms of the interests it protects. It also develops further the idea that I introduced in chapter 4B that states are agents that are in principle distinct from business entities – they fulfil a particular role and therefore have particular powers and responsibilities that business corporations do not have.

I then discuss a number of practical issues that an extension of direct duties for business entities under IHRL would raise. I argue that firstly, it is not clear how the rights focused on government functions would translate into duties for business enterprises and that even for those human rights that seem more readily applicable to businesses, new jurisprudence would need to be developed to address the specific duties of business enterprises. In other words, I argue that for human rights duties to be applicable to businesses, international human rights institutions would first need to translate such duties for businesses. I will consider what I call the objection from a partial extension which argues that at least some human rights duties, namely duties to respect human rights, could straightforwardly be extended to business entities. I argue that even supposedly ‘negative’ duties to respect human rights would need to be reinterpreted for businesses. I then argue that beyond a translation of the substantive content of human rights duties, a number of other core principles of IHRL would need to be changed for IHRL to be suitable to regulate businesses and explain why this would be problematic.

In chapter 6, I discuss whether IHRL, even if it was extended to apply to business entities directly, would be able to address the concerns that have motivated calls for such an extension in the first place. I argue that one overarching concern that has motivated calls for business-human rights-responsibility is the observation that states often fail to regulate businesses sufficiently to prevent or punish harmful corporate activities. I will identify some of the most commonly discussed reasons for this failure of national level regulation, and then ask whether an extension of IHRL to business entities would be able to provide a solution. I will discuss how IHRL is implemented and argue that while an extension of duties under IHRL to business entities would allow international human rights institutions to name and shame business entities directly, it would not lead to a straight enforcement of human rights

duties by international human rights institutions. This is because IHRL relies for its implementation on state action. In other words, an extension of IHRL to businesses would not provide an immediate solution to national enforcement gaps where states are unable or unwilling to regulate companies.

I will then identify a number of other motivations that underlie calls for ‘business-human rights-accountability’. Drawing on typical situations in which business entities have been found to harm human rights, from violations of labour standards to cases where pharmaceuticals have been criticized for driving up the prices of life-saving medicines, I will argue that in some cases, commentators draw on IHRL because IHRL provides international minimum standards that offer a frame of reference where national standards are lacking. Calls for human rights accountability of businesses can also be calls for material compensation for damage caused by corporate activities; or calls to punish corporate actors for wrongdoing, to prevent impunity for abusive behaviour where national criminal laws are not enforced. Finally, calls for corporate human rights accountability can also be calls not for legal accountability but for ‘corporate social responsibility’ more broadly speaking, for businesses to positively use their powers and capacities to contribute to the realization of important human interests. For each of these, I will discuss to what extent IHRL is suitable to address these distinct motivations. I will argue that IHRL may provide a useful starting point for developing legal obligations for business entities, even though existing international human rights jurisprudence would need to be reinterpreted to apply to business entities (as opposed to states, as it has to date). However, as IHRL neither has a strong compensatory component, nor does it fulfil a punitive function, it is arguably less suited to address concerns from material compensation or the punishment of corporate wrongdoing.

Chapter 7 concludes that in the current debate the practical advantages of an extension of direct duties for business entities under IHRL may have been exaggerated – contrary to what commentators often suggest such an extension would not automatically result in greater accountability of business entities. At most, IHRL can provide some guidance for the development of duties for businesses in the future; however, enforcement mechanisms other than the ones currently offered by IHRL would need to be developed for an effective implementation of such duties. I therefore conclude that other avenues including, for instance, international criminal law and extra-territorial tort mechanisms, or the strengthening of states' human duties, might be more suitable and promising to pursue the better regulation of multinational corporations and other business entities.

CHAPTER 2: THE FUNCTIONAL ROLE APPROACH

1. INTRODUCTION

In this chapter I develop a methodology for thinking about what distinctive role is played by international human rights law, if any. The view that underpins much of the business and human rights debate is that business organisations should become direct duty bearers under IHRL because of their increasing capacities to impact, or harm, the interests protected by IHRL (I called this the capacity view¹⁰²). As I argued, this view implies a specific view of IHRL that I labelled the interest view of IHRL.¹⁰³ To recall, the interest view holds that the point of international human rights law is to ‘protect the most fundamental, or important, human interests’ – namely those interests that give rise to rights under IHRL. I argued that the interest view and the capacity view are logically related. If the sole point one attributes to a body of law is protecting and advancing certain *interests*, then there is no principled basis for limiting that body of law to regulating only one kind of agent - it should logically apply to any agent who has capacities to affect the interests in question. In the particular case of IHRL and business entities, if the latter can impact the interests protected by IHRL, it seems only logical to argue and campaign for an extension of IHRL to MNCs and other business organizations.

In this chapter I argue that we should not think about areas of law only in terms of the interests they seek to further, that is, in terms of the consequences they aim to bring about – as suggested by the interest view of IHRL. All legal regulation is of course also about bringing about certain consequences – the reason for having law at all is to guide or control how individual actors act and interact in society. However, I argue that beyond that, the existence of different

¹⁰² In chapter 1, section 3.1 above.

¹⁰³ In chapter 1, section 3.2 above.

areas of law allows us to differentiate between different ways that agents can be responsible, and between distinct reasons for holding agents responsible. In other words, different areas of law can play distinct functional roles in the legal regulation of agents, and in particular, they can express different types of agent liability.

Call these two ways of thinking about areas of law ‘consequence-based approach’ and the ‘functional role approach’. I explain why it is not only possible, but indeed valuable, to understand areas of law in terms of the particular *type of responsibility* they establish, rather than merely in terms of the *types of interests* they protect. To do so, I draw on domestic legal theory, which as I argue has a stronger tradition of theorizing of specific areas of law than international law does and, I argue, holds some insights for thinking about international law and international human rights law in particular.

Having made the case for a functional role approach to thinking about areas of law, I will provide a methodology for how to determine the functional role of an area of law. I will then argue that before extending IHRL duties to business organisations, we need to have a better understanding of what I call the ‘functional role’ of IHRL: of whether IHRL can be understood as establishing a distinct type of agent responsibility that would be rendered incoherent or undermined by extending it to different kinds of agents.

1.1 DEFINING THE FUNCTIONAL ROLE OF AN AREA OF LAW

I understand the ‘functional role’ of an area of law as providing an answer to the normative question ‘what special function, if any, does this area of law play in the regulation of agents?’ I will also use the terms ‘social role’, ‘point’, or simply ‘role’, to refer to the functional role of an area of law. In domestic legal theorizing, the area of theoretical enquiry that is, among other things, concerned

with the functional role of an area of law in this sense has sometimes been referred to as ‘special jurisprudence’.¹⁰⁴ Special jurisprudes are interested, among other things, in the normative question of what specific role, if any, a given area of law should be understood to play; they ask questions such as ‘What is the role of the criminal law?’; ‘What function does the criminal law play in the regulation of agents?’; ‘What justifies holding an agent criminally responsible?’¹⁰⁵ One functional role that is typically ascribed to the criminal law, for instance, is that it is to morally condemn and/or punish offenders for wrongdoing and to do so on behalf of society.¹⁰⁶

¹⁰⁴ Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp.1-2. Note that Besson and Tasioulas consider international law as a whole as a province of law, and therefore philosophies of international law as ‘special jurisprudence’, whereas in this thesis I look at IHRL as one province of international law. Besson and Tasioulas provide an indicative list of important works in the field of special jurisprudence, including Herbert L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon, 1968); Charles Fried, *Contract as Promise* (Cambridge, Massachusetts: Harvard University Press, 1981); Joel Feinberg, *The Moral Limits of the Criminal Law*, vols. 1-4 (Oxford: Clarendon, 1984-88); Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990); Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992); Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts: Harvard University Press, 1995); Ronald M. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996); Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007).

¹⁰⁵ For an extensive discussion of what sort of conduct might rightly be criminalized, see Feinberg, *ibid.* For a discussion of the development of ideas of responsibility in criminal law and criminal processes, see Nicola Lacey, ‘Responsibility and Modernity in Criminal Law’, *Journal of Political Philosophy*, 9.3 (2001), 249-276. Also see the discussions of the normative foundations of the criminal law in Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’, *Law Quarterly Review*, 116 (2000), 225-256; Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 2003); Christine T. Sistare, *Responsibility and Criminal Liability* (Dordrecht: Kluwer, 1989); John Gardner, *Offences and Defences – Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007); Grant Lamond, ‘What is a crime?’, *Oxford Journal of Legal Studies*, 27.4 (2007), 609-632 (pp.615-620); Antony Duff (ed.) *Philosophy and the Criminal Law – Principle and Critique* (Cambridge: Cambridge University Press, 1998) and Duff, *ibid.*, p.231.

¹⁰⁶ See, for instance, Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’, *ibid.*, where he writes “*Perhaps the principal function of the criminal law is to censure persons for wrongdoing. The censuring elements consist of the conviction itself, together with the sentence of the court (which usually constitutes a punishment)*”. Note, however, that there is a debate concerning the relationship between the criminal law and punishment, and whether or not the role of the criminal law primarily is to morally censure individuals – for discussions see, for instance, John Gardner, ‘The Functions and Justifications of Criminal Law and Punishment’, in *ibid.*; Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002); Larry Alexander,

In contrast to theories of ‘general jurisprudence’,¹⁰⁷ which are concerned with the *nature* of law as such and address normative and conceptual questions relating to the law in general,¹⁰⁸ special jurisprudence is focused on specific areas, or provinces¹⁰⁹ of domestic law – examples of such areas of law would be criminal law, tort law, contract law, land law, or property law. As I argue in the following, the answer to ‘What special function does a certain area of law play?’ is explicitly not just about the interests that area of law protects but provides a richer account of what justifies the existence of this area of law as a distinct area of law. This means that the interest view does not offer an account of the functional role.

1.2 DOMESTIC LEGAL THEORIES AND THE FUNCTIONAL ROLE APPROACH

One reason I largely draw on domestic legal theory in the following discussion is that there has been comparatively little theoretical engagement with the special jurisprudence of international law.¹¹⁰ Scholars have addressed questions

Kimberley Kessler Ferzan (with contributions by Stephen J. Morse), *Crime and Culpability – A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009).

¹⁰⁷ Again, Besson and Tasioulas, *The Philosophy of International Law*, provide a list of important works in this area – while explicitly not comprehensive, this list includes H.L.A. Hart, *The Concept of Law* (1961; rev. edn., Oxford: Clarendon, 1994); Lon Luvois Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); Joseph Raz, *The Authority of Law* (1979; 2nd edn., Oxford: Clarendon, 2009); John M. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980); Ronald Dworkin, *Law’s Empire* (1986; Oxford: Hart Publishing, repr.1998); Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon, 1994); Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Clarendon, 2001).

¹⁰⁸ General jurisprudes typically aim to give an account of the general features of law and of what characterizes the law as a distinct social practice. One important area of theoretical engagement, for instance, revolves around questions such as ‘*What are essential characteristics of a legal system?*’, or ‘*When can a polity be said to have a legal system?*’. Theorists of general jurisprudence have also been interested in the question of how the law relates to other social practices, like morality. For references, see the list provided *ibid*.

¹⁰⁹ I will use the terms ‘area of law’ and ‘province of law’ interchangeably in the following.

¹¹⁰ Indeed, a number of scholars have noted that there has been a general neglect of international law by legal theorists. For a discussion of this neglect of theory by international lawyers (and an argument in favour of the importance, and indeed necessity, of a theoretically informed understanding of international law to justify any description of international law and to resolve

concerned with the nature of international law and engaged with questions as to the role, or purposes and objectives of international law *as a whole*.¹¹¹ There has only been limited theoretical engagement, however, with the normative foundations, or roles, of specific areas of international law, such as IHRL, in the way in which domestic legal scholars have engaged with specific areas of domestic law.¹¹² Debates that address international human rights law have often

disagreements about fundamental questions that inevitably arise for international lawyers) see Patrick Capps, 'Incommensurability, Purposivity and International Law', *European Journal of International Law*, 11.3 (2000), 637-661 and Patrick Capps, *Human Dignity and the Foundations of International Law* (Oxford: Hart Publishing, 2009), in particular chapter 1 on 'Philosophical Problems for International Lawyers', pp. 9-21. Also see Samantha Besson and John Tasioulas, 'Introduction', in *The Philosophy of International Law*, ed. by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp.2.

¹¹¹ A selective list of authors who have addressed related questions – albeit from different methodological backgrounds, asking very different questions, and coming to radically different conclusions – includes Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Capps, *Human Dignity and the Foundations of International Law*, *ibid.*; Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995); Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2002); Alan Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); Steven Ratner, 'Is International Law Impartial?', *Legal Theory*, 11(1) (2005), 39-74.; Mortimer N.S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (New York: Pargrave Macmillan, 2006); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

¹¹² Perhaps a notable exception to this is international criminal law that has attracted a lot of scholarly interest in recent years. For an argument in favour of the need to examine and rethink the theoretical assumptions upon which ICL is based, to avoid “*contradictory assumptions and methods of reasoning*” by international criminal courts, see Darryl Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law*, 21 (2008), 925-963 (p.925). For discussions of the theoretical foundations of international criminal law, see for instance Larry May's four-volume series addressing the moral foundations of international criminal law: *Crimes Against Humanity* (Cambridge: Cambridge University Press, 2005), *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), *Aggression and Crimes against Peace* (Cambridge: Cambridge University Press, 2008), and *Genocide* (Cambridge: Cambridge University Press, 2010); Bill Wringer, 'War Crimes and Expressive Theories of Punishment: Communication of Denunciation?', *Res Publica*, 16 (2010) 119-133; Antony Duff, 'Authority and Responsibility in International Criminal Law', in *The Philosophy of International Law*, ed. by Besson and Tasioulas, pp. 589-604; David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in *The Philosophy of International Law*, ed. by Besson and Tasioulas, pp.569-588; Larry May and Zachary Hoskins (eds.) *International Criminal Law and Philosophy* (Cambridge: Cambridge University Press, 2010).

centred on questions of the sources of international human rights,¹¹³ the status and nature of international human rights obligations or the implementation of international human rights law.¹¹⁴ However, little has been written on the question of what particular role, if any, IHRL plays as a distinct area of international law, and in particular, whether there are any *principled* reasons to limit IHRL to states.

There might be a number of possible causes for the relative neglect of special jurisprudence in legal philosophy – some of which may overlap with the causes that Besson and Tasioulas identify for a relative lack of engagement with international law more generally by legal philosophers:¹¹⁵ they argue it may simply be a result of intellectual prudence of philosophers who prefer to approach questions of legal philosophy in the context of more familiar and highly developed domestic legal systems before advancing to international law. Other, related, reasons they propose are that international law is still generally somewhat marginalized as a field within legal studies, that there is still

¹¹³ As a branch of public international law, IHRL draws on the classic sources of such law, as defined in article 38 of the *Statute of the International Court of Justice*, i.e. custom, treaties, and general principles, complemented by precedents and scholarly writings. However, given that customary law is primarily determined by state behaviour, and human rights are much violated in state practice, there have been debates as to what role customary law plays for international human rights law. See Frédéric Mégret, ‘International Human Rights Law Theory’, in *Research Handbook on the Theory and History of International Law*, ed. by Alexander Orakhelashvili (Cheltenham: Edward Elgar Publishing, 2011), pp.199-231, for a discussion of different strands of theoretical engagement with international human rights law. For discussions of the sources of international human rights law see, for instance, Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’, *Australian Yearbook of International Law*, 12 (1988), 82-108; Jordan J. Paust, ‘The Complex Nature, Sources and Evidences of Customary Human Rights’, *Georgia Journal of International and Comparative Law*, 25 (1995), 147-164; both quoted after Mégret.

¹¹⁴ As Mégret, *ibid.*, summarises, international human rights obligations differ from other international legal obligations in at least three ways – their beneficiaries are individuals rather than states, they primarily apply domestically as opposed to other international legal obligations that apply primarily internationally, and they are often considered as hierarchically superior to other international norms. Also see Mégret for references to the different debates this has given rise to.

¹¹⁵ Besson and Tasioulas, *The Philosophy of International Law*, pp.2.

widespread scepticism regarding the status of international law as real law¹¹⁶ and that it may therefore not be considered worthy of normative inquiry, and that the comparative dearth of empirical investigation of international law complicates any doctrinal or philosophical engagement with international law.¹¹⁷ Whatever may explain the relative lack of international legal theorizing, as I show in the following, insights from domestic legal theory can usefully inform the way in which we should think about international law and international human rights law in particular.

2. INTERPRETING THE FUNCTIONAL ROLE OF AN AREA OF LAW

How to go about interpreting the functional role of an area of law? Typically, normative theories about the role of an area of law proceed from an analytical account describing what we may call the core features of the area of law in question.¹¹⁸ The core features, on the one hand, encompass the substantive norms of that area of law; on the other hand, they include its structural features.¹¹⁹ These can also be referred to collectively as the core principles for a body of law. The substantive norms of an area of law include rules on how responsibility is established under the given area of law. One core substantive

¹¹⁶ This argument generally turns on the observation that there are no central enforcement mechanisms in international law with the power to ensure the implementation of international legal provisions. For a discussion of this kind of scepticism about international law, see Capps, *Human Dignity and the Foundations of International Law*, pp.16-18, where he traces early discussions of ‘*whether international law is really law*’ back to John Austin, *The Province of Jurisprudence Determined* (1832; Cambridge: Cambridge University Press, 1995). Also see Anthony D’Amato, ‘Is International Law Really “Law”?’ *Northwestern University Law Review*, 79 (1985), 1293-1314.

¹¹⁷ Besson and Tasioulas, *The Philosophy of International Law*, pp.2.

¹¹⁸ Jules Coleman and Gabriel Mendlow, ‘Theories of Tort Law’, *Stanford Encyclopedia of Philosophy* (2003, rev. 2010), <http://plato.stanford.edu/entries/tort-theories/>, write that analytical theories “*aim (i) to identify the concepts that figure centrally in tort’s substantive norms and structural features*”.

¹¹⁹ I borrow the terms ‘substantive norms’ and ‘structural features’ from *ibid.*

norm of the criminal law, for instance, would be that in order to be found guilty, a defendant must typically have committed the wrongful act *intentionally*, that is, in order to attract criminal responsibility, the defendant must not only have committed the criminal act (*actus reus*), but he must have done so with criminal intention (*mens rea*).

The structural features are those procedures or mechanisms that implement the substantive norms. A core structural feature of most domestic criminal systems, for instance, is that criminal charges are initiated by the state, through a public prosecutor, rather than by the victims of the crime or other citizens. Another paradigmatic structural feature of the criminal law would be that individuals convicted of a crime are typically punished through imprisonment.¹²⁰

Based on this analytical account of what are taken to be the core (we may also call them ‘paradigmatic’) norms and features of the given area of law, a normative theory of that area of law is developed – i.e. theorists provide an account of whether and how the particular area of law in question can be justified, and what added value it brings to the legal system.

The method commonly employed by special jurists is similar to Dworkin’s method of ‘constructive interpretation’. The aim of constructive interpretation famously is to “impos[e] purpose on an object or practice so as to make of it the

¹²⁰ These features are considered so characteristic of the criminal law that the *European Court of Human Rights* (ECtHR) uses these features as criteria to decide whether legal proceedings in a member state should be considered as criminal, regardless of whether these proceedings are called ‘criminal’ or ‘civil’ in the given state. If the proceedings are a) brought by a public authority, and b) have culpability requirements (e.g. in requiring a finding of “culpable neglect” or “wilful default”, or c) have potentially severe consequences (such as imprisonment), the Court will consider them as criminal for the purpose of the European Convention of Human Rights (ECHR). (This is significant insofar as Article 6 of the ECHR confers special procedural rights on any person who has been charged with a criminal offence, such as the presumption of innocence, the right to legal aid, the right to confront witnesses, or a right to an interpreter if necessary.) See *Benham v The United Kingdom*, Grand Chamber, Reports 1996-III, para 56, following *Engel and Others v The Netherlands*, A/22 (1976).

best possible example of the form or genre to which it is taken to belong.”¹²¹ Constructive interpretation also sets out by describing the practice in question. Rather than trying to account for the practice as broadly as possible, an interpretivist approach aims to make sense of the *paradigms* of the practice only. This stage corresponds to what I called the analytical stage above, where the core structural features and substantive principles of the area of law in question are described. At what Dworkin calls the *interpretive* stage, a characterization of the accepted point or aim of the practice is proposed. This may be taken to correspond to the normative work that special jurisprudes engage in when they aim to answer questions about what justifies the area of law in question, including ‘What function does the criminal law play in the regulation of agents?’

Note that there are other approaches to special jurisprudence, too – some of which will be addressed in the possible objections below. So I certainly do not intend to suggest that all special jurisprudes are Dworkinian interpretivists. However, the method taken by many special jurisprudes – often implicitly – bears some obvious similarities with the Dworkinian method: (i) theorists start from *existing practice*; (ii) they tend to focus on the *paradigms* (or *core principles*) of the practice rather than aiming to explain every single rule that falls under the area of law in question; (iii) and they then develop a theory of what normative values, if any, make sense of the practice (as well as what parts of the practice may need to be changed because they cannot be normatively justified).

I will take such an interpretivist approach in the following chapter. I will outline the most important principles that have shaped the duties that states have under IHRL, as well as how responsibility is established under IHRL and how the substantive norms of IHRL are implemented. The method I will employ to

¹²¹ Dworkin, *Law's Empire*, p.52.

identify such structural features, or core principles, will be to first employ standard legal sources arguments for determining the doctrines that are present in a body of law (or recur in such bodies of law when they are distinguished from others in a legal system). In other words, I will appeal to legal materials, such as international human rights treaties and case law (I will outline what these materials are in detail in chapter 4A), identify what I take to be core principles and look at what support there is in the legal materials for taking any such principle to be paradigmatic of IHRL.

Based on this analytical account of the core features of IHRL, I will develop an account of what functional role IHRL can be understood to have; what particular role, if any, IHRL can be understood to play as a distinct area of international law. In other words, I will try and make the best sense of what – given its particular norms and features – justifies IHRL being the way it is.

I should stress that while the method employed here can be described in terms similar to the ones of Dworkin's method of constructive interpretation, Dworkin developed his method in a different context and for different purposes. Firstly, Dworkin was concerned with domestic rather than international law, and with the law as a whole, rather than with individual areas of law. His interest is in what distinguishes the practice of law from other practices, such as policy-making, or morality more widely, and so he is not concerned with differentiation within the law itself. So the scope of the legal practice to be interpreted is quite different. Furthermore, Dworkin employed his method of constructive interpretation in developing his theory of the nature of law that responds to the question of what determines legal rights and duties, i.e. with the question of what makes is the case that the law requires what it does. This is not my aim here. I am not concerned with the question of whether or not international human rights law already establishes duties for business entities or not. In other words, I am

not engaged in the debate of whether IHRL, as it currently stands, is best interpreted as recognizing duties for business entities. Rather, I am interested in the functional roles of international human rights law in order to answer the question of whether or not it would be good legal policy to extend international human rights law to non-state actors or not.

Whether we *can* distinguish paradigmatic principles and features of international human rights law as a distinct area of international law remains, of course, to be shown – it cannot be taken as a given.¹²² Consequently, it remains to be seen whether we *can* identify a specific role for international human rights law. But *if* – as the next chapter aims to show – we can identify paradigmatic substantive norms and structural features of IHRL, and if furthermore, IHRL *can* be understood to play a distinct and valuable functional role, the argument is that this should inform the debate on whether or not to extend IHRL to business entities.

How do we decide whether an area of law as we find it plays a distinct functional role? The method I propose to use begins by surveying a candidate distinct body of law and asking whether there are any discernible principles at the heart of that legal practice – i.e. what I called the core principles of a body of law.

So, for example, the kind of core principles associated with criminal law, such as *mens rea* or *nulla poena sine lege*, can be taken to be candidates for the definition of that body of law. Different types of law will appeal to different core principles. The important point, however, is that to confirm that principles discernible in a body of law (or their interpretation for that matter) do distinguish

¹²² On this point also see Nicos Stavropoulos ‘Interpretivist Theories of Law’ (2003), *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/law-interpretivist/>

that body and should keep on distinguishing that body, they have to be justifiable in terms of some distinct functional role. Without a normative case in terms of its role, a candidate core principle might be seen as contingent, accidental, or a dispensable part of that body of law. Of course, what it takes to dispense with such an element of a body of law (legislation, legal interpretation) is a separate matter. My concern in this thesis is only with what is there as a distinguishing element and what belongs there, and these are both explained by the functional role.

One way to justify the existence of an area of law, as a separate area of law, is to show that firstly, it fulfils a special role that distinguishes it from other areas of law and secondly, that this functional role adds value to the system of legal regulation overall. This is why special jurists, when analysing and discussing the particular role of an area of law, often contrast the specific area of law with which they are concerned with other provinces of law.¹²³ So for instance, there are a number of crucial differences between tort law and criminal law with regard to how responsibility is established and what consequences responsibility under these respective areas of law has. For instance, a core structural feature of most domestic criminal systems is that criminal charges are initiated by the state, through a public prosecutor, rather than by the victims of the crime or other citizens. Another paradigmatic structural feature of the criminal law would be that individuals convicted of a crime are typically punished through imprisonment. A core substantive norm of criminal law, for instance, would be that in order to be found guilty, a defendant must typically have committed the wrongful act intentionally. In other words, in order to attract

¹²³ See, for instance, the following quote by Stephen Perry, 'The Moral Foundations of Tort Law', *Iowa Law Review*, 77 (1992), 449-514: "In order to understand what tort law involves, it is necessary to distinguish tort from other branches of the law, and in so doing to discover how the aims of tort differ from the aims of other areas of law such as contract or criminal law."

criminal responsibility, the defendant must not only have committed the criminal act (*actus reus*), but he must have done so with criminal intention (*mens rea*).

Contrary to criminal law tort law typically does not establish a requirement of *mens rea*. Agents can be held accountable for negligent behaviour, they do not consciously have to commit the particular act or omission which resulted in the tort. Whether or not an agent is liable in tort will turn on whether the defendant breached his general duty of care; whether the action (or omission) was committed purposefully or simply negligently will generally not matter for determining liability.¹²⁴ And contrary to criminal law, tort proceedings are typically initiated by the party harmed rather than by the state – so tort law is concerned with claims by private individuals against other individuals or legal persons.¹²⁵ This means that where the damaged party decides not to proceed with legal action no case will be brought, while criminal charges are typically initiated by the state independently of the victim (or the victim’s family). Furthermore, an individual liable in tort will generally have to pay damages to the party harmed, while the consequences of criminal responsibility will typically be imprisonment. While in criminal law the offender is personally held responsible for what he has done this is not always the case in tort. It is possible to insure against liability in tort with regard to many activities – for instance, manufacturers can insure against harm caused by their products. Employers can insure to cover employees. And motorists are actually legally required to insure against liability for injuries to third parties and passengers.

¹²⁴ Also see Vivienne Harpwood, *Modern Tort Law* (6th edn., London: Cavendish Publishing, 2005), in particular ch.1.

¹²⁵ Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002), p.272, argues that the “archetypal proceeding for the enforcement of civil law responsibility is the claim for damages by one citizen against another. The archetypal proceeding for enforcing criminal law responsibility is the prosecution of a citizen by the state.”

Theorists of tort law tend to stress that tort law focuses on compensation for losses and regulates who should bear the cost of accidents¹²⁶ – as opposed to the criminal law, which is concerned with the punishment of offenders or signalling transgressions that are unacceptable in a society.¹²⁷ Analysing the existence of tort and criminal law as two distinct areas of law allows us to differentiate between different kinds of agent responsibility, to distinguish between different types of (moral) reasons of holding agents legally to account.

¹²⁶ See, for instance, Cane (ibid.) who argues that the “*main social function of principles of responsibility under the civil law paradigm is to prevent and repair harm to individuals.*” (p.251) and that “[u]nder the civil law paradigm, vicarious liability is the basic rule because the focus of that paradigm is on reparation of harm, and vicarious liability increases the chance that harm will be repaired by providing the victim of a breach of civil law with an additional target.” (p.266).

Just like for the case of the criminal law (see fn.105 and fn.106 above), this is not to say that the role of tort law has been uncontested. Theorists differ in their understanding of what purposes, if any, this area of law serves and/ or should serve, and few tort lawyers would argue that tort law *exclusively* serves the purpose of compensation. Scholars like Honoré, for instance, have argued that tort law, similarly to the criminal law, also plays a moral role and labels things as ‘not to be done or omitted or brought about’, though in a less stigmatic way than criminal law. Tony Honoré, ‘The Morality of Tort Law – Questions and Answers’, in *Philosophical Foundations of Tort Law*, ed. by David G. Owen (Oxford: Oxford University Press, 1996), pp.73-98 (p.77). Also offering a moral reading of tort law, Weinrib has argued that tort law establishes corrective justice, thereby instituting a particular system of responsibility for human conduct. See Ernest Weinrib, ‘The Special Morality of Tort Law’, *McGill Law Journal*, 34 (1988), 403-413; Ernest Weinrib, ‘The Morality of Tort Law’ in *Philosophical Foundations of Tort Law*, ed. by David G. Owen (Oxford: Oxford University Press, 1995), p.77. Also see Arthur Ripstein, ‘The Philosophy of Tort Law’, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. by Jules Coleman and Scott J. Shapiro (Oxford: Oxford University Press, 2002) where he argues that tort law articulates distinctive conceptions of responsibility and fairness between persons, and Arthur Ripstein, ‘Tort, The Division of Responsibility and the Law of Tort’, *Fordham Law Review*, 72 (2004), 1811-1844. For a critical discussion of the corrective justice account, see John Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’, *Law and Philosophy*, 30 (2011), 1-50.

By contrast, theories in the strand of the so-called economic analysis of tort law propose that the aim of tort law principally is to minimise the sum of the costs of accidents – see, for instance, Richard Posner, *Economic Analysis of Law* (Boston: Little Brown, 1973) and Richard Posner, ‘Utilitarianism, Economics and Legal Theory’, *Journal of Legal Studies*, 8 (1979), 103–140.

Also see Perry, ‘The Moral Foundations of Tort Law’, p.450 on the idea that tort law may incorporate both principles of reparations and norms of economic efficiency.

However, despite such differences in understanding of the normative foundations of tort law, scholars widely agree that it is not the central function of tort law to censure or punish, but to provide a remedy to the victim for the invasion of protected interests. Usually, tort will result in damage payments, even though sometimes relief will be in the form of an injunction or other.

¹²⁷ Lamond, ‘What is a crime?’, pp.615-620.

Now criminal and tort law are both, in some sense, about ‘protecting human interests’. Whilst these areas do indeed affect interests, and often similar interests, that is not what is interesting or special about them. For instance, tort and criminal law in domestic law might be said to some extent to protect and affect similar interests: both are concerned, for instance, with the interests of ‘property’, ‘life’ or ‘bodily integrity’. But understanding tort and criminal law purely in terms of the consequences that they promote with regard to these interests will not make sense of why we would entertain these two areas of law as distinct areas of law. Put differently, an interest-based understanding cannot account for the existence of criminal law and tort law as different areas of law.

However, if we understand tort and criminal law in terms of the distinct paradigms of responsibility they establish in the legal regulation of agents¹²⁸ - e.g. the criminal law paradigm that centres on moral responsibility for wrongdoing, and the civil law paradigm that centres on compensation for losses, we can make sense of the existence of these two areas of law as distinct areas of law with their distinct core principles.

As an aside, I should clarify what I mean by responsibility and types of responsibility in law. I will use responsibility to refer to the duties and forms of accountability that can be expected from an agent, and a type of responsibility will identify the type of duties a body of law imposes on the types of agents it regulates as well as the kind of accountability to which those agents are held. Remedy is one type of accountability, so typically civil law remedies focus on costs, whilst in criminal law accountability takes the form of punitive or redemptory measures.

¹²⁸ I borrow the term ‘paradigms of responsibility’ from Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002).

If in addition to arguing that an area of law serves a distinct role, we also establish that this distinct role adds value to the overall system of legal regulation, then we have established a case for treating this as a distinct area of law and moreover for maintaining it as such.¹²⁹ So to justify the existence of the criminal law as a separate body of law, for instance, it would need to be argued that there is a value to being able to express moral reprimand¹³⁰ through legal regulation.

3. WHY THINK ABOUT AREAS OF LAW IN TERMS OF THEIR FUNCTIONAL ROLE?

Why should we think about areas of law in terms of their functional role? Simply put, the answer is that the law is not just an arbitrary collection of social behaviours. The law works by imposing obligations on people and other types of agents, such as associations, and claims authority over its subjects. In the case of the criminal law, for instance, a finding of responsibility can have serious consequences, such as incarceration. The law is also a social institution that *can* be changed if thought to be in need of reform. As such, it is the kind of social practice of which we need to ask ‘Why should or shouldn’t we continue this practice?’ or ‘Is this practice rational and justified the way it is?’¹³¹ And, by

¹²⁹ See Saladin Meckled-García, ‘How to Think About the Problem of Non-State Actors and Human Rights’, *Proceedings of the XXII World Congress of Philosophy*, 11 (2008), 41-60 where he develops a similar methodology for the conceptual definition of normative concepts in general, and ‘rights’ or ‘human rights’ in particular. He argues that any successful theory of rights must “capture[...] [the] distinct role of rights in our moral repertoire in the form of principle. It is from this additive point of having a right”, he argues further, “that we can derive criteria of success for a theory of rights”. Note that while Meckled-García develops this methodology for developing theories of moral concepts, he explicitly does not “distinguish the aim of explaining what counts as a legal right from explaining what counts as a moral right” insofar as he understands the “moral notion to illuminate the legal notion”.

¹³⁰ Or whatever else we identify as the distinct functional role of the criminal law. See fn.105 and fn.106 above for references to the debate over different justifications for criminal law.

¹³¹ See John Gardner on the specific case of criminal law in ‘On the General Part of the Criminal Law’, in *Philosophy and the Criminal Law – Principle and Critique*, ed. by Anthony Duff (Cambridge: Cambridge University Press, 1998), pp. 205-255 (p.206), where he writes that “the

extension, insofar as we can descriptively distinguish different areas of law, such as the areas of criminal law or tort law in domestic law, we need to ask whether and why it matters that we have such differentiation in law and what that differentiation means. In other words, we should ask whether there are good reasons to think that there are, and to maintain, distinct areas of law.

There are both moral and practical reasons to identifying distinct areas of law as serving distinct roles. From a moral point of view, if a clear distinction is kept between criminal responsibility, which arises when the focus is on moral censorship, and tort liability, when the focus is on compensating the damaged party, then the labels ‘liable in tort’ and ‘criminally responsible’ will have different signalling functions. This is indeed the case in domestic law – for instance, the finding of criminal guilt is associated to a kind of social stigma which is generally not associated to civil liability as the latter does not imply any moral fault or intentional wrongdoing of the defendant.¹³² By distinguishing situations where agents are labelled ‘criminals’ and those where they are held liable under tort law, the legal system thus takes care to communicate the moral difference at stake. It allows us to clearly distinguish how we address situations where agents are held to account morally for violating standards of society

criminal law should be rational and principled” because it “is a human institution that can be reformed and altered (whether ad hoc or systematically) by human hand. It is therefore precisely the kind of thing that answers to (practical) reasons and to (practical) principles.” He then clarifies that he does “not mean that every doctrine of the criminal law is already supported by reasons and principles, let alone by good reasons and sound principles” but that “it can always be asked, perhaps without much hope of a convincing answer, but at least without making a category mistake: ‘Why should we enact or retain a criminal law like this? For what reason? On what principle?’ That is the only test that needs to be satisfied to show that the criminal law is capable, in theory, of being rational and principled. Moreover, it is built into the very ideas of the rational and the principled that anything which is, in theory, capable of having these qualities ought to have them, the former unconditionally and the latter *ceteribus paribus*.”

¹³² Honoré, ‘The Morality of Tort Law – Questions and Answers’, pp.73-98; Ashworth, ‘Is the Criminal Law a Lost Cause?’, pp.225-256, writes in this regard that “*The element of public censure remains a central feature of criminal liability, echoed in many social and professional spheres by the tendency to place significance on criminal convictions but not even to inquire about civil judgments against a person.*”

purposely and situations where the reason we are holding an agent to account is that we want to compensate someone for harm he has incurred through the negligence of someone else. The existence of these two areas of law, as distinct areas of law, allows for more nuance in the legal regulation of agents.

As long as criminal offenses are limited to offenses considered morally blameworthy by society, the label ‘criminal’ can communicate precisely that. In other words, the criminal conviction of an individual then signals that he was legally held to account because his behaviour was such that it deserved moral reprimand by the state on behalf of society for actions that society prohibits, that his misconduct was sufficiently serious to attract criminal liability (and, by implication, may be punished by potentially severe consequences, such as incarceration).¹³³

Where, by contrast, criminal offenses encompass not only those classically thought of as crimes but a whole range of minor offenses, in other words, where criminalization becomes a means for regulating all kinds of areas of social life, this meaning of ‘crime’ is eventually undermined. The fact that someone has committed a ‘crime’ no longer signals that her behaviour was particularly serious, or deserving of censure from the side of society. If the criminal vocabulary is used to cover a whole range of areas of regulation, the boundaries between traditional crimes and other ‘wrongs’, such as those wrongs that would classically have been regarded as civil wrongs, becomes blurry; the currency of crime is inflated to the point that it loses its distinct value (i.e. the value of expressing those clear standards of what actions and intentions are absolutely

¹³³ I noted above (fn.107) that whether punishment is (always) associated with criminal liability is a matter of debate, however the important point is that some standard citizen rights or privileges, such as the right to liberty, may be withdrawn as a consequence to mark that the actions are prohibited (not just implying a cost like the paying of a fine for civil responsibility).

unacceptable in a society in such a way that people are aware of the moral censure that accompanies those actions).¹³⁴

Given that principled differences in the roles of different areas of law reflect real differences in what is being regulated, maintaining the distinction is also valuable for practical reasons. The existence of tort and criminal law as separate areas of law, with their distinct principles and features, allows lawyers to more easily decide in each given case what the appropriate rules are that should govern that case. It is, of course, possible to imagine a legal system which does not distinguish between different areas of law, but where, on a case-by-case basis, lawyers decide, depending on the circumstances of the case, what the standards of proof should be, what criteria should be fulfilled for responsibility to arise, and what kinds of penalties or consequences the finding of responsibility should have. However, the classification of rules into different areas of law makes this process much easier and likely fairer, as less discretion will be left to the lawyers in each particular case, and the outcome of cases will be more predictable. Coherent and clear distinctions between different areas of law also help legal practitioners to decide in each given case which area of law most appropriately addresses the situation. In this sense, there is not only a moral but also a practical value to legal categories reflecting different paradigms of responsibility.

¹³⁴ Indeed, it has been argued by scholars like Ashworth that domestic criminal law (in the UK) has lost its focus in precisely this way, and become something of a “*multi-purpose tool*” with no sense of what the particular social significance of the criminal law ought to be. He criticizes that politicians and other actors with influence in the legal policy making process tend to simply assume that the creation of new criminal offenses is the only way to deal appropriately with misconduct in society and that as a result the number of criminal offenses in UK law has grown in an uncontrolled and chaotic way, regardless of any consideration of the social significance of the criminal law. Ashworth, ‘Is the Criminal Law a Lost Cause?’, p.225.

4. IMPLICATIONS FOR THE ‘BUSINESS-AND-HUMAN RIGHTS DEBATE’

If my above argument that different areas of law offer distinct ways to legally hold agents accountable, and that there is a value to entertaining these distinctions, were, at least in some cases right, then it would have important upshots for legal policy-making. Good legal policy making would be informed by an understanding of the roles of areas of law - the decision to legally regulate an agent for harming an interest should be informed by an understanding of

- i. What the moral justification and point of such regulation is, and
- ii. What area of law most appropriately addresses this concern.

Consider this example from domestic law: when considering whether or not the dropping of chewing gum in the street should be made a crime, lawmakers should be able to justify this with regard to both the role of the criminal law, and the reasons for regulating this activity. In other words, lawmakers should ask ‘What is the role of the criminal law?’, and ‘Does this role adequately reflect the reason(s) for holding people to account for the dropping of chewing gum?’ If, for instance, we support the view that the functional role of the criminal law is to morally condemn or punish offenders for their wrongdoing on behalf of society we need to consider whether dropping gum is the kind of behaviour that warrants moral condemnation or punishment on behalf of society. Even though we might be convinced of the need to regulate the dropping of gum as undesirable type of behaviour, we might come to the conclusion that criminalization is not the appropriate response. For instance, if our primary concern is to avoid the costs related to the dropping of gum, we might find it more appropriate to make the dropping of gum a civil offense which gives rise to a fine, as opposed to a criminal conviction – otherwise, we risk undermining the very role of the criminal law.¹³⁵ On the other hand, if there were a reason to see

¹³⁵ Ashworth, ‘Is the Criminal Law a Lost Cause?’, pp.225-256.

dropping chewing gum as socially reprehensible—say if it endangered life, or promoted other criminal actions—there might be a case for regulating it as a criminal law concern.¹³⁶

Similarly, if my argument is correct then we need to ask what, if anything, the particular role of IHRL is, whether an extension of this area of international law to business entities is in line with this role, and if not, whether by changing the role of IHRL in this way we would lose anything of value.

5. CONCLUSION

In summary, then, the question that needs to be addressed, and that I argue has been neglected in the business and human rights debate, is whether IHRL is indeed best understood as encompassing the kind of responsibility that is appropriate to regulating the behaviour of business organisations and their effects on people's interests. In this chapter, I proposed a methodology for thinking about what particular role, if any, is played by international human rights law. I argued that what identifies and helps us to determine whether an area of law has a distinct functional role is a set of core principles for that body of law, identifiable by both examining whether recognizable and repeated rules for legal reasoning are present in that body of law and whether those rules are justifiable by a value. I explained why it is important to understand the functional role of an area of law: firstly, the law, as the kind of social practice it is, imposes obligations on those subject to it. As such, the law is the kind of practice that invites questions about its justifiability – in other words, we need to have good normative reasons to interpret and maintain the law as it is (or else, abolish or change it). And secondly, by extension, for any area of law

¹³⁶ Note that I am not here concerned with the actual or desirable content of the criminal law in any jurisdiction, only on the difference it makes to regulation of a particular form of behaviour whether it is regulated under criminal or other types of provisions.

establishing distinct principles and features, we need to ask: does this area of law play a functional role that distinguishes it from other areas of law, and if so, does it add value to the overall system of legal regulation? The existence of distinct areas of law is valuable, I argued, as it allows us – among other things – to differentiate between different types of agent responsibility in the legal regulation of agents.

So I made the case for not just thinking in terms of areas of law in general (and international human rights law in particular) in terms of the consequences they aim to bring about but ask whether they can be understood to embody distinct understandings of agent responsibility. I thereby proposed an alternative to what I argued to be a mainstream view of IHRL, in particular in the current business-and-human rights debate, namely the interest view of IHRL which I argued tends to be at least an implicit understanding taken by proponents of an extension of IHRL to business entities. In the following chapter, I will consider and reject a number of possible objections before applying the methodology proposed here to IHRL in chapter 4.

CHAPTER 3: SOME POSSIBLE OBJECTIONS TO THE FUNCTIONAL ROLE APPROACH

1. INTRODUCTION

In this chapter I discuss and refute a number of possible objections to the functional role approach that I proposed in the previous chapter. In chapter 2 I argued that before calling for an extension of IHRL to business entities we need a better understanding of what distinct functional role, if any, IHRL plays in the regulation of actors. I suggested that the existence of distinct areas of law is valuable as it allows us, among other things, to differentiate between different types of agent responsibility in the legal regulation of agents. Now there are a number of possible objections to the functional role approach that I should address.

The first objection I will consider, the objection from a consequence-based approach to law, agrees *in principle* that we can think of areas of law in terms of particular roles or purposes. It rejects, however, the idea that different areas of law should be understood as establishing distinct kinds of agent responsibility, as the functional role approach suggests.

I will then address two objections that reject the very idea that we can sensibly think of areas of law in terms of particular ‘roles’ or ‘purposes’ at all: firstly, the objection from arbitrariness, which argues that areas of law come about largely driven by arbitrary processes of law-making and that it is therefore futile to try and make sense of areas of law in terms of the distinct role(s) they play; and secondly and relatedly, the objection from disagreement, which rejects the idea of functional role because given a certain ‘arbitrariness’ of the law, theorists are unlikely to ever agree on the respective functional roles of areas of law. In response, I clarify that I do not take issue with the descriptive observation that law-making processes, and areas of law as a result, may to some extent be arbitrary. In other words, I do not suggest that areas of law are intentionally

designed to have the particular functional roles that one might ascribe to them following the methodology proposed here. It is also possible for areas of law to be compatible with different interpretations of what functional role they serve. However, I argue that despite some degree of arbitrariness we can nevertheless make sense of (at least some) areas of law in terms of distinct functional roles and that in order to engage critically with the law we must appeal to these functional roles.

The objection from the relationship between moral and legal responsibility argues that the functional role approach unduly assumes that areas of law mirror moral categories of responsibility. In response, I clarify that the functional role approach is neither committed to the view that all moral categories of responsibility are captured in different areas of law, and neither to the view that the answer to the question of what role an area of law plays needs to necessarily turn on morality at all.

I will then address three different objections that take issue with the methodology I propose for arriving at an interpretation of the functional role of an area of law. The objection from moralising the law stems from a positivist understanding of the law and is concerned that the functional role approach unduly imposes moral values on the law. In response, I argue that the interpretivist approach develops a stand on the functional role of an area of law by close reference to precisely the sources of law specified by the positivist. In other words, the account of the functional role is reconstructive of what laws and principles are in place, and does not prescribe what the law should look like.

The ideal world objection is diametrically opposed to the positivist objection and holds that the problem with the interpretivist approach is that it is too constrained by actual legal practice. Without taking a stand on the general merit of ideal world approaches to legal (or moral) theory, I argue that given this thesis' interest in a question about reform of existing IHRL – namely the

question of whether IHRL should be extended to business entities – it is most appropriate to start from existing practice and ask what functional role, if any, IHRL plays as it currently stands and whether this role might be threatened by an extension of this area of law to businesses.

Lastly, I address the objection from human rights practice which proposes to interpret the role of IHRL based on current discourse about business responsibility for human rights. I argue that this method does not offer a viable way of resolving disagreement in current discourse.

2. THE OBJECTION FROM A ‘CONSEQUENCE-BASED APPROACH’ TO LAW

I have proposed a methodology for special jurisprudence that lies in not simply looking at consequences of law and legal policy. On this view, the legal regulation of agents is not simply about holding agents to account in a way that promotes a particular set of consequences (such as the protection of certain interests). A view, however, that takes the role of all areas of law and legal policy to be properly concerned with a specific set of consequences (a consequence-based approach) will deny that different bodies of law can be distinguished in principle. At best, it will take different areas of law to be distinguishable because they contribute, or should contribute, in different ways to the same consequences that matter. On this view, holding different agents responsible in different ways will only make sense if those are efficient ways of producing the right consequences. So, to claim that a particular body of law *should* be understood in distinction from another body in terms of each of their special roles, will not be sustainable in principle, only in practical terms.

RESPONSE TO THE OBJECTION FROM A 'CONSEQUENCE-BASED' APPROACH

In response, I should stress that I do not aim to resolve the dispute surrounding consequentialism in the law more generally. There is a larger debate as to whether the law should primarily be used to bring about certain consequences,¹³⁷ and about what weight, if any, consequential arguments should carry in legal adjudication, i.e. whether jurists should take into account the situation-specific consequences of their respective judgments when making their decisions.¹³⁸ However, whilst I do not propose to resolve a dispute between a consequence-based approach to special jurisprudence and an approach that focuses on agents and their special provinces, actions and powers, I should explain why the argument from consequentialism is not a significant threat to my project.

Firstly, I argue that this view is unhelpful in interpreting and analysing actual *legal practice*. I already argued in the previous chapter that we cannot make sense of the difference between criminal and tort law purely in terms of the consequences they aim to bring about – while both areas of law are to some extent about protecting important human interests, such as life or physical integrity, these areas of law tie into distinct conceptions of responsibility (criminal law being more concerned with the moral reprimand or punishment of agents for moral wrongdoing, tort law being more focused on the compensation of losses) which explains and justifies why they exhibit distinct core principles. A legal consequentialist may want to argue that existing legal practice is flawed precisely because it does *not* take consequences seriously enough - it might

¹³⁷ See, for instance, Richard Posner, *Economic Analysis of Law* (Boston: Little Brown, 1973) and 'Utilitarianism, Economics and Legal Theory', *Journal of Legal Studies*, 8 (1979), 103–140.

¹³⁸ See, for instance, Niklas Luhmann, *Rechtssoziologie* (4th edn, Heidelberg: Springer) for a critique of consequentialism. Also see Ronald Dworkin's arguments that courts should not make legal decisions based on arguments on policy goals and instead restrict themselves to arguments of principle in his *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p.82. For an overview of the discussion on consequentialism in law in German, Swiss and Anglo-American scholarly literature, see Klaus Mathis, 'Consequentialism in Law', in *Efficiency, Sustainability, and Justice To Future Generations*, ed. by Klaus Mathis (Heidelberg: Springer, 2011), pp. 3-30.

produce better overall consequences if the criminal law focused exclusively on preventing future crime rather than on signalling personal responsibility. In that case, we might want to abolish requirements of proving individual responsibility in the criminal process and make it easier to convict offenders. But transforming criminal law into a purely consequence driven set of regulations would radically change the criminal law as it is currently known – in the criminal law as it exists in most places today, the criminal law is not just about consequences, but also takes into account values such as autonomy, choice, and fairness when assigning responsibility and is thus better interpreted, at least in part, as concerned with personal, or moral responsibility for chosen actions.

Similarly, in this thesis I am not concerned with the question of whether IHRL – in an ideal world - *should be* all about bringing about good consequences or not. Rather, I ask whether – as IHRL currently stands – we can make sense of this area of international law in terms of a distinct understanding of responsibility that would make an extension of this area of law to business entities problematic. Put differently, I will ask whether there is any value to keeping the current state-focus of IHRL.

And as I will argue in chapter 4, IHRL has also explicitly not just been about promoting certain consequences, but it has focused on the particular powers and responsibilities that states, as a particular type of agent, have towards individuals.

3. THE OBJECTION FROM ARBITRARINESS

I addressed an objection from consequence-based arguments above, but that objection accepted that areas of law *can* have a functional role, it is just that it held that all areas of law effectively play the same overarching role: namely that of promoting certain consequences. Here I deal with views that reject the idea of a functional role altogether. One such possible objection, call it the ‘objection from arbitrariness’, holds that there are no clear-cut boundaries between different provinces of law. The argument in favour of distinct functional roles of areas of law relies on descriptive distinctions between areas of law. In other words, it relies on the fact that there exist areas of law that are relevantly different at the level of their substantive principles and structural features (their core principles).¹³⁹

It might be objected then that in practice, there are no clear-cut distinctions between what I refer to as ‘areas’ of law. There are overlaps between different provinces of law with regard to the rules on how responsibility is established (i.e. the substantive norms) and the procedures for implementing those norms (i.e. the structural features). To name a possible example against clear-cut distinctions, I argued above that one core principle of domestic criminal law is the requirement of *mens rea*. But in practice, domestic criminal offenses do not always require criminal intent to establish criminal responsibility. Many criminal offenses in the UK, for instance, are offenses of strict liability requiring little or no fault element. In this sense, they are more akin to classic torts than crimes.

Similarly, a core structural feature of criminal law is generally considered to be that criminal responsibility will lead to incarceration. But in practice, not all criminal offenses lead to prison sentences. In English law, a car accident can lead to a moderate criminal fine for a driving offense. Criminal law also

¹³⁹ See discussion above in chapter 2, section 2, esp. pp.69-72.

sometimes makes provision for compensating victims (e.g. through the criminal Injuries Compensation Board). Again, criminal law is here similar to tort law in that it imposes the payment of damages. It might be argued then that since we cannot clearly distinguish between the substantive norms and the structural features of different areas of law, we also cannot meaningfully distinguish between the different functional roles of tort and criminal law. Similarly, tort law sometimes recognizes punitive damages. So it might be argued that to some extent, both tort and criminal law can contribute to compensation of victims, and to punishment of perpetrators.

The fact that some areas of law are called ‘criminal’ and others ‘tort’, it might be argued, is at least to some extent arbitrary: the ways in which laws are made are often arbitrary and different lawmakers will have different priorities and intentions in proposing particular laws. As a result, what constitutes the bodies of criminal and tort law respectively will often be the result of political haggling and compromise. An extreme view would hold that legal categories are entirely arbitrary. A more moderate sceptical view might suggest that while we can discern certain commonalities between many or most rules that fall under criminal law, and differences between many or most rules of criminal law and rules of other areas of law, those boundaries are not entirely clear-cut. The point of both these views is that there is no necessary single common thread running through all the different rules falling under one particular area of law. In other words, there is nothing like an ‘essence’ of an area of law independently of any particular rule that happens to fall under a certain areas of law at any given time.

If this objection was valid for domestic law, it seems even more salient in the case of international law. The ways in which international law develops are arguably even more ‘arbitrary’ than domestic law-making processes. In international treaty making, political interests will often influence the

negotiations and the development of custom, which is partly defined by state practice, will be influenced by all kinds of different considerations and interests of the different states. And so even more than domestic law, international law may be argued to be too ‘messy’ for it to be a reasonable enterprise to try and make sense of the different areas of international law in terms of any particular role.

Perhaps the single most influential theory of international law has been positivism. Positivists might be particularly tempted by the objection from arbitrariness. On a positivist understanding, the law is fully determined by social facts. The law is determined by what the relevant legal sources say it is – in other words, the law is nothing but the (more or less) contingent result of the different law-making processes.¹⁴⁰ For international law, these social facts would primarily include whether states have ratified or acceded to treaties, or whether state practice has given rise to customary rules.¹⁴¹ On such an understanding, areas of international law are also simply the (more or less) arbitrary outcomes of these same law-making processes. This would mean that IHRL, as an area of law, is simply determined by the sum of the different legal materials outlining its rules and provisions – in other words, IHRL is no more and no less than those rules that states have agreed to.¹⁴² Positivists may speak of the ‘role’, or rather

¹⁴⁰ Raz defined the ‘sources thesis’ as the view that “*the existence and content of every law is fully determined by social sources.*” Joseph Raz, *The Authority of Law* (1979; 2nd edn., Oxford: Clarendon, 2009), in particular the essay on ‘Legal Positivism and the Sources of Law’, pp.37-52; John Gardner, ‘Legal Positivism: 5 ½ Myths’, *American Journal of Jurisprudence*, 46 (2001), 199-215.

¹⁴¹ Other sources of international law include “*the general principles of law recognized by civilized nations*” and “*judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*” according to Article 38 of the *Statute of the International Court of Justice* which is generally considered to constitute the authoritative determination of the legitimate sources of public international law.

¹⁴² Prosper Weil, ‘Towards Relative Normativity in International Law?’, *American Journal of International Law*, 77 (1983), 413-442; also see Steven Ratner and Anne-Marie Slaughter, ‘Appraising The Methods Of International Law’, *American Journal of International Law*, 93 (1999), 1-12 (p.2).

the ‘roles’ of an area of law in terms of the specific aims that the legal rules falling under that particular area of law at the given moment in time stipulate – so for instance, IHRL may be said to serve the roles of ‘protecting the right to property’ or ‘protecting the right to life’. But from a positivist perspective, it makes no sense to speak of the ‘functional role’ of IHRL independently of the specific provisions IHRL encompasses. Positivists are in this sense sceptical of the idea that we can meaningfully speak of the role of an area of law.

In its strongest form, the objection that the law is inherently messy – and that therefore any attempt of ascribing any particular functional role to IHRL – is found in critical legal scholarship. Critical legal theory is another prominent approach to international legal theory. In a nutshell, critical legal scholars argue that international law is nothing but the subjective preferences of individual actors who employ the formalism of international legal discourse to advance their respective interests or to justify their actions.¹⁴³ Critical scholars point out that within the UN and other international fora, as well as in the legal literature, lawyers seem to routinely draw contradictory conclusions from the same norms or find contradictory norms embedded in one and the same text or behaviour. They conclude that international lawyers – although having to conform to certain predictable and highly formal argumentative patterns – can therefore achieve virtually any substantive outcome for a given legal problem.¹⁴⁴

The law, on this view, does not exist independently from the actors who implement it, as positivism has it. Rather different legal decision makers

¹⁴³ Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue With a New Epilogue* (1989; 2nd edn., Cambridge: Cambridge University Press 2005), pp.616.

¹⁴⁴ Martti Koskenniemi, ‘Letter to the Editors of the Symposium’, *American Journal of International Law*, 93 (1999), 351-360.

constitute the law for multiple roles and from multiple perspectives.¹⁴⁵ International law is fundamentally political from a critical scholar's perspective – international lawyers are able to put forward their own political agendas unconstrained by ready-made rules.¹⁴⁶ The positivist can still allow for the possibility of some kind of sense or order, even if any order would be the outcome of the contingencies of the law-making process. But from a critical scholar's perspective, the law is inherently indeterminate. On this account, it would seem futile to engage in a consideration of particular functional role(s) of international law - as long as an actor succeeds in making an argument to that extent within the constraints of formal international legal language, the role(s) that law can serve are virtually unconstrained.

RESPONSE TO THE OBJECTION FROM ARBITRARINESS

Certainly there are overlaps and similarities between areas of law and the boundaries between areas of law may be blurry. I take no issue here with the descriptive observation of positivists and critical legal scholars that in practice, areas of law are not entirely 'clear-cut'. The ways in which laws are legislated (or emerge through custom) will often be 'messy', different legislative actors will have different intentions and the resulting laws will consequently be 'arbitrary' to a certain extent. In other words, it is certainly true that law may often be created without the intention of serving any (one) particular aim.

So when I speak of a role, functional role, or point of an area of law, I do not mean these as intentional concepts. I am not proposing that these areas of law

¹⁴⁵ Steven Ratner and Anne-Marie Slaughter, 'The Method is the Message', *American Journal of International Law*, 93 (1999), 410-423 (p.412).

¹⁴⁶ Joseph H.H. Weiler and Andreas L. Paulus, "The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law", *European Journal of International Law*, 8 (1997), 545-565 (p.555); Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (Oxford: Clarendon Press, 1994), p. 9.

were designed to have the different roles one might ascribe to them, following the method proposed above. Rather, whether it is through statutory aims, organic growth, or un-intentional fortuity, my proposal is that we can make sense of, and guide our interpretation of, these bodies of law as distinct bodies *if there is* a doctrinal basis for ascribing them a valuable but distinct place in a system of law.

It may also be true, as the critical legal scholar asserts, that legal scholars sometimes (or even regularly) try to twist the law to suit their individual preferences. The law may consequently be compatible with – or amenable to manipulation in order to serve – a number of different roles. But at the same time, we can nevertheless descriptively distinguish different bodies of law in terms of recurring principles of jurisprudence. Returning to the examples of tort and criminal law, their respective features are sufficiently different for us to describe them as two distinct areas of law.¹⁴⁷

As I argued in the previous chapter, there are a number of crucial differences between tort law and criminal law with regard to how responsibility is established and what consequences responsibility under these respective areas of law has. Given this feasibility of distinguishing a number of core features,¹⁴⁸ and given that there is value to having distinct areas of law then we can argue that to the extent that actual practice (actual law) diverges from the paradigms we either need to have good reasons for these exceptions, or if such reasons cannot be found, practice may simply be misguided and in need of reform. For instance, paradigmatically, the criminal law requires *mens rea* (criminal intention) -

¹⁴⁷ See discussion above in chapter 2, section 2, esp. pp. 69-73.

¹⁴⁸ On the idea that we can distinguish between ideas that are imported from outside an area of law, and those that are integral to that area of law's basic goals and purposes, also see Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002), p.49.

because a criminal verdict implies a moral judgment on the wrongdoing. So paradigmatically, crimes cannot be committed negligently.

There are some exceptions to this though; for instance, if I kill someone by driving recklessly I might be found guilty of the crime of manslaughter. One way to justify this exception may be that reckless driving is such a dangerous activity that regulating it under tort law only might not have strong enough a deterrent effect/ or that the harm caused is so serious that more than civil liability must be at stake. Alternatively, we might argue that *no* negligent behaviour should ever attract criminal responsibility because negligent behaviour by definition is not purposeful wrongful behaviour and therefore does not warrant moral condemnation of the sort imposed by the criminal law. If we support the latter view, we would argue that the criminal law should be changed accordingly.

In sum, I can say in response to the objection from arbitrariness that I will make a *prima facie* case linking doctrines to a value, postulating their status as core principles given that value as the functional role of the body of law. Given that I am providing a reasoned case for this, the burden of proof would, then, lie with these theorists to show that this is illusory or a mere rationalization, rather than for me to show it is not. I will of course address salient objections as I set out the argument.

4. THE OBJECTION FROM DISAGREEMENT ON FUNCTIONAL ROLES

An objection related to the objection from arbitrariness is the objection from disagreement, which holds that the idea of a ‘functional role’ of an area of law is futile insofar as theorists will never agree on what the respective social roles of different areas of law are. So for instance, one long-standing area of debate in criminal legal theory has concerned whether the role of criminal law is moralistic, i.e. whether it serves the role of punishing transgressions of (legally institutionalized) moral standards, or whether it serves the role of preventing (or at least reducing) harmful behaviour in society.¹⁴⁹ Similarly, I argued that scholars debate whether the aim of tort law is to minimize the sum of the costs of accidents (and the costs of avoiding them) or whether an individual who has wronged another simply thereby incurs a duty to repair the wrongful losses occasioned by his behaviour.¹⁵⁰ Objectors may take this to prove the point about the arbitrariness of the law – given that areas of law are compatible with a number of interpretations of their role, there is no way we will ever converge on a common version of what the functional role of a particular area of law is.

RESPONSE TO THE OBJECTION FROM DISAGREEMENT

However, in order to critically assess and debate existing legal practice, we cannot avoid taking a stand on the social role of the law – or, by extension, *areas* of law. Whether particular substantive principles or structural features of an area of law are justified will in large part depend on the functional roles that we consider this area of law to play. To illustrate: if we hold that the social function of the criminal law is to condemn or punish offenders for their moral wrongdoing on behalf of society,¹⁵¹ we are likely to consider the *mens rea*

¹⁴⁹ See fn.105 and fn.106 above.

¹⁵⁰ See fn. 126 above.

¹⁵¹ Such an understanding is offered, for instance, by Cane who writes that “[t]he main social function of principles of responsibility under the criminal law paradigm is to punish and deter seriously unacceptable behaviour.” Cane, *Responsibility in Law and Morality*, p.251.

requirement an important principle of criminal law: it would be difficult to justify that agents should incur moral blameworthiness for an act that they have not committed intentionally. And if we are convinced that the criminal law should have a punitive function, we might consider imprisonment as a justified consequence of criminal conviction. Deprivation of liberty is one of the harshest punishments that can be imposed on individuals. As was said, other areas of law, like tort law, will instead make the liable party pay damages. But if we support the view that the whole point of the criminal law is to punish, we might think that it should impose very harsh conditions, harsher than the payment of a penalty, and argue that imprisonment is indeed an appropriate consequence for criminal responsibility. Similarly, the fact that criminal proceedings are brought by a public official as prosecutor might be justified in light of the criminal law's role of expressing moral condemnation on behalf of society as a whole. It should not be up to the party harmed by the crime to decide whether or not to sue the alleged offender if what is at stake is the reinforcement of societal norms.¹⁵²

If, by contrast, we disagree with the view that the role of the criminal law should be the punishment of offenders, we are also likely to disagree with some, or all, of its principles and features. For instance, if we think that the criminal law should serve the role of deterring certain wrongful behaviour, rather than punishing such behaviour, we might disagree with the *mens rea* requirement. Individuals might arguably take greater precautions not to commit wrongful acts (or become guilty of a wrongful omission) if they knew that they could be held liable even in the absence of a proven intention to commit the wrong.

¹⁵² Note that some legal systems allow for standing of private individuals in criminal prosecution. So for instance, while the US generally maintains a system of *public* prosecution, victims may sometimes petition to reopen a plea bargain or sentence. For a discussion (and critique) of the development of victim involvement in the criminal process in the US over the last decades, see Danielle Levine, 'Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution'; *Northwestern University Law Review* (2010) 104, 335-362; also see Cane, *ibid.*, on the comparatively small role played by victims in the criminal process.

Similarly, if we disagree with the moral function of the criminal law and favour the utilitarian, crime-minimising interpretation, we might also want to abolish imprisonment, or any kind of punishment as a consequence of criminal liability altogether. (Unless, of course, there is an empirical case to be made that punishment decreases crime rates.)

The point is that in order to argue in favour or against particular areas of law, or specific features of these areas of law, that is to critically engage with the law we have to appeal to these role(s). Similarly, for the debate on whether or not IHRL should be extended to a new category of duty bearers (i.e. business entities) we need an understanding of the functional role of IHRL. Again, the point is that differences in how we conceive of the role an area of law serves will have consequences for how we think this area of law should be shaped – they will determine when we consider it appropriate to hold an agent responsible, and what consequences liability should have. Where two people disagree about whether a certain type of behaviour should be regulated under the law, and under which area of law, the parties to the dispute will still need to adopt a particular view on what role this area of law serves in order to justify their respective views.

Note that not all theorists of the criminal law subscribe to the view that the role of the criminal law is to punish offenders for wrongdoing. Some may argue that the value of the criminal law is that it deters individuals from wrongdoing, others still that it signals or communicates to citizens the inviolable standards of the community. Whichever view one adopts, this does not challenge the functional role method of justification for the existence of the criminal law; it just offers different candidates for that role. To justify the practice of the criminal law, theorists who advocate the deterrence view would need to establish that there is a value in having and maintaining a distinct area of law that has such a function.

I should also stress that areas of law can have a number of different functional roles, which to varying degrees shape the features and principles. A common view of the criminal law, for instance, holds it to be justified *because* it tends to minimize harmful actions, but would nevertheless consider the criminalization of innocent people as illegitimate even if it were to contribute to the minimization of harmful behaviour. Such a view implies that criminal law is shaped by more than one point: while deterrence or minimization of crime plays a key role in justifying the existence of an institution like the criminal law, in individual cases deterrence as a functional role is modified by the functional role of moral punishment. Alternatively, we could say that the functional role of deterrence is constrained by considerations relating to the value of liberty of individuals. Individuals should not be deprived of their liberty lightly unless they are shown guilty. But the point is the same: it is not necessarily one functional role that justifies all aspects of an area of law.¹⁵³

What is essential is that the different functional roles that an area of law plays, if any, are coherent. If core principles embodying and justifiable by two distinct roles for that area of law are not compatible, and no clear distinction is made in procedures to distinguish to which cases these apply, this presents a problem of incoherence. For example, if tort law also contained a doctrine of personal accountability to society for prohibited transgressions, there would be a coherence problem as to who should or could initiate proceedings and what standards of evidence were relevant given the two possible aims of addressing losses and of social reprimand. This might lead to important clashes of principles when trying to decide a particular case, with the standards pulling in different

¹⁵³ Also see Stephen R. Perry (1991/92), 'The Moral Foundations of Tort Law', *Iowa Law Review*, 77 (1992), 449-514 (p.450) and his argument that "[t]he incorporation of pure moral principles into legal or social institutions is an exceedingly complex business, and I do not rule out the possibility in advance that a kind of moral pluralism prevails within the institution of tort law. This might mean, for example, that pure principles of reparation are balanced against, or at least qualified by, norms of economic efficiency."

directions. Such clashes will be clashes in principle, given that resolving such clashes means taking a stance of the point of this area of law.

5. CLARIFYING THE RELATIONSHIP BETWEEN MORAL AND LEGAL RESPONSIBILITY

I have argued that there are moral reasons to think of areas of law in terms of their functional role, and in particular in terms of the particular agent responsibility they establish, because it allows different *moral* reasons to regulate agents to be expressed in the *legal* regulation of agents. It may be objected that the functional role approach assumes a direct relationship between moral and legal categories of responsibilities, or that it assumes that legal categories mirror moral categories of responsibility.

I should clarify that the functional role approach is explicitly not committed to the view that moral categories of responsibilities are mirrored in different areas of law. Nor should they be: for one, not all situations which engage the moral responsibility of an agent will appropriately be addressed by the law. Smith may have promised Jones the other day to plant some roses in their shared flowerbed. Failing to do so, Smith might be morally blameworthy for not living up to his promises. But we would hardly think that the law should interfere in such matters of neighbourly, or friendly, relations. The situation would be different, of course, if taking care of the flowerbed was part of Smith's contractual obligations towards Jones – Smith may have signed up to the obligation of planting the roses when signing the lease with Jones, or there might be a monetary consideration involved. In this case, Smith would not only have a moral duty to plant those roses, but a legally enforceable one, too. And where she failed, the courts would have a legal duty to enforce it against her on Jones' behalf. But while the law does not reflect the entire spectrum of moral obligations, the existence of different areas of law nevertheless makes it possible

to distinguish between *some*, and socially important, categories of moral responsibility.

Neither am I committed to the view here that areas of law *only* differ, or can only be made sense of with regard to, the distinct conceptions of moral responsibility that they embody. In other words, the answer to the question of what the role or point of a specific areas of law is need not turn on morality *only*, or indeed on morality *at all*. Some distinctions between areas of law are defined by the particular areas of social life they regulate. Take the examples of contract law or land law - these areas of law deal with particular areas of social interaction: contract law establishes rules concerning voluntarily entered (and subsequently legally binding) agreements between private parties. Land law, as an area of property law, governs mortgages, rental agreements, licenses, easements, covenants and the statutory systems for land registration. The main distinction between these two areas of law does not turn on different types of moral responsibility. In fact, some parts of land law, like rental agreements, are essentially contract law and so the two areas of law are consequently based on the same understanding of agent responsibility. So in that sense the classification into 'land law' or 'contract law' may be described as turning on the types of issues they address.¹⁵⁴

¹⁵⁴ At the same time, I am not here denying that there may be morally relevant features of the relationships that these areas of law regulate. A case may or may not be made for that - for such debates regarding contract law, see, for instance, Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2003); Dori Kimel, 'The Morality of Contract and Moral Culpability in Breach', *King's Law Journal*, 21.2 (2010), 213-231; Seana Shiffrin, 'Could Breach of Contract be Immoral?', *Michigan Law Review*, 107 (2009), 1551-1568; Seana Shiffrin, 'The Divergence of Contract and Promise', *Harvard Law Review*, 120 (2007), 708-53; Seana Shiffrin, 'Promising, Intimate Relationships and Conventionalism', *Philosophical Review*, 177.4 (2008), 481-524; Brian Bix (2008) 'Contract Rights and Remedies, and the Divergence between Law and Morality', *Ratio Juris*, 21.2 (2008), 194-211; Brian Bix, 'Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried', *Suffolk University Law Review*, 45.3 (2012), 719-734; Jody Kraus, 'The Correspondence of Contract and Promise', *Columbia Law Review*, 109.7 (2009), 1603-1649.

However, for the purposes of the current argument it is sufficient to note that *one* way, and moreover a valuable way, in which areas of law may differ is that they establish different types, or paradigms, of responsibility. Or, to put it differently, differentiating between areas of law allows us, among other things, to differentiate between different ways of holding agents responsible in terms of what that means and what consequences follow given the kinds of agents that they are. It allows for legal regulation to reflect different moral reasons for holding agents to account and in different ways.

6. THE OBJECTION FROM MORALIZING THE LAW

I argued that positivists might argue that it makes no sense to speak of a ‘functional role’ of IHRL independently of the specific provisions that IHRL encompasses, given the relevant legal sources, at any given point in time. But positivists may not only be sceptical that it is *feasible* to make sense of IHRL in terms of an overall functional role. They may further be concerned that the functional role approach unduly imposes moral values on the law. Defenders of positivism have generally sought to emphasise that values and law need to be kept apart when determining the law on any given subject matter. Their concern has been that where any kind of value talk enters the analysis of law, a neutral and objective study of what the law *is*, as opposed to what it *should be*, becomes impossible.

The reason positivists are so concerned that value considerations might distort the law can be found in their account of international law. As I mentioned above, positivists define international law as those rules which states consent to,¹⁵⁵ and the reason why states consent to international law, generally speaking, is that is

¹⁵⁵ Hans Kelsen, *Principles Of International Law*, 438-39 (Robert W. Tucker ed., 2d. rev. ed.1966); Weil, ‘Towards Relative Normativity in International Law?’, pp.413-442; Ratner and Slaughter, ‘Appraising The Methods Of International Law’, p.2.

in their interest to do so.¹⁵⁶ On this view, it would seem that if international law has any particular role to play, it is to facilitate cooperation between states that benefit from this cooperation. Positivists do not have to be committed to a realist view that states will only consent to rules which are in their direct national interest. However, on a positivist account international law ultimately depends on the consent of states. In other words, the content of international legal rules can, and indeed must, be derived from an observation of the different sources which express state consent (e.g. treaties and custom evidenced by state practice). Such an identification of international law does however explicitly not involve any value considerations. In fact, in order to study international law scientifically or objectively, positivists insist that practitioners absolutely must refrain from bringing in any particular moral convictions.¹⁵⁷ On this account, any theorising which goes beyond thinking about how to best establish what states have indeed consented to would be an illegitimate attempt to mess with the sovereignty of states by making what the law is depend on considerations other than state consent.

RESPONSE TO THE OBJECTION FROM MORALIZING THE LAW

In response, it can be said that the interpretivist approach is committed to developing a stand on the role or role of the law by close reference to the legal sources that the positivist specifies. Interpretivism does not freely stipulate values according to which legal practice is then evaluated. Instead, interpretivism draws the values from legal practice itself. This is why Dworkin calls interpretivism a theory-embedded view of practice.¹⁵⁸ Dworkin explicitly endorses 'fit' (with actual practice) as one of the two criteria for successful

¹⁵⁶ Fernando Tesón, *A Philosophy of International Law* (Boulder CO: Westview Press, 1998), in particular ch.3.

¹⁵⁷ Weil, 'Towards Relative Normativity in International Law?', pp.413-442.

¹⁵⁸ Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Belknap Press of Harvard University Press, 2006), p.51.

interpretation: an interpretation must be able to explain the main instances of the practice. (The second criterion is that the interpretation must be superior to other fitting interpretations.¹⁵⁹) So the point here is not to establish moral foundations for IHRL, to propose values which IHRL, in an ideal world, should embody or adhere to but to make sense of existing practice.

The functional role explains and justifies the specific principles that are in place in a given area or system of law. However, the functional role does *not* prescribe what principles should be in place independently of what there is in place. In other words, the explanation and justification provided by the functional role(s) is reconstructive of what laws and principles are in place, and is not prescriptive as to the specifics of what should be there.

It is true that the identification of ‘paradigms’ of a practice, to some extent, may involve value judgments as to which parts of the practice are most important insofar practice may be ‘messy’, as I argued at length above. *To some extent* only though, because the interpreter is not at liberty to stipulate just whatever principle or feature he deems to be paradigmatic of an area of law. It would not be plausible to argue, for instance, that it is a paradigmatic principle of the criminal law that crimes can be committed negligently only because in some legal systems, there are crimes which exceptionally allow for negligence as basis of responsibility.

Value judgments also come in at the interpretive stage, i.e. when “imposing purpose on an object or practice so as to make of it the best possible example of the form or genre to which it is taken to belong”¹⁶⁰. This is because the practice may be consistent with several competing interpretations; different values may

¹⁵⁹ Dworkin stresses that he uses ‘fit’ and ‘justification’ as heuristic devices. Ibid., pp.169-171.

¹⁶⁰ Ronald Dworkin, *Law’s Empire* (1986; Oxford: Hart Publishing, repr.1998), p.52.

‘fit the practice. In such situations it is up to the interpreter to choose which interpretation is the best one.

However, I argued above that we need such normative engagement to critically assess legal practice and make arguments as to whether we want to continue a given area of law as it stands or change the laws. Note that I do not here take a stand on the relative merits of positivism and interpretivism as theories about the grounds of law, that is, about what makes it the case that any given proposition that some legal right or obligation exists true, if it is true.¹⁶¹

7. THE ‘IDEAL WORLD’ OBJECTION

An objection which is diametrically opposed to the positivist objection from the danger of moralising the law stems from what we might call an ‘ideal world’ perspective. On such a view, the problem with an interpretivist approach to making sense of the role of IHRL is not that it imposes values on international law that states may not have consented to, but instead, that it is too constrained by actual practice. The ideal world approach would determine the role of IHRL entirely independently of the existing practice of IHRL and ask what function(s), in an ideal world, IHRL should serve. So in other words, it should not matter on that view what IHRL has looked like so far, whether it has regulated only states, or what have been its core principles. All we need to ask is what direction we want IHRL to go and then reform existing practice accordingly. The underlying idea of such an ideal world approach is that the role of theory is to offer a perspective as to what we should be aspiring to, unencumbered by judgments of practicality.¹⁶²

¹⁶¹ Ibid.; also see Nicos Stavropoulos, ‘Interpretivist Theories of Law’ (2003), *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/law-interpretivist/>.

¹⁶² For a discussion of the contemporary debate about the place of empirical enquiry in political theory see Marc Stears, ‘The Vocation of Political Theory’, in *European Journal of Political Theory*, 4.4 (2005), 325-350.

RESPONSE TO THE 'IDEAL WORLD' OBJECTION

I will take no view here on the general merit on ideal world approaches to legal or political theory.¹⁶³ The question I aim to answer in this thesis, however, is a question directly concerned with *existing practice*: my discussion aims to inform the legal policy debate as to whether IHRL should be extended to MNCs and other business entities. And since my interest is in this very specific question about the reform of existing legal practice it makes sense to start from existing institutions and practices. I therefore ask what role IHRL can best be understood to play, as it currently stands, and what normative as well as practical implications it would have for the existing practice of IHRL to be extended to business entities (and whether IHRL could address the motivations that underlie calls for such an extension in the first place), rather than develop a theory of what role IHRL should play in an ideal world.

¹⁶³ For discussions of this question, see John Rawls, *A Theory of Justice* (1971; repr., Cambridge, MA: Belknap Press of Harvard University Press, 2005); Aaron James, 'Constructing Justice for Existing Practice: Rawls and the Status Quo', *Philosophy and Public Affairs*, 33.3 (2005), 223–316; Alan Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004).

8. THE OBJECTION FROM ‘HUMAN RIGHTS DISCOURSE’

Finally, another possible objection deserves to be mentioned – we may call this the objection from ‘human rights discourse’. Some commentators in the current debate on human rights accountability of business have suggested that the very fact that there is increasing evidence in the practice of IHRL (e.g. the development of ‘soft law’ such as the UN Guiding Principles, or the activities of various human rights bodies on the topic of ‘business and human rights’) and increasing mention of the notion of business accountability under IHRL can as such be interpreted as support for the conclusion that at least part of the role of IHRL is to protect important human interests against business entities. While commentators do not commonly put this forward as an explicit ‘method’, we might consider this approach to be a method of determining the role of IHRL insofar as commentators use reference to public discourse and to individual legal cases to support the conclusion that the point of IHRL is to regulate all actors who have the capacity to harm important human interests, including business entities: e.g. Clapham writes - “[T]hrough the analysis of recent human rights cases we can elaborate ideas in order to develop an understanding of the importance of human rights accountability for [non-state actors]”. He argues that this is a way to “[r]ethinking [...] human rights obligations.”¹⁶⁴

RESPONSE TO THE OBJECTION FROM ‘HUMAN RIGHTS DISCOURSE’

While the interpretivist approach also draws on cases in international human rights law jurisprudence to develop an understanding of the role of IHRL, it does not take individual cases alone to lend support to any conclusions about the role

¹⁶⁴ See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), p.2. There is a parallel view in moral theory that suggests that through an analysis of the general “human rights discourse” we can gain an understanding of what human rights, and human rights law, are about. See Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p.102 and discussion above in chapter 1, section 2.2 on ‘Arguments in moral and political theory’.

of the practice. The human rights discourse method faces the immediate problem that existing practice, both linguistic and legal, is not coherent, and different participants in the practice disagree as to what IHRL is about. Individual cases therefore may lend support to different conclusions - how different participants interpret the significance of human rights cases, and whether, for instance, they think that they lend support to the conclusion that human rights duties should be extended to businesses, depends itself on those participants' commitments about the point of IHRL in the first place. In other words, to assess individual cases we first need a more general understanding of the role of IHRL that can offer reasons for *why* some parts of the linguistic and legal practice are better than others.¹⁶⁵ In this thesis I aim to interpret IHRL in a way that makes it consistent and gives it a rationale. I argued above that without a normative case in terms of its functional role, any part of existing practice might be seen as contingent or accidental – so appealing to some parts of the practice in an unsystematic way, that is without such supporting, normative arguments, as such cannot resolve disagreements as to whether or not IHRL should be extended to business entities. In other words, when looking at a particular case we must have one eye on the matter at hand and its peculiarities and another eye firmly on what deciding this case in a particular way might mean for this body of law as a whole.

Again, I should stress that my thesis does not offer a *legal* analysis – so arguing that certain parts of the practice are not justifiable in terms of the functional role of IHRL is different from saying that these are not part of actual legal practice. I

¹⁶⁵ On the point that bits of a practice as such cannot resolve disagreements about the point of that very practice in cases of disagreement, also see Saladin Meckled-García, 'The Practice-Dependence Red Herring and Better Reasons for Restricting the Scope of Justice', *Raisons Politiques* (English Language Special Issue 2013), 97-120 (pp.98-99).

do not take a view here on legal interpretation as such and whether a rule should not be taken to be legally binding unless it can be justified by a moral value.¹⁶⁶

9. CONCLUSION

In this chapter I addressed a number of possible objections to the functional role approach that I proposed in the previous chapter. Some of these objections disputed the very idea of ‘functional role’ of an area of law (the objection from arbitrariness and the objection from disagreement on functional roles) or took issue with the idea that areas of law should be understood in terms of distinct conceptions of agent responsibility (the objection from a consequence-based approach to law), others were directed at the interpretivist methodology I propose for arriving at an account of the respective functional role(s) of an area of law (the objections from moralizing, the law, the ‘ideal world’ objection and the objection from ‘human rights discourse’). Having explained why I do not take these different possible objections to undermine my project, in the following chapter I will apply the methodology proposed to international human rights law.

¹⁶⁶ For this debate, see Herbert L.A. Hart, ‘Positivism and the Separation of Law and Morals’, in his *Essays in Jurisprudence and Philosophy* (1958; Oxford: Clarendon Press, repr.1983). Also see Dworkin’s critique of positivism, in particular in *Taking Rights Seriously* and *Law’s Empire*; and Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001) for a critical discussion of this debate.

CHAPTER 4: INTERPRETING THE FUNCTIONAL ROLE OF IHRL

4A: DEFINING INTERNATIONAL HUMAN RIGHTS LAW

1. INTRODUCTION

The terms ‘human rights law’ or ‘international human rights law’ are sometimes used in different ways in the literature and policy debate. In particular, I argued that in the current business-and-human rights debate, commentators sometimes include international criminal law and extraterritorial tort mechanisms in their understanding of (international) human rights law.¹⁶⁷ To avoid confusion, it will be useful to clarify the understanding of IHRL that this thesis relies on. In the following, I will outline the different sources of IHRL and explain to what extent they will be drawn upon in the following.

There is no *one* overall regime of human rights obligations at the international level. Rather, international human rights law comprises a number of different regional and global regimes based on distinct treaties and implemented by distinct institutions. However, as will be seen, these different regimes share core structural features and substantive principles and so I argue that it makes sense to conceive of IHRL as one overall area of international law, and to speak of an overarching functional role of this area of law.

2. SOURCES OF IHRL

2.1 TREATY LAW VERSUS CUSTOMARY LAW

To begin with, there are different types of sources of international human rights law. Like any type of public international law, IHRL is made up of both treaties and customary law. Treaties and customary law are generally considered the two

¹⁶⁷ See chapter 1, section 2.2 on ‘Arguments in international legal theory’, esp. pp.35-38.

most important sources of international law.¹⁶⁸ Treaties, for the purposes of international law, are defined as “international agreements concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”¹⁶⁹ Customary law, by contrast, is defined as “international custom, as evidence of a general practice accepted as law”.¹⁷⁰ Custom has generally been understood as constituted of two elements, the ‘objective’ element of *state practice* coupled with the ‘subjective’ element of *opinio juris* – in other words, custom is defined as state practice where it is coupled with the belief of states that their practice is legally obligatory.¹⁷¹

In outlining the particular characteristics of IHRL in the following I will exclusively draw on human rights treaty law. There are two reasons for this: on the one hand, customary law is notoriously difficult to identify in

¹⁶⁸ Article 38(1) of the *Statute of the International Court of Justice*, which is generally considered the authoritative list of the sources of international law, names them first. It stipulates:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

International custom, as evidence of a general practice accepted as law;

The general principles of law recognized by civilized nations;

[...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

¹⁶⁹ *Vienna Convention on the Law of Treaties* 1969, Art.2.1a.

¹⁷⁰ Article 38(1) b, *Statute of the International Court of Justice*.

¹⁷¹ This two-element account was famously confirmed by the ICJ in the famous case of Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v USA* (merits), I.C.J. Reports 1986, 14, at 97. For discussions regarding several difficulties surrounding the identification of customary law, such as the difficulty of determining the ‘beliefs’ of states, or the difficulty of even distinguishing the ‘subjective’ and ‘objective’ elements of custom, see, for instance, Anthony A. D’Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971); Anthea E. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, *American Journal of International Law*, 95.4 (2001), 757-791.

uncontroversial terms and there is no definite list of customary norms and their precise content. Given that the aim of the current chapter is to give an account of the accepted *paradigms* of the practice, customary law does not constitute an appropriate source. In the following, ‘international human rights law’ therefore exclusively refers to those international norms established by treaty law and interpreted by the respective international human rights institutions (IHRIs) that interpret and implement these norms. And on the other hand, and more importantly, the different international human rights courts and monitoring bodies all work with explicit regard to their respective treaty regimes and so international human rights law is primarily developed through treaty law. The ratification rates of international human rights treaties are high and all states have assumed legal obligations under at least one international human rights treaty, and customary law can be argued to develop in the shadow of treaty law in the field of human rights.

2.2 JUDICIAL DECISIONS AND SCHOLARLY LITERATURE

“Judicial decisions” as well as “the teachings of the most highly qualified publicists of the various nations” are formally recognized as “subsidiary means for the determination of rules of [international] law”, in other words, they are recognized as a subsidiary source of international law.¹⁷² The chapter will also draw on judicial decisions of the regional courts and the general comments of the UN human rights bodies, as well as the scholarly literature on human rights when interpreting the role played by IHRL.

¹⁷² Article 38(1) d of the *Statute of the International Court of Justice*. Also see Peter Malanczuk, *Akehurst’s Modern Introduction To International Law*, (7th edn., London: Routledge, 1997), pp. 51-52.

2.3 SOFT LAW

Some authors also include so-called soft law international human rights standards in their account of international human rights law. Soft law may be defined as those international instruments that set standards for states and international organizations which deal with similar subject matter as international treaties, however are not legally binding. As such, they can be defined as guidelines of conduct which despite not being legally binding nevertheless have some weight as political maxims and have been described as operating in a grey zone between law and politics.¹⁷³ Examples for international human rights soft law in the area of corporations and human rights would, for instance, include the OECD Guidelines for Multinational Enterprises¹⁷⁴ or the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises,¹⁷⁵ and more recently the UN Guiding Principles on Business and Human Rights.¹⁷⁶

Soft law can be an important source for international lawyers insofar as soft law instruments may be considered indicative of the *opinio juris* of states when determining customary law, or may indicate the direction of development of hard legal standards.¹⁷⁷ But as this thesis aims to assess whether a development of human rights duties for business entities under international law would be

¹⁷³ Malanczuk, *ibid.*, p.54.

¹⁷⁴ Available at <http://www.oecd.org/corporate/mne/>

¹⁷⁵ Available at http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm

¹⁷⁶ UNHRC (2011) A/HRC/17/31, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’. Also see John G. Ruggie, ‘Business and Human Rights – the Evolving International Agenda’, *American Journal of International Law*, 101.4 (2007), 819-840.

¹⁷⁷ Alan Boyle, ‘Soft Law in International Law-Making’, in *International Law*, ed. by Malcolm Evans (3rd edn., Oxford: Oxford University Press 2010), pp.122-14. See Prosper Weil, ‘Towards Relative Normativity in International Law?’, *American Journal of International Law*, 77 (1983), 413-442, for a critique of the concept of soft law.

desirable at all, I will not draw on these soft law instruments in interpreting the functional role of IHRL. I will, however, discuss business-human rights soft law instruments (and in particular the UN Guiding Principles on Business and Human Rights) at a later point where the thesis looks at what an extension of IHRL to businesses may look like and what would be the practical implications of such an extension.

3. REGIONAL AND GLOBAL HUMAN RIGHTS TREATY REGIMES

The previous section introduced the different *types* of sources of IHRL and which of them will be relevant for the current discussion. Another important distinction needs to be made when defining IHRL - there are several distinct international human rights law treaty regimes which in turn establish distinct human rights systems with their respective monitoring bodies and courts.¹⁷⁸ Most commonly, a distinction is made between two broad *areas* of international human rights treaty law: on the one hand, there are the human rights treaties of different regional organizations that make up what we may call *regional* human rights law; then there are the human rights treaties of the United Nations (UN) on the other hand. Any UN member state can become a signatory of each of these treaties and thereby accept their bindingness. The UN treaties therefore have a potentially much wider applicability than regional treaties, and are also referred to as *global* human rights law.

¹⁷⁸ Jörg Künzli, *Zwischen Rigidität und Flexibilität: Der Verpflichtungsgrad internationaler Menschenrechte* (Berlin: Duncker und Humblot, 2001), p.24; Stephen Gardbaum, 'Human Rights as International Constitutional Rights', *European Journal of International Law*, 19.4 (2008), 749-768.

3.1 REGIONAL HUMAN RIGHTS LAW

The regional human rights treaties most prominently include the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹⁷⁹ and the European Social Charter (ESC) which apply to members of the Council of Europe (CoE)¹⁸⁰ and the American Convention on Human Rights (ACHR)¹⁸¹ which applies to members of the Organisation of American States (OAS)¹⁸². They also encompass the Arab Charter on Human Rights¹⁸³ which is binding on members of the Council of the League of Arab States¹⁸⁴ and the African Charter on Human and Peoples' Rights (ACHPR)¹⁸⁵ which is valid for members of the African Union (AU)¹⁸⁶.

The ECHR stipulates basic physical integrity rights¹⁸⁷ and a range of what are commonly referred to as civil-political rights.¹⁸⁸ The ECHR also includes the

¹⁷⁹ For the full text of the ECHR, see http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁸⁰ For the website of the Council of Europe, see <http://hub.coe.int/>

¹⁸¹ For the full text of the ACHR, see http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

¹⁸² For the website of the Organization of American States, see <http://www.oas.org/en/default.asp>

Note that the American Convention does not apply to *all* the member states of the Organization of American States but only to those which have explicitly ratified the Convention. The twenty-four states (of the thirty-five OAS member states) that are parties to the Inter-American Convention include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Trinidad and Tobago were a party until denouncing membership in 1998.

¹⁸³ For the full text of the Arab Charter on Human Rights, see <http://www1.umn.edu/humanrts/instree/loas2005.html>

¹⁸⁴ For the website of the Council of the League of Arab States, see www.lasportal.org/wps/portal/en/home_page

¹⁸⁵ For the full text of the ACHPR, see <http://www.achpr.org/instruments/achpr/>

¹⁸⁶ For the website of the African Union, see <http://www.au.int/en/>

¹⁸⁷ In particular, the right to life (Article 2) and the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3 "Prohibition of torture").

¹⁸⁸ The right not to be held in slavery or servitude or to be required to perform forced or compulsory labour (Article 4 "Prohibition of slavery and forced labour"); the right to liberty and security (Article 5); the right to a fair trial (Article 6); the right not to be punished without law (Article 7); the right to respect for private and family life (Article 8); the right to freedom of

right to education¹⁸⁹ which is commonly thought of as a socio-economic right, however is phrased in primarily negative terms in the European Convention.¹⁹⁰ The ECHR also stipulates that the enjoyment of all Convention rights is to be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.¹⁹¹

thought, conscience and religion (Article 9); the right to freedom of expression (Article 10); the right to freedom of assembly and association (Article 11); the right to marry (Article 12); and the right to an effective remedy before a national authority (Article 13).

¹⁸⁹ The right to education is laid down in Article 2 of the 1952 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁹⁰ It reads “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.” (Article 2 of the 1952 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms).

Note that I do not subscribe to the view that a clear distinction can be made between ‘positive’, that is socio-economic rights, and ‘negative’, that is civil-political rights. See, for instance, Colm O’Cinneide, ‘A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights’, *European Human Rights Law Review*, 5 (2008), 583-605; and Elizabeth Palmer, ‘Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights’, *Erasmus Law Review*, 2.4 (2009), 397-425 for arguments that the jurisprudence of the *European Court of Human Rights*, for instance, has increasingly developed positive obligations to provide for basic socio-economic rights despite its original focus on civil and political rights.

Also see Henry Shue’s argument that both categories of rights establish positive as well as negative duties in Henry Shue, *Basic Rights* (1980; 2nd edn., Princeton NJ: Princeton University Press, 1996).

¹⁹¹ Article 14 ECHR. A number of Optional Protocols which have been ratified since the entry into force of the Convention itself have added further rights. These Protocols have not all been signed by all CoE member states and are hence not binding on all states. Optional Protocol 1 has added rights to the peaceful enjoyment of possessions, education, and to free education. Optional Protocol 4 had added the right not to be imprisoned for debt, the right to freedom of movement, the right of nationals not to be expelled from the state to which they belong, and the right of aliens not to be collectively expelled. Optional Protocol 6 has abolished the death penalty except in time of war. Optional Protocol 7 stipulates procedural safeguards regarding the expulsion of aliens, the right of appeal in criminal proceedings, the right to compensation for wrongful conviction, the right not to be tried or punished twice in the same state for the same offence, and the equal right of spouses under the law. Optional Protocol 12 outlaws discrimination in relation to any legal right (i.e. not just Convention rights). Optional Protocol 13 abolishes the death penalty even in time of war. All quoted after Steven Greer, *The European Convention On Human Rights: Achievements, Problems And Prospects* (Cambridge: Cambridge University Press, 2007), p.22.

The ACHR covers similar rights – like the ECHR it focuses on civil and political rights¹⁹² and physical integrity rights¹⁹³. In addition, it includes an article which stipulates that states parties should progressively realize socio-economic rights.¹⁹⁴

The European Social Charter (ESC)¹⁹⁵ sets out social and economic human rights for the Council of Europe countries, including the rights to housing,¹⁹⁶ health,¹⁹⁷ to work¹⁹⁸ and rights concerning just, safe and healthy conditions of

¹⁹² In particular, it includes the right to juridical personality (Article 3); the right to freedom from slavery (Article 6); the right to personal liberty (Article 7); the right to a fair trial (Article 8); the right to freedom from ex post facto laws (Article 9); the right to compensation for miscarriage of justice (Article 10); the right to privacy (Article 11); the right to freedom of conscience and religion (Article 12); the right to freedom of thought and expression (Article 13, also Article 14 “Right of Reply” to “inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication”); the right of assembly (Article 15); the right to freedom of association (Article 16); rights of the family (Article 17); the right to a name (Article 18); rights of the child (Article 19); the right to property (Article 21); the right to freedom of movement and residence (Article 22).

¹⁹³ In particular, the right to life (Article 4); the right to humane treatment (Article 5);

¹⁹⁴ The precise wording of Article 26 of the ACHR reads that states should “*adopt measures [...] with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.*”

¹⁹⁵ For the full text of the European Social Charter, see http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp.

¹⁹⁶ Article 31 European Social Charter.

¹⁹⁷ ESC Article 11 (right to health) and Article 13 (right to social and medical assistance)

¹⁹⁸ ESC Article 1.

employees,¹⁹⁹ as well as a range of other workers' rights²⁰⁰ and rights to social security and benefits.²⁰¹

I should mention that while the distinction between civil-political human rights on one hand and socio-economic human rights on the other is useful in providing a broad description of international human rights treaty regimes, it is not a conceptually tight distinction, as has been argued by many scholars.²⁰² On the one hand, one of the primary arguments that has been made to entertain this distinction – namely that civil and political rights primarily require states to refrain from interfering with individual freedoms, while socio-economic rights are about the (costly) provision of goods and services – has been shown to be unconvincing. Both socio-economic and civil-political rights give rise to both positive and negative duties. For instance, socio-economic rights among others impose duties on states to refrain from interfering with the individual freedom to form or join trade unions, or to seek work freely. In a similar vein, civil-political rights not only require states to refrain from interfering with the freedoms of individuals, but also give rise to duties with respect to the maintenance of costly infrastructure, including for instance a functioning court system, where the minimum living conditions for prisoners are respected, the provision of legal aid, or the holding of free and fair elections. It is also increasingly recognized in

¹⁹⁹ Article 2 (just conditions of work); Article 3 (safe and healthy working conditions); Article 4 (fair remuneration); Articles 5 and 6 (rights to organize and bargain collectively); Article 7 (rights of children and young persons to particular protections with regard to employment); Article 8 (rights of employed women to protections of maternity); Articles 9 and 10 (right to vocational guidance and training); Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community); Articles 16 and 17 (rights of families and children to particular social, legal and economic protections);

²⁰⁰ Articles 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, and 29.

²⁰¹ Articles 12 (social security); Article 23 (particular right of elderly persons to social protection); Article 14 (social welfare services);

²⁰² Such as Colm O'Conneide or Henry Shue, see fn.190.

international jurisprudence that meaningful enjoyment of civil-political as well as socio-economic rights is often interlinked.²⁰³

Of the regional human rights systems the European system is generally considered to be the most developed and efficient of the regional human rights systems.²⁰⁴ Other human rights bodies routinely refer to the jurisprudence of the European court in their own judgments and opinions.²⁰⁵ It will therefore be discussed in most detail here. The Inter-American human rights system has also been increasingly active in recent years and will provide the second example discussed here.

There are two reasons for why I will not draw on the Arab and African human rights systems in this thesis. First, the debate concerning business entities and human rights has primarily concerned multinational corporations which are under the jurisdiction of states under the European and the Inter-American system. Since one central question of this thesis is whether IHRL would provide a suitable and effective mechanism to legally regulate non-state actors, it makes sense to focus on those human rights systems which have established an

²⁰³ See O’Cinneide, ‘A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights’, pp.583-605, for the argument that state action or inaction that leads to the destitution, degrading living conditions or similar manifestations of extreme poverty of individuals, should under certain circumstances be considered as constituting a violation of the ECHR. In other words, this would mean that the ECHR, which is generally considered to only protect civil and political rights, could under certain circumstances be interpreted as protecting socio-economic rights. Also see Mantouvalou’s argument for the inter-relatedness of civil-political and socio-economic rights in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Oxford: Hart Publishing, 2011).

²⁰⁴ Steven Greer, *The European Convention On Human Rights: Achievements, Problems And Prospects* (Cambridge: Cambridge University Press, 2007); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007).

²⁰⁵ Gérard Cohen-Jonathan and Jean-François Flauss (eds.) *Le Rayonnement International de la Jurisprudence de la Cour Européenne des Droits de l’Homme* (Brussels: Nemesis-Bruylant, 2005), quoted after Virginia Mantouvalou and Panayotis Voyatzis, ‘The Council of Europe and the Protection of Human Rights: A System in Need of Reform’, in *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar Publishing, 2010), pp.326-352.

effective practice to start from. Secondly, both the African and the Arab system are still in their infancy²⁰⁶ and have arguably not established enough of a practice to speak of their paradigmatic principles and structural features.

3.2 GLOBAL HUMAN RIGHTS LAW

At UN level, there are nine international human rights treaties. They encompass the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). As their names indicate, these two Covenants cover civil-political rights²⁰⁷ and social, economic and cultural rights respectively.²⁰⁸ The UN human rights treaties also encompass treaties which focus on particular rights, namely the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). These treaties outline in more detail

²⁰⁶ Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?', *Human Rights Law Review* 5.2 (2005), 361-376.

²⁰⁷ The ICCPR recognizes the rights to life and freedom from torture and slavery (Articles 6, 7, and 8); liberty and security of the person, in the sense of freedom from arbitrary arrest and detention and the right to *habeas corpus* (Articles 9 – 11); procedural fairness in law, including rights to due process, a fair and impartial trial, the presumption of innocence, and recognition as a person before the law (Articles 14, 15, and 16); individual liberty, encompassing the freedoms of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the right to privacy (Articles 12, 13, 17 – 24); prohibition of any propaganda for war as well as any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence by law (Article 20); the right to political participation, including the right to join a political party and the right to vote (Article 25); and the right to non-discrimination, minority rights and equality before the law (Articles 26 and 27).

²⁰⁸ The ICESCR stipulates the rights to work, under just and favourable conditions, and including the right to form and join trade unions (Articles 6, 7, and 8); to social security, including social insurance (Article 9); the right to family life, including paid parental leave and the protection of children (Article 10); to an adequate standard of living, including adequate food, clothing and housing, and the "continuous improvement of living conditions" (Article 11); the right to health, specifically "the highest attainable standard of physical and mental health" (Article 12); to education, including free universal primary education, generally available secondary education and equally accessible higher education (Articles 13 and 14); and to participation in cultural life (Article 15).

what duties states have with respect to the right not to be subject to torture or inhuman punishment or treatment, and with respect to the right not to be discriminated against on the basis of race (meaning any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin).

Finally, there are the human rights treaties which focus on the rights of *particular groups of humans*, namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CED), and the Convention on the Rights of Persons with Disabilities (CRPD).²⁰⁹ These treaties provide more detailed obligations for states with regard to their duties towards the respective groups of individuals they protect, and encompass civil-political as well as socio-economic rights.

This chapter has clarified the understanding of IHRL I use in this thesis and outlined the sources of IHRL I will draw on. This has set the starting point for chapter 4B which, based on existing practice of IHRL as defined here, will identify some of the core principles of IHRL and develop a theory of what normative values, if any, make sense of IHRL.

²⁰⁹ There are a number of so-called Optional Protocols which are treaties amending existing human rights treaties which also form part of international human rights treaty law. For the purposes of the current discussion here, however, they can be considered part of the respective treaties they amend. For further details, see <http://www2.ohchr.org/english/law/index.htm>.

4B: THE STATE FOCUS OF INTERNATIONAL HUMAN RIGHTS LAW

1. INTRODUCTION

In the current chapter I will apply the methodology that I have described in chapter 2 to the particular case of IHRL and develop an interpretation of the role of international human rights law. To recall from the methodology chapter, this will be done as follows: starting from existing practice of IHRL which I will identify based on the standard sources of international human rights law that I outlined in chapter 4A, I will identify the core principles (I will also refer to those as ‘core norms’ or simply ‘norms’ interchangeably) that I take to be paradigmatic of the practice. Based on these core principles, I will develop a theory of what normative values, if any, make sense of this practice of international human rights law.

To recall, the core principles encompass both what I call the substantive norms of an area of law and its structural features. The substantive norms include the rules on how responsibility is established under a given area of law. In chapter 2 I argued that one core substantive norm of criminal law, for instance, would be that in order to be found guilty a defendant must typically have committed the wrongful act *intentionally*. For international human rights law, I will identify the norms that have shaped how international human rights institutions interpret the content of the duties that IHRL gives rise to and the norms that guide how international human rights institutions establish whether a human rights violation has occurred.

Looking at these norms, I will argue that a consequentialist understanding of IHRL as proposed by the interest view cannot make sense of these norms. IHRL, I argue, has not simply been about ‘protecting important interests’. Instead, IHRL has explicitly focused on holding states to account in their institutional

capacities – it has been about regulating political power. To argue this, I will identify the following core features of international human rights law:

- (i) Many rights are distinctly about functions that only government can fulfil, or
- (ii) about powers that only states can exercise vis-à-vis citizens.
- (iii) Even rights concerning interests prone to be affected by businesses have been interpreted in a statist way (meaning that the interpretation of IHRL by international human rights institutions has reflected the particular powers and duties of states).
- (iv) IHRL stipulates interests to be protected in abstract terms and
- (v) human rights duties have been interpreted progressively over time
- (vi) States may restrict human rights under certain circumstances

I will then further argue that the focus on the institutional responsibilities of states is also reflected in the following core norms of IHRL that shape how and when responsibility for a human rights violation is assigned to a state. State responsibility under international human rights law encompasses:

- (vii) responsibility for human rights violations directly committed by state agents,
- (viii) responsibility when state agents exceed their institutional powers,
- (ix) responsibility for harm done by non-state actors empowered to perform public functions, and
- (x) responsibility to safeguard human rights against private actors like business entities.
- (xi) IHRL is not concerned with determining the direct agent of the harm, and so there is
 - no need to show that the violation is directly attributable to any particular individual, and
 - no need to prove intentional action.

I will argue that we can make sense of all these features if we understand IHRL as holding states accountable for the performance of their institutional duties, i.e. their duties *as states*. IHRL is explicitly not about holding accountable *whatever agent* has harmed a human rights interest, but specifically about assigning strict responsibility to a state for failing its institutional obligations.

In sum, I will argue that given how the scope of human rights duties has been interpreted in international human rights law and jurisprudence, and given how responsibility for human rights violations is generally determined, IHRL is best understood as distinctly concerned with the regulation of political authority; with regulating the relationship between individuals and the governments under whose jurisdiction they find themselves.

That means that human rights responsibility is not essentially concerned with determining the direct involvement of any given individual, or group of individuals, in harming the human rights interest at stake (I will call this ‘direct attributability’), as the interest view proposes, but about a state’s *institutional duties* to which the interest gives rise where the state has failed to meet its duties to respect, protect, or provide for human rights.

This argument goes beyond the descriptive observation that states have been the sole duty-bearers under IHRL to date. Not only have states been the sole duty-bearers of IHRL, but this focus on states has profoundly shaped IHRL: for one, it has shaped the content of human rights duties – in other words, it has determined how human rights duties have been interpreted by international human rights institutions. It has also shaped some of the core substantive principles of IHRL,

including the rules on how responsibility is established under international human rights law.²¹⁰

At a later point,²¹¹ I will discuss that the state-focus has also shaped how IHRL is implemented – i.e. how international human rights institutions enforce human rights obligations. I will discuss this in more detail in chapter 6 where I will also address whether IHRL would provide appropriate ways of implementing accountability for business entities, given the concerns that have most commonly motivated calls for business-human rights accountability.

2. HOW THE STATE FOCUS HAS SHAPED THE CONTENT OF HUMAN RIGHTS DUTIES

In the following, I argue that the state-focus has shaped international human rights law in a number of ways. In other words, the fact that IHRL has historically only applied to states is reflected in many of what I argue are core principles of international human rights law. Firstly, as I will argue in the current section 2 of this chapter, how international human rights institutions have interpreted the content of human rights duties has been shaped by the particular powers and responsibilities of states. And secondly, as I will argue in section 3, it has shaped when and how human rights responsibility is assigned – in other words, what the modes of responsibility are under IHRL.

²¹⁰ In chapter 2 I proposed the example that one core substantive norm of criminal law, for instance, would be that in order to be found guilty, a defendant must typically have committed the wrongful act *intentionally*.

²¹¹ In chapter 6, section 3.

2.1 WHAT ARE STATES?

To explain how the state-focus has shaped IHRL, it is important first to understand what is special about states. States, in the sense that it matters for the purposes of this thesis, have a number of characteristics that distinguish them from private (also ‘non-state’ in the following) actors like business entities. States exercise effective control over a population.²¹² They exercise political authority, meaning that they decide on an institutional order, including a legal order.²¹³ Through that legal order they have powers to impose compulsory duties and to extend rights to a population, and those rights and duties are decided and enforced by a structure of authority relations and adjudication. States thereby have powers to define the institutional structures of the state, they have authority to regulate the behaviour of private actors in their state, and they define how public power is exercised in that state. I am assuming the case of *functioning* states here, so this should be understood as a normative rather than empirical-descriptive statement. In reality, there are of course cases where states fail to exercise effective control and this leads to important problems, not least in the context of the business-human rights-debate. However, for the sake of describing the normative role of states we can posit that the exercise of effective control is an integral part of it.

As Raz has argued, states claim *comprehensive* authority in the sense that legal systems (unlike other normative systems like business enterprises) do not limit the spheres of behaviour that they have the powers to regulate.²¹⁴ By controlling

²¹² Stephen Perry, ‘Political Authority and Political Obligation’, in *Oxford Studies in Philosophy of Law: Volume II*, ed. by Leslie Green and Brian Leiter (Oxford: Oxford University Press, 2013), pp.1-74 (p.3).

²¹³ I am not concerned here with the broader discussion of whether states can only have law and a legal system if they exercise effective control. For this discussion, see Raz, *The Authority of Law*, pp.116-117; quoted after Perry, *ibid.*, pp. 3-4.

²¹⁴ *Ibid.* The claim that authority is *comprehensive* holds even in countries that may have constitutional provisions that are immune to amendment – compared to the spheres of behaviour

the police and armed forces, states also control the use of coercive power in their respective territories.

In other words, states exercise a particular kind of coercive power over their citizens that is qualitatively different from the kind of power that individuals can exercise over one another, or that private actors like businesses can exercise over individuals. While state power is of course exercised through individuals who take up the roles of state agents and exercise the respective powers, no individual can exercise those powers officially (*de jure*) unless they indeed occupy the special recognized roles of state actors.

States not only have special powers that private actors like multinational corporations or other businesses do not have but they also have responsibilities towards citizens that business entities do not have. Ensuring the realization of the well-being of their citizens is the primary *raison d'être* of a state.²¹⁵ Note, again, that this is of course not an empirical statement but a normative one: there certainly are states that do not act as though the well-being of their citizens was their primary concern. However, such states do not act legitimately; put differently, they fail to live up to their very role as states - states derive their legitimacy from pursuing the well-being of their citizens,²¹⁶ and the realization of human rights, in turn, is arguably central to individuals' well-being.

that private agents can regulate, the powers of states through control of the legal system is still much larger.

²¹⁵ Saladin Meckled-García, 'How to Think About the Problem of Non-State Actors and Human Rights', *Proceedings of the XXII World Congress of Philosophy*, 11 (2008), p.54; David J. Karp, *Responsibility for Human Rights – Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014), pp.116-117, where he argues that public agents by definition accept the burdens of human rights protection and provision, or else they give up their public role.

²¹⁶ Also see the argument of Patrick Capps, *Human Dignity and the Foundations of International Law* (Oxford: Hart Publishing, 2009), esp. ch.8, where he argues that states must be understood as ultimately deriving legitimacy from the pursuit of the human dignity of the communities they govern.

Arguing that states have primary responsibilities for the protection and realization of human rights is of course not the same as arguing that non-state actors like businesses do not have any responsibilities with regard to the interests that underlie human rights. But in this thesis I am not concerned with discussing the precise substantive responsibilities that business entities do or do not have with regard to important human interests. As I argued above²¹⁷ I take it as a given that business entities have more than just responsibilities to make profit for their shareholders. Such responsibilities may well include moral responsibilities not to harm important human interests or responsibilities to positively contribute to the realization of important human interests. However, this thesis does not aim to make a case for or against a particular division of labour between states and business entities with regard to the realization of important human interests. Instead, this thesis takes an interest in the *form* that such duties should take, and more precisely, with whether an extension of direct duties for business entities under IHRL would be a desirable development. It is therefore sufficient for the purposes of this thesis to argue that states, by virtue of the kinds of agents they are, have powers and responsibilities that are qualitatively distinct from those of business entities.

In this chapter I will focus on how some of the special characteristics of states are reflected in IHRL and have shaped many of the core principles of IHRL. While the argument here already draws on normative reasons for why states, given the kinds of agents they are, require particular standards to ensure that they exercise their powers in a legitimate way, chapter 5 (in particular section 2) will elaborate on the normative case and discuss in more detail why it is indeed valuable to preserve IHRL to distinctly address states. In other words, while the current chapter focuses on describing that IHRL has been concerned with states

²¹⁷ See discussion in chapter 1, section 2.2 on ‘Arguments in moral and political theory’.

and their particular powers and obligations, in the next chapter I will present a normative argument in favour of keeping this state-focus of IHRL.

In the following, I will show that the state-focus (i.e. the fact that IHRL has to date only applied to states) has shaped the content of human rights duties in the following ways: to begin with (in section 2.2), I argue that the duties to which IHRL gives rise are largely left open-ended and that the idea that underlies this open-ended, or abstract, framing of IHRL is that states are the kinds of agents that can legitimately make choices as to how, in detail, to realize human rights. This is also reflected in the fact that states have some discretion to interpret human rights, as I argue in section 2.3.

I then argue (in section 2.4) that many of the rights recognized in international human rights treaties are distinctly concerned with regulating the relationship between states and their citizens. This holds true either in the sense (i) that they are about functions that only governments can fulfil, by virtue of the kinds of institutions they are, or in the sense (ii) that they protect citizens (or other individuals under the jurisdiction of a given state) from the particular powers that states, again by virtue of the kinds of institutions they are, may exercise or abuse *vis-à-vis* individuals. In other words, I argue that many human rights are distinctly about particular government functions and powers.

In section 2.5 I argue that even those rights which concern interests which are more prone to be affected by non-state actors like businesses have been interpreted by international human rights courts and monitoring institutions in a statist way. This means, for one, that the interpretation of such rights by IHRIs has reflected the particular powers of states but also that the duties that are established have reflected the particular responsibilities that only states have towards individuals under their jurisdiction. Related to the point that IHRL

stipulates the interests to be protected in abstract terms, I will argue in section 2.6 that human rights have been interpreted as giving rise to progressive duties, in other words, human rights duties may change over time without changes in the texts of international human rights law documents. I will argue that this is justifiable for states but would not be justified, at least not in the same way, for private actors like business entities. Finally, in 2.7 I argue that states may restrict fulfilment of their human rights duties under certain circumstances, or balance human rights against other policy considerations, which again reflects that IHRL has been tailored to hold states, as specific agents that hold legitimacy to make policy, to account.

2.2 THE ABSTRACT NATURE OF HUMAN RIGHTS IN IHRL

Both the UN human rights treaties and the regional human rights treaties come in the form of lists of rights which stipulate the *interests* to be protected – such as the interests of ‘life’, of ‘not being subject to torture’, of ‘freedom of expression or thought’, ‘health’, or ‘education’ - in a relatively abstract manner. The duties to which these interests give rise are largely left open-ended, they are not specified in much detail in the texts of IHRL treaties as such.

So for instance, Article 3 of the ECHR stipulates that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”,²¹⁸ but does not outline what constitutes torture or inhuman or degrading treatment or punishment, nor what duties states have to ensure realization of this right; similarly, Article 6 of the ICCPR stipulates that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be

²¹⁸ Similarly, Article 7 of the ICCPR reads “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

arbitrarily deprived of his life” but does not outline in detail the obligations that states have with regard to realizing the right to life.²¹⁹

Some rights are laid down in some more detail: Article 6 of the ECHR, for instance, lays down the right to a fair trial and specifies to some extent what conditions need to be met for a trial to be fair and what particular duties states have. For instance, hearings have to be fair and public, they have to take place within a reasonable time and have to be conducted by an independent and impartial tribunal established by law. States need to presume the innocence of anyone charged with a criminal offense until they have been proven guilty; they have to inform the accused of the nature and cause of the accusation in a language she understands; to provide adequate time and facilities to the accused to prepare his defence; to provide and pay for legal assistance if needed; and to provide an interpreter in court if proceedings are in a language the accused cannot understand.²²⁰

But while with respect to a number of rights, international human rights treaties go into *some* more detail what duties these rights give rise to on behalf of states, it is true for all rights that they have to be interpreted in *much* more detail to be meaningful in specific contexts.²²¹

²¹⁹ Article 6 (2-6) of the ICCPR does outline a number of obligations that states have, for instance, regarding the imposition of the death penalty; however, it does not outline all the duties that states have been found to have with regard to the right to life in IHRL. Similarly, Article 2 of the ECHR stipulates that “*Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*” and outlines a number of situations where deprivation of life resulting from the use of force shall not be regarded as a violation of the right to life.

²²⁰ Article 6 ECHR.

²²¹ On this point, also see Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), p.337.

In what way does the fact that human rights duties are not laid down in detail reflect that IHRL has been particularly concerned with regulating states? Arguably, it is based on the understanding that states are the kinds of agents that have authority to make political decisions on the precise content of human rights, in other words, the understanding that states have the legitimacy to decide how the various human rights should be fulfilled under their respective jurisdiction.²²² They can choose, for instance, among different models of providing health or education to citizens, what type of legal system to have and how to realize the various fair trial rights within that system, and so forth. The provisions of IHRL are explicitly not attempts to define in detail what states should or should not do to realize each right. Rather, they require interpretation by states in their implementation. Evidently states do not have complete freedom in their realization of human rights – the very point of international human rights law, as I argue here, is to restrict the use of powers of states and ensure that they adequately realize human rights and thereby respect their responsibilities as states within their respective systems. What particular obligations human rights give rise to is elaborated over time by the jurisprudence of the regional courts, General Comments and Optional Protocols of the UN human rights bodies respectively.²²³ However, the idea that underlies the comparatively open-ended, or abstract, framing of IHRL is that states are the kinds of agents that can legitimately make choices as to how, in detail, to realize human rights.²²⁴

²²² Ibid., pp.336-338.

²²³ Chapter 6, section 3, provides more detail as to the specific workings of the different international human rights institutions and how they go about communicating or publishing their respective interpretations.

²²⁴ Note that this is compatible with different understandings of what is the *morally justified* content of any particular human right (which, in turn, should arguably inform how states decide to specify the legal content of human rights - a discussion that is, however, beyond the scope of this thesis). For a discussion of different schools of thought on what justifies the content of any given right, see Saladin Meckled-García, 'Specifying Human Rights', in *Philosophical Foundations of Human Rights*, ed. by Rowan Cruft, S. Matthew Liao and Massimo Renzo (Oxford: Oxford University Press, forthcoming 2015).

2.3 STATE DISCRETION TO INTERPRET HUMAN RIGHTS

Relatedly, and arguably based on the same justification, is that states are left some discretion to decide how to interpret the content of particular rights or how to weigh individual rights against each other.²²⁵ International human rights institutions have the function of monitoring *whether* states comply with their international human rights duties but there are legitimate variations as to how different states interpret human rights at the national level. In the jurisprudence of the ECtHR, this idea is expressed through the concept of ‘margin of appreciation’. Even though the European Court of Human Rights holds jurisdiction over all cases concerning the interpretation of the Convention, the ECtHR can defer to the judgment of national authorities where it considers the national authorities in a better position to decide on a specific issue.²²⁶ While the precise extent of the margin of appreciation and what justifies its use in particular cases is contested,²²⁷ the general idea is that international human rights institutions play a subsidiary role to the national legal systems and that in the first instance, it is the responsibility of states to protect human rights and to choose how to do so.

States may, for instance, differ in their interpretation of what constitutes a breach of the freedom of speech. For instance, in the case of *Handyside v UK*, the applicant complained that the seizure and confiscation of a book (the ‘Little Red Schoolbook’) that he had published constituted a violation of his right to freedom of expression. The European Court of Human Rights argued in its judgment that it was for the national authorities to decide in this case whether or not the confiscation was indeed necessary to protect public morals (the book

²²⁵ Pieter van Dijk and Godefridus J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn., Leiden: Martinus Nijhoff Publishers, 1998), pp.82.

²²⁶ *Handyside v The United Kingdom*, A24 (1976), para 49.

²²⁷ See George Letsas, ‘Two Concepts of the Margin of Appreciation’, *Oxford Journal of Legal Studies*, 4 (2006), 705-732.

contained what the state considered sexually obscene materials). In other words, the Court left it to the state's discretion whether or not the right to freedom of expression indeed included the right to publish the kinds of materials contained in the 'Little Red Schoolbook'.

In other words, international human rights institutions complement domestic legal institutions in their protection of human rights; they play a subsidiary role where domestic institutions fail to fulfil their human rights duties.²²⁸ Beyond certain minimum requirements,²²⁹ individual states also have discretion as to how to implement human rights domestically and what bodies, in addition to judicial bodies, to assign responsibilities, such as national human rights commissions, ombudsmen or truth commissions.²³⁰

2.4 HUMAN RIGHTS THAT ADDRESS PARTICULAR STATE FUNCTIONS AND POWERS

Many of the human rights recognized by international human rights law are about the particular functions and powers that governments exercise for and vis-à-vis those under their jurisdiction. As I argued above, states, by virtue of the kinds of agents they are, have particular powers that are qualitatively distinct from the powers that private agents can exercise over individuals. We may distinguish between different groups of human rights that constrain these particular powers that states have and ensure that individual interests are protected against abuse of these powers. They encompass some, but not all, of

²²⁸ Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), p.185.

²²⁹ *Ibid.*, pp.185-190, identify the following minimum requirements: States must (i) allow individuals to invoke human rights at the domestic level (duty to incorporate) and to seek an effective domestic legal remedy in the event of violations (duty to provide a legal remedy); (ii) investigate alleged violations (duty to investigate) and, in cases of particularly serious violations, to bring criminal charges against perpetrators (duty to prosecute and punish); (iii) to compensate or rehabilitate victims of violations (duty to provide reparation); and (iv) to prevent future violations (duty to prevent).

²³⁰ *Ibid.*

the human rights that are typically referred to as civil-political rights. Firstly, there are those rights that lay down procedural fairness in the way individuals are treated in the legal system that the state establishes. They include the various fair trial rights - the right to due process, a fair and impartial trial, the presumption of innocence, but also rights regarding the recognition as a person before the law or rights that protect individuals against punishment without law or *ex post facto* laws.

Political participation rights are another category of human rights which are essentially about the relationship between states and their citizens, they entitle citizens to take part in state institutions – including the rights to vote and be elected to participate in government, and to have access to public service in one's country on terms of equality.

Finally, there are those rights that entitle individuals to civic status – such as the right to marry, or the right to a name and to a nationality, and to some extent the rights of the child or of the family. The interests that these rights protect distinctly concern the standing of individuals *as citizens*, in other words the standing that individuals have *vis-à-vis* institutional state structures and that only state structures can confer.

For instance, the right to nationality imposes duties on states not to (arbitrarily) deprive individuals of their nationality, nor to deny them the right to change their nationality. One important reason why it is so important for individuals not to be deprived of their nationality and to have official standing as a citizen is because in a world where nation states do have the powers described above, and where states are also the primary duty bearers to provide for human rights, being stateless (i.e. not being the national of any state) leaves individuals unable to

participate in society or to enjoy their human rights.²³¹ As stateless individuals do not have a legal bond with any state, they can often not access health care, education, enjoy their property rights or their ability to move freely as all of these tend to require proof of national identity to prove that the individual is entitled to enjoy these rights.²³²

Similarly, the right to a name is about the entitlement of every individual to be officially recognized as individual with legal standing. Article 24 of the ICCPR stipulates that “Every child shall be registered immediately after birth and shall have a name” - without a name, an individual does not have an official identity within the state structure which, like the stateless person, would leave her unable to claim her rights from a government.

Business entities, as private agents, do not have the powers that correspond to any of these rights – they cannot create or enforce laws, they do not entertain the institutions that define the political system and they cannot confer civic standing to individuals. In turn, it would not make sense to impose the duties that international human rights law creates with respect to these rights and that regulate the use of these powers on business entities.

2.5 THE STATIST INTERPRETATION OF ALL HUMAN RIGHTS

However, not all the rights that have traditionally been classified as international civil and political human rights seem to immediately concern the relationship between citizens and governments, or the regulation of distinct government functions and government powers. Other civil-political rights, it may be argued,

²³¹ In this context, also see Arendt’s argument that the right to political membership in a community is the “right to have rights”. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & World, 1966), pp.292-300.

²³² UN High Commissioner for Refugees, ‘What is Statelessness?’, www.unhcr.org/pages/49c3646c158.html

protect interests that are more liable to being affected by non-state actors, including business entities. These rights include, for instance, the right to life, the right to liberty and security, or the right not to be subject to torture. As advocates of business-human rights duties have stressed, business enterprises can greatly harm the interests that underlie these rights, as the following (by no means exhaustive) examples illustrate:

One of the better known and extreme examples where business entities were directly involved in grave harm to the physical and psychological integrity of individuals, for instance, included the cases of torture of detainees in the US-run Abu Ghraib prison in Iraq where private corporate contractors that had been hired to interrogate detainees directed US soldiers to humiliate, beat, sexually assault and otherwise torment prisoners.²³³

Business entities also have capacities to affect the liberty and freedom of movement of their employees; for instance, private companies have been known to confiscate passports or identity cards of employees, making it impossible for employees to leave their employer or the country of employment at their own discretion.²³⁴ In many cases, businesses have come under scrutiny for employing forced labour. One of the examples mentioned earlier was the employment of slave labour by some major global supermarkets chains in the production of prawns in Thailand.²³⁵ In another high-profile case, several multi-national oil companies were found to have benefitted from forced and child labour provided by the Burmese government for the construction of a gas pipeline in Burma .²³⁶

²³³ See chapter 1, section 1.2.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

The oil company Royal Dutch Shell in Nigeria has been criticized as having at least contributed to the death of peaceful protesters against their operations in Nigeria by having requested Nigerian soldiers and police to clamp down on the protests, and of having provided monetary and logistical support to the Nigerian state forces, even though they were aware of the brutal methods of the Nigerian forces.²³⁷

Companies have also been criticized for providing the tools for governments for violating freedom of thought and expression rights – Cisco Systems, a company that sells computer networking equipment, for instance, has been accused of having designed and maintained a censorship network used by the Chinese government to monitor and access private internet communications, identify anonymous blog authors and to block online publications critical of the Chinese Communist Party.²³⁸

And certainly, businesses have capacities to discriminate against employees, or would-be employees, on the basis of the different protected characteristics laid down in IHRL (i.e. race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status)²³⁹ in their hiring or promotion processes.

Business corporations have also been argued to impact many or most of the interests protected by socio-economic rights. Many socio-economic rights directly relate to employment and the conditions of employment, and business

²³⁷ Ibid.

²³⁸ For details on the lawsuits brought against *Cisco Systems* in California on behalf of 11 members of the Chinese Falun Gong movement see <http://business-humanrights.org/en/cisco-systems-lawsuits-re-china#c18389>

²³⁹ See ECHR Article 14; ICCPR Article 2; UN Committee on Economic, Social and Cultural Rights, General Comment No 20 (2009) E/C.12/GC/20, ‘Non-Discrimination in Economic, Social and Cultural Rights’.

can of course very directly affect many of the underlying interests. Examples of these rights include the right to just and favourable conditions of work which ensures, among others, fair wages that allow for decent living, safe and healthy working conditions, rest and leisure; the right to form and join trade unions and to strike; rights to social security and insurance; and the rights of children not to be economically exploited or to perform any work that is hazardous or interferes with their education, health or development. Where corporations do not pay employees decent wages, provide for safe working conditions or employ child labour, business entities could also be thought of as harming the interests of an adequate standard of living, health, and education more generally.

Proponents of human rights duties for business enterprises argue that all this goes to show that business entities can negatively affect (many or at least some of) the interests that IHRL protects, and so, assuming the interest view I described in more detail above, it would only be logical to make business a potential duty bearer under IHRL.²⁴⁰

The fact that business entities have capacities to impact, and indeed to seriously harm, important human interests seems undisputable in the face of growing evidence and I am not concerned with discussing the extent or nature of these capacities here beyond the illustrative examples given above. I also agree with the claim made by proponents of business-human rights accountability that we need much more effective regulation and oversight of business entities to minimize such harm, including through *legal* regulation. However, the argument that I make in the following is that IHRL, in its current form, is not simply – as the interest view has it – about ‘protecting the interests’ that underlie the rights stipulated by IHRL ‘against just any actor that may have capacities to harm these interests’. Instead, international human rights, including the ones discussed in

²⁴⁰ See chapter 1, section 3 above.

the preceding paragraphs, that would seem most liable to being affected by business corporations, have been interpreted in a statist way. This means that they have been interpreted in the jurisprudence of international human rights courts and other monitoring bodies in a way that focuses on protecting these interests against the particular powers of states, and on outlining the negative as well as the positive duties that states must fulfil for these rights to be realized.

For instance, the way in which the right of life has been framed in IHRL is in context of the particular threats that states pose to the life of individuals. I argued that states, on the one hand, exercise a particular kind of coercive power over citizens that is qualitatively distinct from the kind of power that private actors can exercise over one another. States exercise political authority, which entailed decision-making on an institutional order, including a legal order. So states, for instance, have powers to decide whether or not to impose the death penalty. Consequently, one area of focus of IHRL with regard to the right to life has been concerned with outlining under what conditions states may impose the death penalty, and when deprivation of life that results from the use of force by states constitutes a violation of the right to life and when it does not.²⁴¹

Among the duties corresponding to the right to life are also duties of states to regulate third actors²⁴² and ensure that they do not deprive others of their life –

²⁴¹ Kälin and Künzli, *The Law of International Human Rights Protection*, pp.275-284; *McCann and Others v The United Kingdom*, Grand Chamber, A/324 (1995); *Andronicou and Constantinou v Cyprus*, Reports 1997-VI; *Ergi v Turkey*, Reports 1998-IV, paras 79ff.; *Güleç v Turkey*, Reports 1998-IV; paras 63ff. on the lawfulness of the use of force by the state to quell violent demonstrations. All quoted after Kälin and Künzli, p.278.

²⁴² It is true for all international human rights that states have duties to adopt laws or other measures that may be necessary to give effect to the rights recognized in IHRL. See, for instance, General Comment No 31(80), CCPR/C/21/Rev.1/Add.13 (2004), ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ which stipulates that states must “*adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations*”; 2 of Article 2 of the ICCPR reads: “*Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions*

for instance, states must criminalize murder and they must investigate any unexplained death and possibly bring to justice the perpetrator. For instance, the duty to fulfil the right to life includes duties to investigate all unexplained deaths under a state's jurisdiction, particularly those having occurred in custody, with the requisite independence and diligence.²⁴³ A refusal to undertake such investigations or failure to conduct them with due diligence will constitute a violation of the right to life.²⁴⁴ The same duties could not apply to business – business neither has the means nor the normative authority to regulate and/or prosecute individuals.

I also argued that states have special positive responsibilities towards individuals to realize the fundamental interests recognized in IHRL – this has also been reflected in the jurisprudence concerning the right to life. For instance, where people are unable to satisfy their subsistence needs as a consequence of the behaviour of state authorities, duties to fulfil the right to life can give rise to an obligation to provide goods and medical services necessary for survival.²⁴⁵ States also have duties to take steps to enhance the protection of life such as through the adoption of measures to reduce infant mortality and to increase average life expectancy. And finally, states also have duties to protect those under their jurisdiction from threats that emanate from natural or human-made

of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

²⁴³ UN Human Rights Committee, *Baboeram et al v Suriname*, 146/1983 and 148-154/1983 (1985), para 16; IACtHR case of *Rubio and Parents v Colombia*, C/146 (2006); ECtHR cases of *Ramsahai and Others v The Netherlands*, Grand Chamber, 52391/99 (2007), paras 321 ff.; and *Finucane v The United Kingdom*, Reports 2003-VIII, paras 67 ff.

²⁴⁴ IACtHR case of *Velásquez-Rodríguez v Honduras*, C/4 (1988), para 166; ECtHR case of *Yasa v Turkey*, Reports 1998-VI, para 100, and UN HRCtee, *Chaparro et al v Colombia*, 612/1995 (1994), para 8.8.

²⁴⁵ This happened, for example, when Paraguay refused to protect the land rights of indigenous communities who, as a consequence, were no longer able to pursue their traditional lifestyle leading to the death of some of their members. IACtHR cases of *Xakye Axa Indigenous Community v Paraguay*, C/125 (2005), paras 162 ff., and *Sawhoyamaya Indigenous Community v Paraguay*, C/146 (2006), paras 159 ff..

risks – the state of Russia, for instance, was found responsible for a violation of the right to life in a case where it had failed to warn and take measures to protect citizens from a deadly mud slide.²⁴⁶ In a similar vein, the state of Turkey was found responsible for a violation of the right to life because it had failed to take “appropriate steps to prevent the accidental death of nine of the applicant’s close relatives” who were killed when a methane explosion occurred at a household-refuse tip.²⁴⁷

So on the one hand, the right to life has been interpreted with the particular powers of states in mind, it has been interpreted as protecting individuals against the particular threats that states, given their particular institutional powers, pose to individuals’ lives. It would not make sense to impose those same duties on business entities – businesses do not have the powers to impose legal punishment, let alone capital punishment, on individuals, and they do not control the use of legitimate force. (It has been argued that in some situations, there is no clear distinction between state and private powers, such as where business entities are contracted to operate detention centres or support the military in its functions – this objection will be considered in more detail in chapter 6, section 4.5)

And on the other hand, states have duties that are more extensive than the duties that businesses would have. While it seems rather uncontroversial that business entities can be assigned responsibilities to ensure safe working conditions for their employees, or to ensure that their products do not harm those who use them, most people would agree that business entities do not have duties to adopt measures that reduce infant mortality or increase life expectancy for the

²⁴⁶ ECtHR, *Budayeva and Others v Russia*, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (2008).

²⁴⁷ ECtHR, *Öneryildiz v Turkey*, Grand Chamber, Reports 2004-XII.

population at large, or to protect individuals against all kinds of natural or human-made risks to their lives. Businesses, as the kinds of institutions they are, also do not have the same extensive duties to realize human rights. While it is a primary *raison d'être* for states to ensure the realization of human rights for their citizens²⁴⁸ (and with regard to most human rights for any individual under their jurisdiction) this is not the case for business entities. To ask businesses to take on the same duties that states have, even given similar or the same *de facto* capacities, would be to confuse the respective roles of states and business entities.²⁴⁹

The state-focus is also evident in other rights – for instance, the right to liberty and security of the person has been interpreted as aiming to prevent states from unlawfully arresting or detaining individuals, and outlines the entitlements that individuals have once they are detained or arrested, such as that no individual may be deprived of their liberty unless it is in accordance with a legal procedure and unless the individual has been convicted by a court, that individuals need to be informed promptly of the reasons for arrest and any charges against them, that everyone detained or arrested must be brought promptly before a judge, and is entitled to proceedings by which the lawfulness of the detention must be decided, or that everyone who has been the victim of arrest or detention in contravention of IHRL shall have a right to compensation.²⁵⁰

And the right to freedom of movement, as interpreted in IHRL jurisprudence, has focused on outlining rules that regulate the movement within, out of and into

²⁴⁸ Meckled-García, 'How to Think About the Problem of Non-State Actors and Human Rights', p.54; also see Perry, 'Political Authority and Political Obligation', p.10, where he writes that "[t]he most important function of the state is to accomplish particularly important moral goals that states are uniquely suited, or at least particularly well suited, to achieve on behalf of their subjects by means of the normative instrument of a capacity to impose obligations."

²⁴⁹ Karp, *Responsibility for Human Rights – Transnational Corporations in Imperfect States*, pp.116-117; also see chapter 4B, section 2.1 on 'What are states' in this thesis.

²⁵⁰ Kälin and Künzli, *The Law of International Human Rights Protection*, pp. 273-302.

states, including rules applicable to the expulsion of aliens. States also have a range of further-reaching positive duties to facilitate the right to movement; the UN Convention on the Rights of Persons with Disabilities (CRPD), for instance, establishes state duties to take specific measures that states need to take to increase the mobility of persons with disabilities.²⁵¹

And even those international human rights that are concerned with the workplace very directly have been interpreted by IHRIs to outline the particular duties that states have: for instance, the right to health at work does *not* stipulate the particular measures that businesses would have to take to provide for a healthy workplace. Rather, international human rights institutions have focused on outlining what *states* have to do to regulate businesses. For instance, Article 3(1) of the European Social Charter requires states to formulate, implement and periodically review a coherent national policy on occupational health and safety in consultation with employers' and workers' organizations²⁵², and states have

²⁵¹ For instance, Article 20 CRPD reads: “*States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by: Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost; Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost; Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities; Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.*”

Article 9 CPRD on accessibility stipulates that “*To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:*

Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

Information, communications and other services, including electronic services and emergency services.”

²⁵² European Committee of Social Rights, ECSR Conclusions 2003, Art 3(1), p.31 (on Bulgaria).

duties to promote the progressive development of occupational health services for all workers²⁵³.

The right to health more broadly requires states to ensure the best possible state of health for their population given their resources and existing knowledge, that health systems respond appropriately to health risks that can be controlled by human actions,²⁵⁴ and that they are accessible to the entire population without discrimination.²⁵⁵

Again, the way in which these rights have been interpreted by IHR bodies has very clearly reflected the specific duties that states have towards their citizens or those under their jurisdiction – businesses neither have the legitimacy, nor can they sensibly be thought to have the obligations, to formulate and implement health policies or to provide health systems for the population at large.

This is of course not to say that we cannot conceive of obligations that businesses could sensibly, and justifiably, be imposed in relation to the interest of health, however, such obligations would need to take a very different form from those of states. We would want, for instance, much more detailed guidance as to the particular conditions of the workplace, including health and safety measures that businesses should put in place on their premises, or on the kinds of health benefits to pay their employees. So what I have argued here is that the state-focus has shaped how the content of human rights obligations has been interpreted, and that if IHRL were to be extended to businesses, these obligations would need to be translated for businesses first. And it is certainly not

²⁵³ European Committee of Social Rights, ECSR Conclusions 2003, Art 3(4),p.37, and ECSR Conclusions 2005, Art 3(4).

²⁵⁴ European Committee of Social Rights, ECSR Conclusions XV-2 (2001),pp.126-129 (on Denmark) and p.599 (on the United Kingdom).

²⁵⁵ European Committee of Social Rights, ECSR Conclusions XVII-2 (2005) and Statement of Interpretation on Article 11 (5).

impossible to imagine that IHRIs could develop such a specific jurisprudence for business entities; however, as I will argue in more detail in chapter 5, this would fundamentally alter the nature of IHRL to the point that it would undermine what is currently the distinct role of IHRL. For now, the point made is that existing jurisprudence has explicitly been developed with states in mind as duty bearers and could not simply be applied to business entities as it stands. So far, IHRIs have not described or elaborated on the specific duties that non-state actors like businesses would have with respect to the rights laid down in IHRL.

2.6 THE FLEXIBLE NATURE OF HUMAN RIGHTS DUTIES

I argued that international human rights law gives rise to extensive obligations for states that would not be justified, at least not to the same extent, for business entities. Moreover, it is a core principle of IHRL that what duties a given right gives rise to may change over time. I also discussed above²⁵⁶ that international human rights treaties do not lay down in much detail what duties human rights give rise to on the side of duty bearers (that is *states* in the current state of IHRL). Instead, they stipulate, in rather abstract terms, the interests that right holders (i.e. individuals) have. The precise extent of duties relating to each right is interpreted through case law and jurisprudence of the regional courts as well as the UN human rights bodies over time. But what is interesting to note is that the aim is explicitly *not* to arrive at a *definitive* understanding of human rights. Rather, the flexibility of duties has emerged as a core doctrine of international human rights law over time and can be found throughout the jurisprudence of both regional courts and UN human rights bodies.²⁵⁷

²⁵⁶ Section 2.2 of this chapter.

²⁵⁷ Greer, *The European Convention On Human Rights: Achievements, Problems and Prospects*, p.212, for instance argues (with regard to the ECtHR) that “*the Court has the ultimate constitutional responsibility for determining what each right means . . . [W]hether this process is described as ‘defining’ vague rights more precisely, ‘determining their scope’, or ‘balancing’ one right against the other, matters less than the recognition that there is no scope for genuine domestic discretion concerning how the rights themselves should be understood.*”

This means that rights can give rise to different, and increasingly demanding, duties over time, depending both on the evolving conception of what a particular right entails, as well as on the available resources of the state – this has often been referred to as the ‘progressive’ or ‘evolutive’ nature of IHRL.²⁵⁸ On the one hand, the content of duties will evolve with the understanding of what constitutes a violation; and on the other hand, the human rights duties that a state has depends on the availability of resources that can be dedicated to the fulfilment of human rights at the given point in time.

That the content of duties depends at least in part on the understanding of what constitutes a violation at a given point in time finds expression, for instance, in the ECHR’s ‘living instrument thesis’, also known as ‘evolutive’ or ‘dynamic’ interpretation, on the basis of which the Convention “must be interpreted in the light of present-day conditions”.²⁵⁹ In the Court’s view, it “must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved”.²⁶⁰

In the European human rights system, the method of evolutive interpretation was first used in the case of *Tyrer v United Kingdom* where the question at stake was whether judicial corporal punishment of juveniles amounted to degrading

²⁵⁸ van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn., Leiden: Martinus Nijhoff Publishers, 1998), pp.77.

²⁵⁹ See, for instance, *Tyrer v The United Kingdom*, A/26 (1978), para 36; *Cossey v The United Kingdom*, A/184 (1990), para 35; *Goodwin v The United Kingdom*, Grand Chamber, Reports 2002-VI, para 75; *I v The United Kingdom*, Grand Chamber, 25680/94 (2002), para 55; *VO v France*, Grand Chamber, Reports 2004-VIII, para 82. Also see the report by the European Commission of Human Rights (ECmHR) on *East African Asians v The United Kingdom*, 4403/70 (Commission Decision 14 Dec 1973), paras 192-195 which stresses that the ECHR is to be broadly interpreted in order to protect human rights effectively. The latter quoted after Darryl Robinson, ‘The Identity Crisis of International Criminal Law’, *Leiden Journal of International Law*, 21 (2008), p.933.

²⁶⁰ *Goodwin v The United Kingdom*, Grand Chamber, Reports 2002-VI, para 74; *I v The United Kingdom*, Grand Chamber, 25680/94 (2002), para 54.

punishment within the meaning of Article 3 (the prohibition of torture and inhuman or degrading treatment or punishment) of the ECHR. The court found that corporal punishment could indeed be considered as degrading, pointing out that it had largely been abolished in other member states of the Council of Europe.²⁶¹ In other words, even though corporal punishment might not have been considered degrading in earlier years, the understanding of the scope of the right, and the corresponding duties of states, had changed.

Similarly, in the case of *Marckx v Belgium*²⁶² the ECtHR based its decision on the observation that there had been an evolution in the understanding of what could be considered a human rights violation: the applicants, a child born out of wedlock and his mother argued that Belgian legislation violated their right not to be discriminated against. At that time, Belgian law did not confer maternal affiliation by birth alone with respect to children born out of wedlock. Maternal affiliation could thus only be established either by voluntary recognition or by court declaration. The court held that Belgian law put so-called “illegitimate families” under unfavourable and discriminatory conditions. In response to the Belgian government’s argument that the discrimination was justified on the grounds that “this was in the purpose of ensuring the [traditional] family’s full development as a matter of objective and reasonable grounds relating to morals and public order”²⁶³ the court responded that while a distinction between legitimate and illegitimate families may have been permissible at the time when the Convention was drafted, the understanding of most Member States of the Council of Europe had evolved since that time. In the light of these changes, the distinction between legitimate and illegitimate families could no longer be

²⁶¹ *Tyrer v The United Kingdom*, A/26 (1978), para 31. Also see van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, pp.77.

²⁶² *Marckx v Belgium*, A31 (1979).

²⁶³ *Ibid.*, para 40.

regarded as appropriate.²⁶⁴ The idea that underpins this flexible, or progressive, interpretation of human rights duties is that human rights standards are not static but reflective of social developments.²⁶⁵

The doctrine of dynamic interpretation of human rights has also been embraced by the Inter-American Court of Human Rights. In an Advisory Opinion, the Inter-American Court of Human Rights held that “[a]ll the international case-law pertaining to human rights has developed, in a converging way, throughout the last decades, a dynamic or evolutive interpretation of the treaties of protection of the rights of the human being.”²⁶⁶

²⁶⁴ *Ibid.*, quoted after van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, pp.77. In another case, *Dudgeon v United Kingdom*, A/45 (1981), the Court found that the penalization of homosexuality in Northern Ireland violated the right to respect for family life, arguing that

“[a]s compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.”

For a critical discussion, see George Letsas, ‘The ECHR as a Living Instrument: its Meaning and Legitimacy’ in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, ed. by Geir Ulfstein, Andreas Follesdal and Birgit Peters (Cambridge: Cambridge University Press, 2013), pp. 106-141.

²⁶⁵ van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (above n.x), pp.78, argue that “[t]he standards of the Convention are not regarded as static, but as reflective of social changes. This implies that the Court takes into account contemporary realities and attitudes, not the situation prevailing at the time of the drafting of the Convention.”

²⁶⁶ Antonio A.Cançado Trindade, ‘The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights’, *Human Rights Law Journal*, 25 (2004), pp. 157-160.

Also see IACtHR Advisory Opinion OC-16/99 (1999) ‘The Right To Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law’ (requested by Mexico), p.70, which states that “[a]ll the international case-law pertaining to human rights has developed, in a converging way, throughout the last decades, a dynamic or evolutive interpretation of the treaties of protection of the rights of the human being.” and IACtHR Advisory Opinion OC-5/85 (1985) ‘Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism’, paras 6 and 12 (“necessity of a broad interpretation of the norms that it guarantees and a restrictive interpretation of those that allow them to be limited”).

And in particular the duties that socio-economic rights establish have explicitly been conceptualized as duties which are progressive depending on the resources available to states – states have duties to realize socio-economic rights to a maximum of the resources they have available and with a view to progressive realization of these rights.²⁶⁷

To avoid misunderstanding, I should note that not *all* the duties that socio-economic rights give rise to are contingent on the availability of resources. States have a number of immediate duties relating to socio-economic rights that are independent of their state of wealth. They must, for instance, prohibit discrimination with regard to health care, education or the workplace; and they must take immediate steps towards the realization of socio-economic rights which might include the collection and assessment of relevant data, or the formulation of strategies and plans towards the realization of rights and the

²⁶⁷Article 2(1) of the ICESCR states that “[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” Also see Art.11,12, 13 (b)(c)(d)(e), Art.14, Art.15 for further provisions which stress the evolutionary nature of the duties under the Covenant. Also see CESCR, General Comment 3 (1991), E/1991/23, ‘The nature of States parties’ obligations’

In the same vein, Article 4 (2) of the Convention on the Rights of Persons with Disabilities states that “[w]ith regard to economic, social and cultural rights [stipulated in the Convention], each State Party undertakes to take measures to the maximum of its available resources [...] with a view to achieving progressively the full realization of these rights”; and the American Convention on Human Rights stipulates that state parties should “adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and other cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

The flexibility of duties is also found in UN human rights treaties which include longer term goals which can only be progressively achieved over time. For instance, the provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination* read as follows: “to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races” (Art.2) or to “combat[e] prejudices which lead to racial discrimination and to promot[e] understanding, tolerance, and friendship among nations and racial or ethnical groups” (Art.7).

adoption of laws and policies.²⁶⁸ They must also *not* take retrogressive measures, i.e. allow the protection of socio-economic rights to deteriorate unless the state has shown that the measure was adopted after a careful review of all its options to fully use its available resources. Also, some socio-economic rights, such as the right to form and join trade unions which do not require significant resources, are not subject to progressive realization. And finally, states do have what are called ‘minimum core obligations’ to meet the minimum essentials of each of the socio-economic rights laid down in IHRL. If states fail to meet their minimum core obligations they must demonstrate that they have made every effort to use all available resources.²⁶⁹ The minimum core obligations are elaborated in detail in different General Comments adopted by the UN Committee on Economic, Social and Cultural Rights, but they include, for instance, obligations to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups; to ensure access to the minimum essential food, to basic shelter, housing and sanitation, and an adequate supply of safe drinking water, or free and compulsory primary education.²⁷⁰ However, the duties corresponding to socio-economic rights are dependent on the availability of resources in the sense that as states’ capacities to realize human rights increase, their duties to *do so do*, too.

So human rights duties are flexible over time in two ways: on the one hand, in particular with regard to socio-economic rights, IHRL recognizes that duties depend on the availability of resources to meet them. On the other hand, they

Other examples of such steps could be the monitoring and assessment of any progress made in the implementation of the plans and strategies; the establishment of grievance mechanisms so that individuals can complain if the State is not meeting its responsibilities. Examples taken from Office of the High Commissioner for Human Rights, ‘Frequently Asked Questions on Economic, Social and Cultural Rights’, <http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>.

²⁶⁹ Office of the High Commissioner for Human Rights, ‘Key concepts on ESCRs - What are the obligations of States on economic, social and cultural rights?’, p.16,

<http://www.ohchr.org/EN/Issues/ESCR/Pages/WhataretheobligationsofStatesonESCR.aspx>.

²⁷⁰ *Ibid.*, p.17.

depend on the evolving understanding of what constitutes a violation of a right.²⁷¹ The flexibility of IHRL has been called a “hallmark of human rights law”.²⁷²

This abstract and flexible nature of human rights duties is arguably justified for states: it was already argued that a core aspect of the *raison d'être* of states is to provide for the well-being of their citizens. And if the well-being of citizens is indeed a primary aim for states, it seems plausible that states should be held to account to progressive standards. Where states have greater resources, they should also have greater responsibilities to spend these resources towards increasing the well-being of their citizens. States should aim to achieve the highest fulfilment of human rights possible. And given the central responsibility that states have in ensuring their citizens' rights, it also seems justified that an evolving understanding of what a particular right entails should be reflected in the states' correlative duties. However, as the following chapter will argue in more detail, imposing such flexible duties on non-state actors would be more problematic.

That rights are essentially ‘progressive’ or ‘evolutive’ in nature also fits again with the idea that HRs are not attempts to lay down detailed rules on how to realize human rights, but that rather they were designed to guide states as the kinds of actors that legitimately have some scope to interpret rights, to make political decisions on how to best implement human rights.²⁷³ Business entities, by contrast, are not the kinds of agents that we want to give discretion to give

²⁷¹ Marton Varju, ‘Transition as a concept of European Human Rights Law’, *European Human Rights Law Review*, 2 (2009), 170-189; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, pp.77.

²⁷² Robinson, ‘The Identity Crisis of International Criminal Law’, p.933. Also see UN Human Rights Committee, *A v Australia*, 560/1993 (1997), Annex VI, pp.127-146.

²⁷³ See Dworkin, *Justice for Hedgehogs*, p.338, on the point that “*human rights treaties and conventions pose questions that await interpretive answers*”.

these answers so to regulate businesses we would need much more detailed, fleshed out regulation.

2.7 STATES MAY RESTRICT HUMAN RIGHTS

States may restrict human rights under certain circumstances. International human rights law explicitly recognizes that states may restrict rights, to some extent, if necessary to pursue collective goals such as national security, public safety, general welfare or economic well-being or the prevention of crime, or to protect the rights and freedoms of others.²⁷⁴ The right not to be tortured or to be subject to inhuman and degrading treatment is the only right which cannot be derogated from. So in this sense, international human rights duties can explicitly be balanced against other policy goals. This is not to say that international human rights bodies may not determine that particular measures or derogations that a state has taken to pursue these other policy goals are excessive and unduly interfere with or restrict human rights; however, again the point is that the system of international human rights protection are based on the assumption that duty bearers are the kinds of agents that have the legitimacy and the prerogative

²⁷⁴ Articles 8-11 of the ECHR stipulate that the rights to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and the freedom of assembly and association may all be restricted for various reasons, including the interests of national security, territorial integrity or public safety, economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms, the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Article 15 ECHR allows states parties to derogate from their obligations under the Convention “[i]n time of war or other public emergency threatening the life of the nation”. Similarly, the American Convention stipulates that derogation is permitted “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party” (Article 27). The ICESCR allows limitations on rights “for the purpose of promoting the general welfare in a democratic society” (Article 4) and where “necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others” (Article 8). The ICCPR allows states to derogate from their obligations under the Covenant “[i]n time of public emergency which threatens the life of the nation” (Article 4) or where “necessary to protect national security, public order, public health or morals or the rights and freedoms of others” (Article 12).

to make policy.²⁷⁵ What this means is that if duties under IHRL were extended to business entities, the discretion to restrict their human rights duties or to balance human rights duties against other policy priorities could not be extended to business agents in the same way that it currently applies to states.

So in this sense, international human rights duties can explicitly be restricted by states, they can be balanced against other policy goals.²⁷⁶ This does not mean that states have complete discretion as to when to fulfil their duties. International human rights bodies may find that particular measures that a state has taken to pursue these other policy goals are excessive and unduly interfere with or restrict human rights. So states have duties to strike an appropriate balance between human rights and other policy aims.²⁷⁷ However, this is another feature which reflects that IHRL has been tailored to the specific function of holding states to account. If international human rights duties were extended to business or other private actors, we certainly would not want these actors to have discretion how and when to fulfil their human rights duties.

²⁷⁵ Dworkin, *Justice for Hedgehogs*, pp.336-338.

²⁷⁶ The only right which cannot be derogated from under any circumstances is the right not to be tortured or be subject to inhuman and degrading treatment. Frédéric Mégret, 'The Nature of Obligations', in *International Human Rights Law*, ed. by Daniel Moeckli, Sandesh Sivakumaran, Sangeeta Shah, and David Harris (Oxford: Oxford University Press, 2010), pp.140.

²⁷⁷ Under the *European Convention on Human Rights*, permissible derogations under Article 15 must meet three substantive conditions: 1. There must be a public emergency threatening the life of the nation, 2. Any measures taken in response must be "strictly required by the exigencies of the situation", and 3. The measures taken in response to it, must be in compliance with a state's other obligations under international law. *The ICCPR allows states to derogate from their obligations "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."* (Article 4).

3. HOW THE STATE FOCUS HAS SHAPED THE DIFFERENT *MODI OF LIABILITY* UNDER IHRL

In this section I argue that the state-focus has also shaped what we may call the different *modi of responsibility* under IHRL. In the following, I will identify when and how states may incur responsibility for a human rights violation. I will argue that responsibility for human rights under IHRL not only encompasses responsibility for human rights violations directly committed by state agents (section 3.1), including where state agents exceed their institutional powers (section 3.2), but that states can also be responsible for human rights violations when harm is done by non-state actors that performed public functions (section 3.3). Furthermore, states have human rights obligations to safeguard important human interests against private actors like business entities (3.4). I will further argue (in section 3.6) that IHRL is not concerned with determining what we may call the ‘direct agent’ of the harm. In particular, there is no need to show that the violation is directly attributable to any particular individual, and no need to prove intentional action.

In other words, human rights responsibility, as it is currently conceptualized in IHRL, is not only about responsibility for acts or omissions directly attributable to the state, but it is more broadly about the performance of the institutional duties of states, which include duties to perform public functions and regulate private actors.

As I mentioned above, what particular obligations the human rights specified in UN and regional human rights treaties give rise to is elaborated over time by the jurisprudence of the different international human rights institutions (i.e. the regional human rights courts and UN human rights bodies). In human rights jurisprudence, human rights duties have come to be conceptualized as duties to

respect, protect and provide²⁷⁸ and I discussed several examples of these duties above. Analysing the kinds of duties that arise under these duties to respect, protect and provide, we find that whether a state violates a human right does not necessarily turn on whether a state agent was directly involved in the harm in the sense of a state agent performing an abusive act. I therefore argue that human rights responsibility is not primarily concerned with responsibility in the sense of direct attributability – i.e. it does not assign responsibility to the agent who did the harm that led to a particular human rights violation. Rather, the relevant question for human rights responsibility is whether the state failed one of its institutional duties with regard to the interest at stake – so responsibility in IHRL is about institutional responsibility.

3.1 HUMAN RIGHTS VIOLATIONS BY STATE AGENTS

To be sure, on the one hand IHRL is of course concerned with regulating the actions and omissions of state agents directly. The duty to respect has generally been interpreted in human rights jurisprudence as entailing that states may not interfere with human rights, they may not prevent individuals from enjoying their rights. In other words, under the duty to respect states have negative obligations to avoid harming the interests identified by human rights. State agents include all organs exercising legislative, executive or judicial functions, including municipal and other local authorities or state authorities in federal states.²⁷⁹ So states must take reasonable measures to ensure that their agents do

²⁷⁸ The verb ‘fulfil is sometimes used interchangeably with ‘provide. This tripartite classification of human rights duties was influenced by Henry Shue who argued that any right grounds multiple duties. In his language, obligations are conceptualized as “*avoid (violations), protect and aid*” - Shue, *Basic Rights*, p.52. Also see Mégret, ‘The Nature of Obligations’, pp.130.

²⁷⁹ International Law Commission ILC, ‘Commentary – Draft Articles on Responsibility of States for Internationally Wrongful Acts’, UN Doc A/56/10. Also see UN Human Rights Committee, General Comment No 31(80), CCPR/C/21/Rev.1/Add.13 (2004), ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, para 4, which reads as follows: “*The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial),*

not harm human rights while exercising public functions, such as to ensure that state agents refrain from controlling or censoring the press, that they abstain from ill-treating or torturing detainees, or that they do not interfere with individuals' choices of where to take up university education.²⁸⁰

3.2 RESPONSIBILITY WHEN STATE AGENTS EXCEED THEIR INSTITUTIONAL POWERS

A state remains accountable for the actions of its agents even where the latter act outside the state's actual control. So when state agents exceed their official authority, that is when they do not implement state policy but act on their own behalf, their actions are still attributable to the state.²⁸¹ Even if state authority collapses, say during times of conflict, and in the resulting vacuum of state power private groups without formal authority begin to perform state functions the violations they commit will still be attributable to the state in question.²⁸²

3.3 STATE RESPONSIBILITY FOR NON-STATE ACTORS PERFORMING PUBLIC FUNCTIONS

States are also responsible for private actors who have been empowered to perform public functions. So for instance, where a private security firm is contracted by the state to run a prison, where an airline performs functions on behalf of the state in the area of immigration control²⁸³ or where private security

and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party."

²⁸⁰ Kälin and Künzli, *The Law of International Human Rights Protection*, pp. 98-99.

²⁸¹ This has been confirmed both by the Inter-American Court of Human Rights - see case of *Velásquez-Rodríguez v Honduras*, C/4 (1988), para 170, and the European Court of Human Rights case of *Assanidze v Georgia*, Grand Chamber, Reports 2004-II, paras. 144 ff. Both quoted after Kälin and Künzli, *ibid.*, p.79. Also see ECtHR case of *Makaratzis v Greece*, Grand Chamber, Reports 2004-XI, paras 56ff., quoted after Kälin and Künzli, *ibid.*, p.96.

²⁸² Kälin and Künzli, *ibid.*, p.80.

²⁸³ International Law Commission (ILC), 'Commentary – Draft Articles on Responsibility of States for Internationally Wrongful Acts', UN Doc A/56/10, para 2 on Art.5. quoted after Kälin and Künzli, *ibid.*, pp.79-80.

firms perform *de facto* police or military functions, the state's human rights obligations will still be engaged. If the employees of a private security firm contracted by the state to run a prison torture prisoners, it is not that firm, nor the employees, who will be responsible under IHRL but the state. Public functions, by nature, are the kinds of functions that states have duties to perform and states cannot absolve themselves from those duties by delegating them to private actors.²⁸⁴

According to the same logic, the state will also be responsible for private agents who are not formally contracted to fulfil public functions but who nevertheless act on the instructions or under the control of the state²⁸⁵ - so for instance, paramilitary units or vigilante or terrorist groups²⁸⁶ acting either inside or outside the state.

Where state agents properly secede from central control and establish a *de facto* separate authority states are no longer responsible for the actions of these agents.²⁸⁷ Again, this can be made sense of if the point of human rights responsibility is to hold states to account because as the kinds of institutional agents they are, they have specific powers over individuals. Where a new *de facto* authority is established, the original state no longer has these powers – and consequently IHRL is no longer applicable to the original state.

²⁸⁴ ECtHR case of *Costello-Roberts v The United Kingdom*, A/247-C (1993), para 27. Also see ILC (ibid.) and ECtHR case of *Casado Coca v Spain*, A/285-A (1994), para 39.

²⁸⁵ ILC (ibid.), on Art.8.

²⁸⁶ ECtHR case of *Acar and Others v Turkey*, 36088/97 and 38417/97 (2005), paras 83ff.; IACtHR case of *Mapiripán Massacre v Colombia*, C/134 (2005), paras 110ff.

²⁸⁷ ECtHR case of *Ilaşcu and Others v Moldova and Russia*, Grand Chamber, Reports 2004-VII, para 333; quoted after Kälin and Künzli, p.79.

3.4 RESPONSIBILITY TO SAFEGUARD HUMAN RIGHTS AGAINST BUSINESS ENTITIES

In light of the interpretation of human rights responsibility as being about institutional responsibility, it also makes sense that states not only have to ensure respect for human rights in the performance of public functions, but that in addition, under the duty to protect, states have a range of positive duties to protect the interests safeguarded by international human rights law from harm by third parties.²⁸⁸ This includes the duty to legally regulate those under their jurisdiction. In order to protect the right to life, for instance, states have to establish legal rules in domestic law to protect the interest of life, e.g. through the criminalization of murder.²⁸⁹ This duty would be breached, for instance,

²⁸⁸ UN Human Rights Committee, General Comment No 31(80), CCPR/C/21/Rev.1/Add.13 (2004), ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (Art.8) states that “*the positive obligations on States Parties to ensure Covenant Rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.*”

For an extensive analysis how positive obligations with regard to human rights have been progressively developed by the European Court of Human Rights over the past 30 years, see Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights*, (Oxford: Hart Publishing, 2004) and Monica Hakimi, ‘State Bystander Responsibility’, *European Journal of International Law*, 21.2 (2010), 341-385 (p.342).

Positive obligations in relation to human rights have also been acknowledged by the UN human rights bodies – so for instance, the Committee against Torture, General Comment No 2 (2007) CAT/C/GC/2/CRP. 1/Rev.4, ‘Implementation of Article 2 by States Parties’, pp. 376-383, para. 6. recalled that “*international human rights law not only prohibits torture, but also the failure to adopt the national measures necessary for implementing the prohibition and the maintenance in force or passage of laws which are contrary to the prohibition. [...] Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.*”

²⁸⁹ ICCPR Art 6, ACHR Art 4, ArCHR Art 5 and ECHR Art 2 provide that the right to life “shall be protected by law”. Also see UN HRCtee, General Comment No 20, HRI/GEN/1/Rev.9 (1992) ‘Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment’, para 13; UN HRCtee, General Comment No 30, CCPR/C/21/Rev.2/Add.12 (2001) ‘Reporting Obligations of State Parties under Article 40’, para 8; EctHR case of *Mahmut Kaya v Turkey*, Reports 2000-III, para 15; IACtHR case of *Velásquez-Rodríguez v Honduras*, C/4 (1988), paras 184-185. Similarly, for the right not to be subject to torture, Art 4 to 9 of the CAT oblige states to make torture a punishable crime under domestic law and prosecute and punish its agents who are responsible for acts of torture. States are obliged to establish the jurisdiction of their courts for any such act of torture committed on its territory, or by its nationals or against victims with their nationality.

where domestic criminal legislation failed to sanction certain homicide offences, or where it provided excessive justificatory grounds for security forces.²⁹⁰

Beyond legal regulation, states have further positive duties to protect human rights against possible harm from third actors.²⁹¹ States can be found to have violated human rights where a private individual killed another even if all the appropriate laws were in place. What has to be shown is that the state failed to meet its institutional duties – for instance, a killing could amount to a human rights violation where the state failed to adequately protect the victim, such as by providing police protection for private persons who have been threatened by another private individual,²⁹² or where it failed to investigate the murder after the fact.²⁹³ (If, by contrast, the state did fulfil its institutional duties, a murder committed by a private individual will *not* qualify as a human rights violation.)

In the case of *Z. and others v The United Kingdom*, for instance, the European Court of Human Rights found that the UK had violated the rights of four children not to be subject to ill-treatment, having failed to take reasonable steps to protect the children from abuse by their parents over a four-year period even though the abuse was known to social services.²⁹⁴

²⁹⁰ In the judgment in *Ireland v The United Kingdom*, A/25 (1978), the European Court of Human Rights observed that a breach of human rights violations could result from “*the mere existence of a law which introduces, directs or authorizes measures incompatible with the rights and freedoms safeguarded [...] if the law challenged ... is couched in terms sufficiently clear and precise to make the breach immediately apparent*”.

²⁹¹ UN HRCtee, General Comment No 31(80), CCPR/C/21/Rev.1/Add.13 (2004), ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, para 8.

²⁹² ECtHR case of *Osman v The United Kingdom*, Grand Chamber, Reports 1998-VII, para 115.

²⁹³ Kälin and Künzli, *The Law of International Human Rights Protection*, p.106.

²⁹⁴ ECtHR case of *Z. and others v The United Kingdom*, Reports 2001-V; quoted after International Council of Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (2002), p.50.

The precise content of positive state obligations to protect is contested - and indeed has changed over time.²⁹⁵ However, the point is that this shows, again, that human rights responsibility is about the institutional responsibility of states. Potentially, the actions of any individual under a state's jurisdiction could trigger the state's accountability for a human rights violation. In other words, the government need not have participated in the abuse to incur human rights responsibility; human rights law makes institutions accountable rather than holding individuals to account for personal involvement in the abuse.

4. HUMAN RIGHTS RESPONSIBILITY AS INSTITUTIONAL RESPONSIBILITY

How can we make sense of the fact that states are not only responsible for the immediate acts and omissions of their own agents, but that they are also responsible for harm done by non-state actors performing public functions, and responsible to safeguard important human interests against private actors? I argue that we can justify these different possible *modi* of responsibility under IHRL if we understand human rights responsibility as concerned with holding states accountable for performance of their institutional duties, in short, if we understand it as concerned with states' 'institutional responsibility'. This institutional responsibility encompasses both situations where state agents were directly involved in harm, but also a range of situations where states have indirect responsibility given their particular institutional duties, irrespective whether they are the directly attributable agents for a given harmful situation through policy and/or a chain of command, or not.

²⁹⁵ Hakimi, 'State Bystander Responsibility', p.342 argues that while there is wide agreement *that* states have obligations to protect under international human rights law, there currently exists no unified framework for identifying the precise content of state obligations to protect. She suggests that both the state's relationship with the third party as well as the kind of harm caused will affect what duties have in each given situation. Also see the discussion in International Council of Human Rights Policy, *Beyond Voluntarism* (ibid.), pp.51 on when a state is responsible for abuses by private actors.

By contrast, IHRL is *not* concerned with responsibility in the sense of direct attributability – it is not about attributing responsibility to the individual who did a particular harmful act that resulted in the human rights violation. So when deciding whether a state has violated a human right, the core question for international human rights bodies is *not* whether state agents were actually involved in harming the human rights interest at stake. What matters is whether the state had an institutional duty which it failed to perform. As the particular kind of institutional entities they are, states have institutional duties to control their agents, which explains that states are accountable for the actions and omissions of their own agents even where the latter act outside the *de facto* control of the state.

There are a number of other principles of IHRL which underline that IHRL is explicitly not concerned with responsibility as direct attributability, but with a state's institutional responsibility. When determining whether a human rights violation has occurred, both regional and global institutions will focus on establishing whether the facts of the violation fit that list of actions and/or omissions for which the state is responsible directly or indirectly, rather than on showing that the violation is directly attributable to a particular individual.²⁹⁶ Both UN and regional human rights institutions will primarily aim to ascertain *whether* a violation has occurred, rather than establish that the violation was

²⁹⁶ Andrew Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law', *International and Comparative Law Quarterly*, 52 (2003), 615-640 (p.617).

There are differences between regional human rights courts and global institutions with regard to how they go about determining a violation. One notable difference is that fact-finding is not a core role of the regional courts. In the great majority of cases, the regional courts will base their findings on the documents which have been generated throughout prior (i.e. domestic) legal proceedings. Only where domestic authorities are unwilling or unable to carry out fact-finding investigations will the regional courts step in. UN human rights institutions, by contrast, do engage in fact-finding missions; indeed the investigation of the circumstances of human rights violations may be considered an integral part of many of the UN human rights institutions. For further detail see Philip Leach, Costas Paraskeva and Gordana Uzelac, *Report on International Human Rights and Fact Finding* (London: London Metropolitan University, 2009).

committed by any particular individual – in other words, responsibility is not assigned to any particular individual within a state. What this means, also, is that states can be found guilty of a human rights violation even where the person who directly committed the act that harmed a particular interest protected by human rights is entirely unknown.²⁹⁷

Even where state agents are directly involved, IHRL does not single out the individual officer or state agent and case names will only bear the name of the state. In other words, under IHRL the state bears institutional responsibility for actions and omissions both of its own agents (i.e. state agents) and of third actors if it fails to take measures to regulate those actors appropriately.

And since IHRL is not concerned with the personal responsibility of the person who directly acted (or failed to act) in the particular way that gave rise to the human rights complaint, the establishment of responsibility does not require any proof of intentional action. IHRL does not include a *mens rea* requirement – i.e. to find a human rights violation it does not need to be shown that any offending individual acted intentionally.²⁹⁸ Instead, state responsibility depends on showing policy and decisions are either direct or negligent with regard to the duty, which is not itself essentially about direct attribution of harms to a natural person or collective private agent like a business entity.

In this sense, state liability for human rights violations is strict – it is established regardless of individual culpability. Again, this is justified insofar as

²⁹⁷ Inter-American Court of Human Rights case of *Velásquez-Rodríguez v Honduras*, C/4 (1988), paras 172-173. The European Court of Human Rights takes a similar approach and generally refrains from assigning responsibility within a state for human rights violations –see case of *Avsar v Turkey*, Reports 2001-VII, para 284. Also see John G.Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn., Manchester: Manchester University Press, 1993), p.11.

²⁹⁸ Nollkaemper, ‘Concurrence Between Individual Responsibility and State Responsibility in International Law’.

international human rights law is concerned with deciding when a state has failed its institutional responsibilities.

5. AGAINST THE STATIST INTERPRETATION – DOES IHRL ALREADY IMPOSE DUTIES ON BUSINESS ENTITIES?

The argument has sometimes been made that IHRL already applies to non-state actors, including business entities. This might be taken as an argument against my interpretation of IHRL as focused on the institutional responsibilities of states. In this vein, Clapham has argued, for instance, that “[r]egional human rights bodies have been faced with a number of cases where the direct perpetrator of the human rights abuse was a non-state actor”.²⁹⁹ However, the examples then offered in favour of the argument that human rights already apply in the private sphere are all cases where human rights institutions have defined the duties of states how to protect individuals from “human rights abuses committed by non-state actors”,³⁰⁰ in other words, where human rights treaties have taken what is also called horizontal effect.³⁰¹ The case law that Clapham refers to has, for instance, required states to put in place regulations for entities that pollute,³⁰² or to prevent employers from engaging in anti-union practices.³⁰³

²⁹⁹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), p.347.

³⁰⁰ *Ibid.*

³⁰¹ See Stephen Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’, *Michigan Law Review*, 102 (2003/2004), 387-459, p.458, where he argues for the case of domestic constitutional law that although private actors are not bound by individual constitutional rights in the United States, they are nevertheless subject to those rights indirectly – so for instance, he gives the examples of the First Amendment preventing the economic interests of employers from being legally protected against picketing by its employees, or preventing shopkeepers from being legally protected against politically inspired boycotts. In that sense, private conduct is within the reach of constitutional rights.

³⁰² See ECtHR cases of *López Ostra v Spain*, A303-C (1994), *Guerra and Others v Italy*, Grand Chamber, Reports 1998-I, *Hatton and Others v The United Kingdom*, Grand Chamber, Reports 2003-VIII; all quoted after Clapham, *Human Rights Obligations of Non-State Actors*, pp.389-390.

³⁰³ ECtHR case of *Young, James and Webster v The United Kingdom*, 7601/76 and 7806/77 (1981).

However, the fact that private actors are *indirectly* subject to IHRL insofar as the laws that states enact must promote human rights does not contradict my argument that responsibility in IHRL is about the responsibility of states: the examples of such indirect effect are precisely examples of such state responsibility. As the kinds of agents that states are, they must regulate third actors in relation to their (potential) impact on the interests protected by IHRL. Business entities then have legal obligations to comply with the legislation or regulations put in place by states, but they do not thereby have human rights duties. The human rights duty of the state is, for instance, the duty to regulate business entities that pollute, but the obligations of businesses then stem from the domestic law (perhaps criminal or tort law) that has been enacted to give effect to the state obligation.³⁰⁴ This is precisely the distinction I drew between responsibility as *direct attributability* and responsibility as *strict institutional responsibility*.

6. CONCLUSION

I have argued in this chapter that the state focus, that is the fact that IHRL has only directly applied to states to date, has defined international human rights law in a number of ways. Firstly, I argued that the state focus has shaped the content of human rights duties. Many rights are about functions that only governments can fulfil, or protect individuals against the particular institutional powers of states. And even human rights that concern interests that seem most liable to being affected by business enterprises, from the right to life to rights that concern health and safety or other conditions in the workplace, have been interpreted by international human rights courts and monitoring institutions in a way that has focused on determining the specific duties that states have towards individuals. In section 3, I argued that the state-focus has also shaped the

³⁰⁴ On this distinction, also see Kälin and Künzli, *The Law of International Human Rights Protection*, p.83.

different *modi* of responsibility under IHRL and that human rights responsibility under current IHRL is best interpreted as about the strict institutional responsibility of states, rather than as direct attributability for abusive actions or omissions.

The interpretation I offer of human rights responsibility in international law stands in contrast with the interest view of international human rights law that I introduced in chapter 1. To recall, according to the interest view, the role of IHRL is to protect important human interests against anyone who has the capacity to interfere with these interests – in other words, it is about direct attributability for abusive behaviour. I have argued that this is not how IHRL has been interpreted by IHR institutions. Instead, the explicit concern of IHRL has been on the regulation of the duties and powers that states have with regard to these interests.

It might be argued that there is no conflict between the interest view and my interpretation of IHRL so far: my argument in this chapter has been that international human rights law, as it currently stands, is best interpreted as concerned with the institutional responsibilities of states. The interest view, by contrast, is a view about what IHRL should do or should be like. Proponents of the interest view do not claim that IHRL has been about responsibility of any agent who can harm important human interests. Instead, they propose that the state-focus is outdated in the face of new realities where non-state agents increasingly harm fundamental human interests and that therefore, IHRL should be extended to business entities in the future. In the next chapter, however, I will argue that there are good reasons – both normative and practical - for keeping the current state focus and for why the interest view does therefore not offer an attractive account of what IHRL should be reformed to be either.

CHAPTER 5: AGAINST AN EXTENSION OF DIRECT DUTIES FOR BUSINESS ENTITIES UNDER IHRL

1. INTRODUCTION

In chapter 3, I argued that *prima facie*, we should not assume that legal regulation is only about consequences but also ask whether an area of law allows us to express distinct kinds of responsibility. In chapter 4, I then argued that the specific focus of IHRL has been on regulating political authority, on regulating the relationship between states and individuals under their jurisdiction. To that end, I drew out several characteristics of IHRL. I argued that many rights are about functions that only governments can fulfil, or protect individuals against the particular powers that states have *vis-à-vis* those under their jurisdiction. I argued that even those human rights which are seemingly about interests that may be harmed by business have been interpreted in a statist way, that is in a way that reflects the particular powers and responsibilities of states. I then argued that the state-focus of IHLR has also shaped some of the core substantive principles that guide when and how responsibility for a human rights violation can arise under IHRL.

Now this chapter addresses the question of whether there are any good reasons to keep this state-focus. I will present both a principled and a pragmatic argument against extending international human rights law to business entities (and so for keeping the state focus): in section 2, I will argue that an extension of human rights duties to business, i.e. to non-state actors, would undermine the distinct role and value of IHRL – I call this the principled case against direct duties for business under IHRL. This argument draws on chapter 2, where I argued for the value of having distinct areas of law to reflect distinct types of responsibility, and against a view of areas of law that understands it merely in terms of the interests it protects. It also develops further the idea that I

introduced in chapter 3 that states are agents that are *in principle* distinct from business entities – they fulfil a particular role and therefore have particular powers and responsibilities that business corporations do not have.

I discuss a number of practical issues that an extension of direct duties for business entities under IHRL would raise. I argue that for one, it is not clear how the rights focused on government functions would translate into duties for business enterprises and that even for those human rights that seem more readily applicable to businesses, new jurisprudence would need to be developed to address the specific duties of business enterprises. In other words, I argue that for human rights duties to be applicable to businesses, international human rights institutions would first need to translate such duties for businesses. I will consider what I call the objection from a partial extension which argues that at least some human rights duties could straightforwardly be extended to business entities. I argue that even supposedly ‘negative’ duties to respect human rights would need to be reinterpreted for businesses. I then argue that beyond a translation of the substantive content of human rights duties, a number of other core principles of IHRL, including the principles that govern when and how responsibility for a human rights violation can be attributed to a state, would need to be changed for IHRL to be suitable to regulate businesses. This means that IHRL could not immediately be applied to businesses and therefore does not provide the obvious solution that it is sometimes made out to be in the current business-and-human rights debate. It also means, relating back to the principled case, that any extension of IHRL to business entities would turn IHRL into a whole new body of law that would no longer play the distinct and valuable role that I argue IHRL to currently play in this thesis.

2. THE PRINCIPLED CASE AGAINST EXTENDING DIRECT HUMAN RIGHTS DUTIES TO BUSINESSES

Having argued that IHRL has explicitly focused on regulating political authority, the argument I make here is that an extension of IHRL to non-state actors would undermine the distinct role of IHRL. In chapter 2 I argued that legal regulation is not just about holding agents to account for negative consequences but that the existence of different areas of law allows us to differentiate between different reasons to regulate agents, between different types of agent responsibility³⁰⁵. With regard to IHRL in particular, I argued in the previous chapter that this area of international law has specifically been concerned with the regulation of relationships between states and those under their jurisdiction, that is has been about the strict institutional responsibility that states have for the protection and realization of important human interests rather than about direct attributability – i.e. holding agents to account for their immediate impact on important human interests.

I argued in chapter 2 that one value of entertaining distinct areas of law is that it allows for legal language to more clearly communicate, or signal, what is at stake, morally speaking, in a given instance of legal regulation. As long as IHRL only applies directly to states, as it currently does, and as long as the language of legal human rights violations is therefore reserved to address instances where states have failed to fulfil their duties with regard to the important human interests protected by IHRL, the finding of a human rights violation implies more than that an important human interest has been harmed. It also signals that

³⁰⁵ Recall that I emphasised that this is not to argue that moral categories are reflected one-to-one in the law. The differentiation of law into different areas of law does not always, and not only, turn on moral categories. But at least in some cases, legal differentiation does turn on different types of agent responsibilities and I argued that there is a value to being able to express distinct kinds of responsibility in the legal regulation of agents. See argument in chapter 3, section 5 above.

a state has either abused the particular powers it has by virtue of being a state, or that a state has failed to fulfil its particular duties in its capacity as state.

This could be taken to be circular: as long as human rights duties are restricted to states, a finding that a human right was violated implies that a state committed the violation. So there seems to be nothing interesting in that discovery. However, the point of my argument here is that the way IHRL applies to states tells us about the role of objectives of the provisions. Saying a human rights violation has taken place indicates something about the kind of agents involved and their particular kinds obligations— i.e. the relationship between states and those under their jurisdiction and the particular normative responsibilities this entails for states. As I argued in more detail in chapter 3, states on the one hand have specific powers, by virtue of the kind of institution they are. On the other hand, they have specific institutional responsibilities to provide for the human rights of their citizens.

States hold sovereign powers over their respective territories, and have the institutional power to define the laws and policies in their country, in other words, they have the power to define what is lawful and what is unlawful under their jurisdiction. So states are not only capable of committing violations, but they can do so under the colour of law.

To illustrate, governments may expel certain minorities from their lands, or make laws to curtail the freedom of expression or assembly. While business entities can affect these very same interests – e.g. they may expel and displace people from their lands, or they may curtail their employees’ rights to freedom of expression, I argue that there is an important *qualitative* difference between these two situations. Violations by the state are violations under the colour of law - not only is harm done (i.e. individuals are dispelled, or prevented from

expressing or exchanging their views, but this harm is done under the veil of lawfulness, or under the veil of righteousness. Harm is done under the veil of lawfulness if the laws of the land officially legitimize the abuse – such as laws that discriminate against certain minorities, or laws that curtail the freedom of expression.

International human rights law responds to exactly this danger: by providing a framework of what governments may and may not do to people under their jurisdiction, what kinds of positive and negative responsibilities they have towards those under their jurisdiction, including when laws are in breach of those responsibilities. It defines when state behaviour is abusive, and indeed illegal under international law, even where it may be lawful under the law of the land. IHRL sets out constraints on how states may exercise their institutional powers, including constraints on how the law may be used.³⁰⁶

But international human rights law does not only respond to violations under the colour of law. It also addresses situations where the domestic law of a states is in line with international human rights standards, but where state practices violate human rights law – a state may have impeccable freedom of speech and expression laws in the books, perfectly in compliance with IHRL, but nevertheless jail dissenters when they exercise their legal rights, or fail to hold to account police forces that use excessive force in suppressing peaceful assemblies or demonstrations. In such situations, even though the harm done may not be legitimized legally (‘under the colour of law’), it nevertheless occurs under the veil of righteousness because the state abuses its institutional powers to commit the harm, or fails to live up to its duties to prevent or investigate harm and hold agents to account for harm done.

³⁰⁶ In this context, see Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Belknap Press of Harvard University Press, 2006) on the value of legality, of using the law rightly.

The argument I make here is that harm that is done under the veil of righteousness or lawfulness is a particular kind of harm. Violations committed by states, or tolerated by states, deny individuals the official respect they deserve from their government.³⁰⁷ This is a special kind of harm to an interest: the wrongness of an act lies not only in the consequences but also in the kind of agent in play: official disrespect is wrong in a way that personal disrespect is not because it is using the collective and legal authority and legitimacy of a community to do so, even in omitting to act.

Proponents of business-human rights responsibility under IHRL tend to argue in terms of the consequences that business entities may bring about – and that these consequences can be as bad as the consequences that states can bring about.³⁰⁸ But I argue that the particular role of international human rights law does not, or not only, lie in its addressing ‘negative outcomes’, but that it offers a unique framework of addressing the special kind of harm that is done under the veil of lawfulness or righteousness. IHRL thus plays a role that, by definition, cannot be played by the domestic laws of a particular state. International human rights law, for the first time in history, introduced the idea that violations committed by states against their own citizens can amount to legal violations at all. Before, international law had regulated inter-state affairs only, and so by definition, states could only violate the legal interests of other states. There were no rules to define the legitimate conduct of states *vis-à-vis* their own citizens. It was only after the Second World War that the international community decided that the protection of individuals against their own governments should become a subject of international law. In this way, the drafting of the Universal Declaration of Human Rights, and the subsequent adoption of the legally binding global and regional human rights treaties, marked the entry to a new era of international

³⁰⁷ I borrow the term ‘official disrespect’ from Thomas Pogge, ‘How Should Human Rights be Conceived?’, *Jahrbuch für Recht und Ethik*, 3 (1995), 103-20.

³⁰⁸ See discussion in chapter 1, sections 3.1 and 3.2 above.

law. States, for the first time in history, *officially* recognized that there were boundaries to how they could treat their own citizens and committed themselves legally to respect those boundaries.

The domestic laws of a particular state can, by contrast, address the kind of harm that private actors like businesses may do. This is of course dependent on states adopting and implementing laws that prohibit harmful behaviour – in other words, states have to regulate the actions of business entities in a way that protects important human interests against harm or even promotes the positive realization of these interests. Examples of such regulation might be laws that protect workers' rights in the workplace, like the rights to unionize and strike, laws that prohibit discrimination by employers on the grounds of religion, gender, or sexual orientation, or laws that lay down minimum wages that employers have to pay so their employees can enjoy a decent standard of living. (This list is of course by no means comprehensive and meant for brief, illustrative purposes only.)

The argument by proponents of direct business responsibilities under IHRL is, of course, that in practice, states often fail to put in place laws or regulations that prevent businesses to do harm. This is an important point in the business-human rights-debate and as I have stressed elsewhere, I fully agree with the need to better regulate business entities. But the point is a pragmatic one that suggests using IHRL to patch holes in the regulation of business entities without considering what, if anything, might be lost in principled terms.³⁰⁹ My point here is that we risk losing nuance in our legal language, as I will explain drawing on two examples in the following.

³⁰⁹ Later in this chapter, and in chapter 6, I will also look at pragmatic reasons not to extend IHRL.

A finding of a human rights violation can also signal that a state has failed its particular institutional duties to protect and provide for a right. Under IHRL, as it currently stands, when a private actor commits a killing – and the state fails to take the appropriate steps to follow-up, such as to investigate who committed the killing and take the appropriate (legal) steps, or – if the state could reasonably have prevented the killing – the state violates its human rights responsibilities. However, a murder can be committed without a state having committed a human rights violation – the state may have taken all appropriate steps to prevent the murder before it happened, and it may have brought to justice the murderer after the fact. In this case, a criminal court may find the individual guilty of murder which is a verdict on this particular individual's wrongdoing. However, given that the state has met all its institutional responsibilities there is no additional finding on institutional responsibility. If we called the murder committed by the individual a human rights violation the human rights vocabulary would no longer allow us to make this distinction between the two distinct levels of responsibility involved – i.e. the direct responsibility of the private actor for the killing, and the strict institutional responsibility of the state for failing to take the appropriate steps before or after the killing.

Similarly, currently, when a human rights institution finds a violation of the right to health this is not only a finding on whether someone's interest of health has been harmed or negatively affected. It is not only a finding on a negative outcome. Rather, it means that the state has failed its responsibilities with regard to the interest of health. It could mean that the state either failed to provide goods or services that could reasonably be expected given that state's resources; or that the state purposely discriminated against particular groups or individuals in the provision of healthcare, for instance by denying people from a particular

ethnic background access to hospitals or denying an individual access to health care on other arbitrary grounds.³¹⁰

If IHRL was extended to business entities this distinct purpose of IHRL would be undermined: IHRL would no longer be reserved to address the specific responsibilities that states have *vis-à-vis* those under their jurisdiction. The finding of a human rights violation, in turn, would no longer imply that a state had failed its institutional duties. The term ‘human rights violation’ would no longer tell us anything about the kind of responsibility/ agent accountability engaged; it would only tell us that a specific interest had been harmed.

It is important to stress that my argument here is not that states always, or even most of the time, have the greater capacity to affect important human interests, neither in a negative way (by harming these interests) nor in a positive way (by contributing to the realization of the interests). It is beyond doubt that business entities have tremendous power to do harm to fundamental human interests, as has been amply discussed in previous chapters. And, as is often pointed out in the context of the business and human rights debate, some businesses have huge resources that would allow them to contribute to realizing important human interests.³¹¹

My argument in this thesis is that if we agree that there is a principled distinction between the duties that states have with respect to the interests protected by IHRL, and the duties that non-state actors like business have, there is a good

³¹⁰ For a more detailed discussion of what duties states have with regard to the right to health, see Committee on Economic, Social and Cultural Rights, General Comment No 14 (2000) E/C.1/2000/4, ‘The right to the highest attainable standard of health’.

³¹¹ See, for instance, Swiss Confederation, Federal Department of Foreign Affairs and Geneva Academy of International Humanitarian Law and Human Rights, *Protecting Dignity: An Agenda for Human Rights* (2011), http://www.udhr60.ch/docs/Panel-humanDignity_rapport2011.pdf, p.14

case to reflect that principled distinction in legal vocabulary. In other words, there is a good case to then reserve the language of human rights for states.

And as long as states have the legal monopoly on the legitimate use of force in their respective territories and remain the primary actors in regulating and setting the institutional framework, there is value to being able to distinguish situations where a business does not comply with regulation from situations where the state fails to regulate in the first place, or fails to enforce regulation.³¹²

As I show in more detail in the following chapter, there are other ways, including regulation under other areas of law, under which businesses could be regulated which would be more suitable to business entities than IHRL – e.g. through domestic criminal or civil regulation, or through an extension of the state duty to protect. In fact, as I argue, such alternative ways to regulate might also be more effective in the regulation of business than IHRL.

3. PRACTICAL CHALLENGES TO EXTENDING DIRECT IHRL DUTIES TO BUSINESS ENTITIES

This section discusses a number of practical challenges to extending direct duties under IHRL to businesses. I argue that for one, a whole new jurisprudence would need to be developed with regard to the substantive content of human rights duties for business entities: as I showed in chapter 4, many rights are focused on government functions, and it is not clear what duties, if any, these rights would give rise to for businesses. And even those rights that seem more directly applicable to business entities would need to be re-interpreted for business because international human rights jurisprudence has focused on specific state responsibilities for these rights.

³¹² Saladin Meckled-García, 'How to Think About the Problem of Non-State Actors and Human Rights', *Proceedings of the XXII World Congress of Philosophy*, 11 (2008), 41-60.

Also, some of the core principles of IHRL would need to be rethought to be made suitable for businesses. Currently, human rights duties are explicitly left open-ended, states have some significant discretion to interpret human rights and may, under certain circumstances, restrict human rights. Human rights duties are also conceptualized as explicitly progressive over time and, for the case of socio-economic rights, dependent on states' resources. All these features, I argue, make good sense as long as human rights duties apply to states, given that states are the kinds of actors that have the legitimacy to make certain policy choices, but also specific responsibilities to provide for the realization of human rights. They would have to be amended if IHRL was extended to businesses. The state-focus of IHRL has also defined the principles that guide how responsibility is established under IHRL – if IHRL were extended to business entities, international human rights institutions would have to develop standards of responsibility that are fit to hold private actors like businesses to account (perhaps it could import such standards from areas of law that have been developed to hold private actors to account, such as criminal or civil law).

This, in turn, means on the one hand that an extension of IHRL to business entities would not offer the immediate solution that it is sometimes made out to be in the current debate. But, more importantly, it also means that an extension of IHRL to business entities would turn IHRL, as we currently know it, into a whole new body of law and IHRL would consequently lose its distinct character as described above. In other words, an extension to businesses would undermine what I argue is the specific identity and value of IHRL.

3.1 RE-INTERPRETING THE SUBSTANTIVE CONTENT HUMAN RIGHTS DUTIES

In the previous chapter, I argued that many of the human rights recognized by international human rights law are about the particular functions and powers that governments exercise for and *vis-à-vis* those under their jurisdiction: in particular, those include those rights that lay down procedural fairness in the way individuals are treated in the legal system that the state establishes, political participation rights that entitle citizens to take part in state institutions, and those rights that entitle individuals to civic status – such as the right to marry, or the right to a name and to a nationality, and to some extent the rights of the child or of the family. I argued³¹³ that the interests that these rights protect distinctly concern the standing of individuals as citizens, in other words the standing that individuals have *vis-à-vis* institutional state structures and that only state structures can confer. Business entities, as private agents, do not have the powers that correspond to any of these rights – they cannot create or enforce laws, they do not entertain the institutions that define the political system and they cannot confer civic standing to individuals. In turn, it would not make sense to impose the duties that international human rights law creates with respect to these rights and that regulate the use of these powers on business entities.

It has sometimes been argued by proponents of an extension of IHRL to businesses that given their extensive economic powers which they may use or abuse for political influence, businesses can *impact* all the interests protected by IHRL, including the ones just discussed, and some efforts have been made to draw out the kinds of responsibilities that businesses could be imposed even with regard to the rights that primarily concern citizen-state relations. A joint publication by the UN Office of the High Commissioner for Human Rights, the UN Global Compact, the International Business Leaders Forum and the Castan

³¹³ See discussion in chapter 4B, section 2.4 above.

Centre for Human Rights Law of Monash University³¹⁴, for instance, states concerning the right to a fair trial that “[c]ompanies could negatively impact on this right if they attempt to corrupt the judicial process, for example, by bribing judges or jurors, or destroying relevant evidence. Companies may facilitate the right by helping to provide legal representation to employees who cannot otherwise afford it.”³¹⁵

And I do not mean to argue that it would be impossible for international human rights institutions to re-interpret, or translate, human rights duties for business entities and I will come back to this point. But the point I argue here is that current international human rights jurisprudence could not simply be imposed on businesses the way in which it has applied to states.

I further argued in chapter 4 that even those international human rights that would seem to be liable to being affected by business entities (such as the rights to life and physical integrity, the rights to liberty and freedom of movement, rights to privacy, freedom of thought and religion, freedom of assembly and association, or a number of socio-economic rights that directly relate to employment and the conditions of employment) have been interpreted in the jurisprudence of international human rights courts and treaty monitoring institutions in a way that focuses on protecting the underlying interests against the particular powers of states, and on outlining the particular positive duties that states have for the realization of these rights.³¹⁶ I argued, for instance, that the jurisprudence on the right to life has been concerned with outlining what

³¹⁴ UN Office of the High Commissioner for Human Rights, the UN Global Compact, the International Business Leaders Forum and the Castan Centre for Human Rights Law of Monash, *Human Rights Translated – A Business Reference Guide* (2008), http://hrbdf.org/doc/human_rights_translated.pdf

³¹⁵ *Ibid.*, p.37.

³¹⁶ See discussion in chapter 4B, section 2.5 above, for a more comprehensive discussion.

measures states have to take to regulate the use of force in their territory, what laws need to be in place to protect individuals' lives (such as legislation criminalizing murder), under what circumstances, if any, states may impose capital punishment, but also what further positive steps states have to take to promote the interest of life, such as to provide goods and (medical) services, or to adopt measures to reduce infant mortality and to reduce average life expectancy.

Again, the same duties could not sensibly be imposed on business entities. On the one hand, businesses do not have the same powers that states have by virtue of their particular institutional role – business entities do not have the powers to impose legal regulation, they do not control the use of legitimate force, etc. – so it would not make sense to impose the same duties that states currently have under IHRL on business entities. At the same time, state duties for the realization of human rights are arguably more extensive than business duties could be – it would seem rather controversial to argue that business entities have duties to adopt measures that reduce infant mortality or to increase life expectation for the population at large.

Again, it is certainly conceivable that IHRIIs could develop a new human rights jurisprudence specifically targeted to MNCs and other business entities, and there have been various attempts to draft (non-binding) guidance for what duties human rights could give rise to for businesses. The joint publication by the UN, a business forum and Monash University mentioned above, for instance, seeks to clarify what the duty to respect could mean for business. For each of the rights laid down in the two global human rights covenants, the ICCPR and the ICESCR, it explains how each of the rights “may be relevant to a company’s

activities”.³¹⁷ However, the guide remains rather vague in most instances or on most aspects of duty specification,³¹⁸ which attests to the fact that such ‘translation’ is far from being straightforward, as is often implied in the current debate. Rather than outlining specific duties for business, the guide highlights areas in which business might be found to harm the interest underlying the respective human rights in question. Just like human rights jurisprudence for states has evolved over decades, and continues to evolve, to specify what duties states have corresponding to different international human rights, it would require similar time and effort to develop a jurisprudence outlining the duties for business.

³¹⁷ UN Office of the High Commissioner for Human Rights et al., *Human Rights Translated – A Business Reference Guide* (2008), p. xv.

³¹⁸ For example, concerning the right to freedom of thought, conscience, and religion, it states that “[c]ompanies’ activities are most likely to impact on this right with regard to their workforces. For example, companies may need to accommodate the religious practices of workers who are required to pray during work hours or who request time off in order to observe certain holy days. Issues may arise regarding religious clothing, headwear or jewellery that affects commercial activities. Companies need to balance the freedom to manifest one’s religion with competing legitimate interests such as health and safety, the rights of other workers, and the legitimate needs of the business. [Emphasis added.]

With regard to the right to health, it states: *Company activities and products can impact on the right to health of employees, and are expected to ensure that their operations and products do not impact on the right to health of people, such as workers, consumers and local communities. Special consideration should be made in relation to vulnerable sectors of society, such as children and adolescents, women, disabled people and indigenous communities. [...] NGOs and others increasingly look to pharmaceutical firms to help provide access to high-quality, essential medicines for poorer communities, for example through tiered pricing or via flexible approaches to intellectual property protection. Pharmaceutical companies also face demands to increase their investment in the research and development of medicines and treatments for otherwise neglected diseases (such as river blindness, leprosy and sleeping sickness) that have typically ceased to be prevalent in developed countries, but are still common in developing countries. Companies from sectors where the risk of pollution from their activities is particularly great, such as extractive firms and chemical companies, may face close scrutiny over the policies and systems they have in place to ensure that pollution does not negatively impact on the right to health of workers and members of surrounding communities.*

3.2 THE ARGUMENT FROM A PARTIAL EXTENSION OF HUMAN RIGHTS DUTIES

I should stress that a translation of human rights duties for business entities would not, of course, be impossible. However, I argue that it would nevertheless add a number of practical challenges to an extension of IHRL that have been little discussed in the current debate. In the following section, I argue that an implicit but widespread assumption has been that while IHRL may to some extent focus on the specific duties or powers of states, this is not the case for all of international human rights law. It has been assumed that at least some of the duties that IHRL establishes could directly be extended to business entities because they are primarily *negative* in nature – in other words, they are duties *not to harm* important interests rather than duties to positively *provide for* goods or services to contribute to the realization of human rights. I call this the argument from a partial extension of direct human rights duties to business entities. As the following sections show, this argument is very much at the core of the current business-and-human rights debate.

In chapter 2, I introduced one of the most widely noted and discussed documents in the current policy debate on business and human rights have – the 2011 United Nations (UN) Guiding Principles on Business and Human Rights (also the ‘Guiding Principles’ in what follows). As I argued, these Guiding Principles have since been influential in international policy debates.³¹⁹ What is interesting is that while the Guiding Principles suggest that all human rights might potentially be ‘impacted’ by business enterprises³²⁰, they also stress that not all the duties that IHRL gives rise to should apply to multinational corporations and

³¹⁹ See chapter 1, section 2.1 on ‘The search for consensus – the *UN Guiding Principles on Business and Human Rights*.’

³²⁰ UNHRC (2011) A/HRC/17/31, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, p.13.

other business entities and explicitly emphasize that the duties that business has with regard to human rights are *complementary* to state duties. In particular, the Guiding Principles suggest that business duties should be limited to the responsibility to respect – they suggest only applying negative human rights duties to business entities, i.e. such duties that are about not harming important interests: “[business enterprises] should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”³²¹

I call this the ‘partial extension view’, in contrast to what we can call the ‘full extension view’ as it was suggested, for instance, by the UN predecessor of the Guiding Principles, the so-called Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.³²² The 2003 Draft Norms took a different approach to the Guiding Principles and proposed that businesses should essentially be assigned the same legal human rights duties to “promote, secure the fulfilment of, respect, ensure respect of, and protect human rights”³²³ that have traditionally only applied to states. The Draft Norms faced a lot of criticism for their full extension approach which made no principled distinction between the duties of states and those of businesses, and for failing to provide guidance as to how to delineate duties for business entities that would take account of the different roles of businesses as opposed to states.

³²¹ The *Guiding Principles* further stipulate that “[t]he responsibility to respect human rights requires that business enterprises: Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” *Ibid.*

³²² See the discussion in chapter 1, section 2.1 on ‘Towards an extension of IHRL – the *UN Draft Norms* on responsibilities for businesses’ above.

³²³ UNSUBCOM, E/CN.4/Sub.2/2003/12/Rev.2 (2003), ‘Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’.

What the partial extension view suggests is that at least some of the duties that IHRL currently establishes can straightforwardly be applied to businesses. In other words, there would seem to be no need for a translation of human rights duties for business entities - the partial extension view suggests that an extension of duties to respect³²⁴ would simply be about applying a subset of duties that have already been defined by international human rights institutions to business entities. I argue that this is misleading.

The assumption underlying the argument from partial extension proposal is that duties to respect human rights are primarily negative, i.e. that they require refraining from doing harm, rather than the provision of goods or services to positively contribute to the realization of human rights. And negative duties, it is argued, can quite uncontroversially be imposed on businesses enterprises. However, one problem with this line of reasoning is that there is not always a clear-cut distinction between positive and negative duties corresponding to human rights. So for instance, the right to a fair trial is often thought of as giving rise to negative duties not to deny an individual a hearing before an impartial tribunal within reasonable time, not to presume the accused guilty, etc. However, to be able to fulfil these supposedly ‘negative’ duties, states need to supply a functioning court system which requires positive measures of putting such a system in place and of maintaining it with all the facilities and human resources it needs to be functional.

Another problematic assumption underlying the partial extension view is the idea that negative duties would automatically be the same for states and for business entities. This is not necessarily the case – Ratner provides the example of the right to freedom of speech which requires governments, among other

³²⁴ In the wording of the Guiding Principles (fn.322) business entities would have a “*corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.*”

things, to refrain from penalizing individuals for speech that is critical of the government. However, it might be legitimate for a company to penalize its employees for public speech that insults the company to consumers, or gives away trade secrets.³²⁵ In other words, different principles will be needed for determining when human rights duties can be balanced against the interests of states, and for determining when and how they can be balanced against the interests of business entities.

I have argued that even a partial extension of IHRL would not evade the challenges of human rights duties having to be reinterpreted for business. This, in turn, means that on the one hand, IHRL does not offer the immediate solution that it is sometimes made out to be in the current debate.

3.3 RETHINKING CORE PRINCIPLES OF IHRL FOR BUSINESS ENTITIES

I further argued that the state-focus of IHRL has been reflected in three other core features of IHRL: firstly, IHRL does specifically not lay down the duties that correspond to each of the human rights but stipulates the interests to be protected in relatively abstract terms. I argued that the underlying idea is that states are the kinds of agents that *prima facie* have the legitimacy to make the relevant policy choices as to how, in detail, to realize human rights. And, relatedly, states are left some significant discretion to decide how the content of particular rights should be interpreted in particular contexts. International human rights law also explicitly recognizes that states may restrict human rights under some circumstances, such as where this is necessary to pursue certain collective goals such as national security, public safety, general welfare or economic well-being or the prevention of crime, or to protect the rights and freedoms of

³²⁵ Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *Yale Law Journal*, 111.3 (2001), 443-545 (p.514).

others.³²⁶ Again, I argued that this is justified insofar as states have the legitimacy, and the obligation, to make policy choices and the understanding is that under certain circumstances, it may be necessary for states to compromise their human rights responsibilities in order to exercise their role.

By contrast, the same is not true of private agents like business corporations. These are not the type of agents that have the moral legitimacy to decide on how best to realize the interests protected by IHRL. Business corporations are not the kinds of agents that we would want to entrust with decisions regarding the realization of human rights. They are not representative of a legitimate political body and they are not entrusted with authority to decide or adjudicate interpretative questions of right or duty in the way that states are. They would be judges in their own cause, given that their interests or the interests of their shareholders would always be factored into their decisions in one way or another. As primarily profit-making entities, their main forms of ‘accountability’ are accountability to their shareholders,³²⁷ to legal authorities, and to the market in terms of success or failure. In short, businesses are not accountable in the right way, that is in the way that states are, to make decisions on behalf of the well-being of the whole population.³²⁸ As a result, the comparatively broad guidance that IHRL provides to states as to how to protect and further important human

³²⁶ Also see discussion in chapter 4B, section 2.7 above.

³²⁷ This is a descriptive rather than a normative statement – the fact that businesses *de facto* lack the appropriate accountability mechanisms beyond those to their stakeholders is not to say that morally speaking, they can only be thought to have responsibilities to their shareholders, as suggested by Milton Friedman in his ‘The Social Responsibility of Business is to Increase its Profits’, *The New York Times Magazine*, September 13, 1970.

³²⁸ This is not, of course, to suggest that in practice, political accountability mechanisms of the state work flawlessly. The limitations of political accountability mechanisms, in particular in the context of the complexity of modern governance and globalisation, have been discussed, for instance, by Colm O’Cinneide, ‘Legal Accountability and Social Justice’, in *Accountability in the Contemporary Constitution*, ed. by Peter Leyland and Nicholas Bamforth (Oxford: OUP, 2013), 389-409. O’Cinneide argues that the rise of the popularity of legal accountability and the different modes of control it can exercise *vis-à-vis* the activities of public authorities may at least partly be explained by deficiencies in political accountability.

interests is not the kind of guidance that is appropriate for businesses. IHRL would need to develop much more detailed guidance as to what particular duties each right gave rise to than they currently do for states. In the previous chapter, I gave some examples of human rights that concern the workplace and so might seem particularly relevant for business entities. In interpreting the right to health at work, for instance, international human rights institutions have focused on outlining what states have to do, such as to formulate and implement national policies on occupational health and safety, or to promote the progressive development of occupational health services for workers. For businesses, we would want to have much more detailed guidance; we would not want to leave it up to businesses to decide what constitutes adequate rules on occupational health and safety.

So arguably, if IHRL was indeed extended to business entities, the way in which IHRIs would need to specify duties would need to have much more regulatory detail as to what are the minimum standards that businesses should observe in all different areas of corporate activity. One question that this raises is whether international human rights institutions would have the appropriate expertise and capacities to provide such detailed regulation. But also, and more importantly, another question is whether this would not interfere with one of the ideas that I argued is at the heart of IHRL: the idea that states, *prima facie*, should have a certain level of discretion to decide how to realize human rights. This, in turn, includes decisions as to how to regulate private actors like business entities with regard to the different interests that underlie human rights. If IHRIs began to develop jurisprudence for the regulation of businesses in this regard, this would therefore raise important questions as to the proper division of labour between IHRIs and states.

And the practical challenges of extending direct human rights duties to business would not be limited to the determination of the substantive content of such duties. My argument in chapter 3 was that the statist focus of IHRL has shaped some of the core principles of IHRL.

I also argued that human rights duties are interpreted progressively, meaning that rights can give rise to different, and increasingly demanding, duties over time, depending both on the evolving conception of what a particular right entails, as well as on the available resources of the state.³²⁹ I argued that we can make sense of the flexible, or progressive, nature of human rights obligations for states insofar as the well-being (and therefore the realization of human rights) of citizens lies at the core of states' *raison d'être*. This arguably justifies that states should spend more towards the realization of human rights as their resources increase, as well as that they should be held to the highest standards of what a particular right entails in a given context at a given point in time.

Imposing such flexible obligations on private agents, like business entities, by contrast, would be problematic. The flexible nature of human rights duties is in direct contrast with a principle which is generally considered to be at the core of law: the principle of legality. The principle of legality encompasses three related principles: the principle of specificity, the principle of non-retroactivity, and the ban on analogy or extensive interpretation. The principle of specificity holds that legal rules should be as specific as possible. The principle of non-retroactivity holds that no action or omission should be made illegal retro-actively, i.e. after it has been (c)omitted. And the ban on analogy or extensive interpretation holds

³²⁹ See discussion in chapter 4B, section 2.6 above.

that laws should not be applied by analogy or, in other words, be extensively interpreted.³³⁰

There are two related arguments in favour of the principle of legality. The first one which we may call the ‘fair notice argument’ holds that it would be unfair to punish people for not acting in accordance with law where it was not clear what the law required in the first place. The second argument, call it ‘government abuse argument’, holds that historically, rulers have used vague law to target and repress opponents³³¹ and we should therefore avoid vague law.

The reason we value that agents can freely choose to abide by the rules is that in liberal societies we are committed to the value of the autonomy of persons. Individuals should, as far as possible, be able to plan their lives, including avoiding breaching the law and be punished for it.³³² Where the law is unclear and individuals can be punished for breaching a rule they were not aware existed, this autonomy is obviously disturbed. The specificity of rules protects individuals from an arbitrary application of rules to them. Where laws are loosely defined, authorities have relatively greater powers to define breaches of the law *ad hoc* and apply the law ‘arbitrarily’. The specificity of laws thus not only enables individuals to exercise their freedom to choose, but also prevents authorities from holding individuals to account arbitrarily.³³³

³³⁰ See, for instance, John Gardner in his ‘Introduction’ to Herbert L.A. Hart, *Punishment and Responsibility* (1968, 2nd edn., Oxford: Clarendon, 2008), p.xxxvi; Antonio Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008), p.41; Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 2003), pp.57-58.

³³¹ David Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’, in *The Philosophy of International Law*, ed. by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp.569-588 (p.583); Cassese, *International Criminal Law*, p.41.

³³² Ben Juratowitsch, *Retroactivity and the Common Law* (Oxford: Hart Publishing, 2008), p.49; Quoted after Ashworth (above no.342), p.58.

³³³ Cassese, *International Criminal Law*, p.41.

Of course, where duties are flexible, and change over time, they cannot at the same time be specific, non-retroactive or non-analogous. Insofar as IHRL only applies to states, this has not been problematic. We can certainly imagine situations where international courts or monitoring bodies find states in breach of their human rights duties even though states could not have foreseen these duties when they committed to them. And it might be costly for states to change their laws and policies in response. But holding institutional agents to account still does not raise the same moral issues as holding individuals to account. States, as institutional agents are non-natural agents, not autonomous agents who must be able to pursue their individual life-plans and be able to avoid being held to account by the law where they could not have foreseen it (the fair notice argument).³³⁴ To put it differently, holding states legally to account for an action or omission they might not have foreseen to be illegal does not interfere with the autonomy or agency of any particular individual. Neither do states have to be protected from the arbitrary use of their own coercive power (the government abuse argument).

Business entities are not individuals in the sense of natural persons. However, as business entities their role is also quite distinct from the role that states play. Businesses are specialized organs of society which primarily exist for the purpose of pursuing their respective business interests, and as such they need to be able to foresee their obligations, and potential costs associated with them. There need to be clear rules that apply to business so that corporations can plan and pursue their business in compliance with existing standards. This is certainly not to say that states should not be permitted to change laws and regulations over time, even if this may affect businesses – negatively or positively - in their operations. However, given that for business – other than for states – the

³³⁴ On this point, also see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), pp.73-74.

fulfilment of human rights is not a primary *raison d'être*, it would seem problematic to impose the same progressive duties on business that apply to states, in particular the progressive duties associated with socio-economic rights. States have obligations to realize such rights to a maximum of their available resources – imposing the same duties on businesses would effectively amount to asking business to take on the role of states.³³⁵

Businesses certainly have moral duties to contribute their fair share towards social justice and states should hold them accountable for these duties (e.g. by regulating business activities, or by taxing profits made by private business entities). It also seems plausible to hold that these duties become more demanding the wealthier the business in question is. But if we were to apply the principle of progressive realization to business organizations unaltered, this would mean that businesses would need to realise human rights to a maximum of their available resources; perhaps requiring the setting up of special institutions, tax schemes, etc., that they have no right to create and impose on their contracted employees or anyone else. Whilst states have a right to impose specific and well defined social burdens, that being part of their role, business organisations work through contract and have no rights of imposition beyond that.

This means that if IHRL was extended to business entities, international human rights institutions would need to develop different principles to determine the content of human rights duties for these entities. We would need different principles as to how much, if any, of their available budget, for instance, business entities could legitimately be required to dedicate to the positive realization of socio-economic rights such as the right to health or education.

³³⁵ David J. Karp, *Responsibility for Human Rights – Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014), pp.116-117.

The statist focus has also defined the principles that guide how responsibility is established under IHRL – these principles could also not simply be applied to business as they stand. Human rights institutions would need to develop different principles for determining when a violation by a business has taken place; to determine what modes of involvement in the harmful situation at stake would give rise to business responsibility. I argued that states are not only responsible for the actions and omissions of their own agents, regardless of whether these agents act on direction of the state or whether they exceed their institutional powers, but that states are also responsible for non-state actors that are empowered to fulfil public functions, as well as for the regulation of any private actor (including businesses) under their jurisdiction with regard to human rights.

If IHRL was extended to business entities, one central question, for instance, would be how to delineate responsibility – such as whether only actions and omissions ordered by management would be covered by IHRL, or whether the actions of any employee could trigger human rights responsibility; whether businesses would be responsible for the actions and omissions of suppliers and sub-suppliers, etc.

It would also need to be decided *whose* rights business entities would have duties to protect and realize - whether businesses would only have duties for their employees, or whether they would also have responsibilities to provide for the fulfilment of human rights of the communities where they operate, or perhaps for citizens of their country of operation at large. States are generally responsible to regulate any actor under their jurisdiction and to provide for the interests of those under their jurisdiction – however, it would need to be decided what the equivalent of jurisdiction would be for business.

I also argued in chapter 4 that under current IHRL, there is no need to establish the identity of whoever did the particular harm that gave rise to the human rights violation in question, and that there is no need to prove intentional action. These principles seemed justified for states: firstly, as chapter 3 argued at length, responsibility of states under IHRL is not just about holding states to account for the direct actions and omissions of state agents, but also about state duties to regulate its jurisdiction and to ensure that those important human interests laid down in IHRL are protected against third actors (and other natural or man-made risks). Where one of these interests has been harmed, the focus of determining whether this harm amounts to a human rights violation is therefore not on determining the identity of whoever caused the harm, but on asking whether the state failed to fulfil its special duties, whether the state could reasonably have been expected to prevent or punish the harm in question.

To put it differently, strict liability is important when dealing with states because they are charged and trusted with regulating our collective life both in terms of intervening in and in terms of setting the background for private actors to interact. That means that setting those terms wrongly (and so allowing harms), even where that is not intended, or reasonably foreseen, brings with it liabilities that a private actor could not and should not bear. States, as political entities trusted with the regulation of political community owe us a special kind of accountability.

If IHRL were extended to business entities, international human rights institutions would arguably have to incorporate standards of responsibility from areas of law that have been developed to hold private agents to account, such as criminal law or civil law; arguably, it would only be justified to hold business entities to account where it can either be shown that there was some kind of

intent to harm, or where businesses acted negligently in the sense that harm could reasonably have been foreseen and avoided.

This is not to argue that these practical challenges of changing the principles of IHRL to suit business entities could not be met; and there have been some efforts to address some of these practical issues. Scholars have suggested, for instance, that corporate duties could vary depending on a corporation's ties with the government, its relationship to populations affected by business operations, the particular human right in question or the particular structure of the business entity.³³⁶ However, it would alter IHRL in such a way that it would turn into a different body of law – it would no longer have the same identity that I argued to constitute the very role and value of this body of law.

4. CONCLUSION

In this chapter, I addressed the question of whether there are any good reasons to retain the state-focus of IHRL that was described as having defined the role of IHRL in chapter 4. I first discussed what I called the *principled case* against an extension of IHRL to business entities and argued that such an extension would undermine the distinct role and value of IHRL – that is, its being able to express the distinct institutional responsibilities that states have towards individuals in their capacity as states. Currently, I argued, the term ‘human rights violation’ tells us something about the special normative relationship between states and individuals – states have particular powers to commit violations under the veil of lawfulness or righteousness that makes harm done by states qualitatively different from the harm that business entities (or other non-state actors) can do to individuals. Where states violate human rights, the wrongfulness not only lies in the negative consequences for important human interests but also in the fact that

³³⁶ Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, pp.443-545.

it expresses official disrespect on behalf of the state, that the harm is done using the collective and legal authority and legitimacy of a community.

I then discussed a number of practical issues that an extension of direct duties for business entities under IHRL would raise. Firstly, I argued that for human rights duties to be applicable to businesses, international human rights institutions would first need to translate such duties for businesses, even if an extension was only partial and restricted to so-called duties to respect. Beyond a translation of the substantive content of human rights duties, it would also be necessary to rethink a number of other core principles of IHRL, including some of the principles that have guided how and when responsibility can arise for human rights violations. This, on the one hand, means that an extension of IHRL to business entities would not offer the immediate solution that it is sometimes made out to be in the current business-and-human rights debate. But on the other hand, and perhaps more importantly, it also means that an extension of IHRL to business entities would turn IHRL, as it currently stands, into a whole different body of law. This new body of law would have to incorporate a whole new set of core principles targeted at business entities, as opposed to states. IHRL would start to look more like a hybrid of what currently is IHRL, and areas of law that have addressed private wrongs and the responsibility of private agents and developed the appropriate principles been used to hold private actors responsible, such as civil or criminal law.

This brings us back to the principled case made in the first part of this chapter – IHRL would no longer play the distinct role of establishing institutional responsibility of states, but also be concerned with an entirely different understanding of responsibility. In fact, IHRL would encompass different understandings of responsibility - it would encompass different principles for determining the substantive content of human rights duties, as well as for

determining responsibility for a violation, that would apply depending on what actor it applied to. I argued that currently, the very value of IHRL lies in its being able to express a distinct understanding of statist-institutional responsibility. If IHRL was opened up to business entities, and consequently amended for these entities in the ways described above, it would no longer be able to do so.

Having made the normative case against an extension of IHRL to business entities, and having discussed a number of the practical complications that such an extension would entail, I argue that it needs to be asked whether an extension of IHRL to business would indeed be worth while. To answer that question, I suggest that we need a clearer understanding of whether IHRL is at all suitable to address the concerns that underlie calls for business human rights responsibility in the first place. This will be the subject of the following chapter.

CHAPTER 6: CAN IHRL ADDRESS THE CONCERNS THAT MOTIVATE CALLS FOR BUSINESS-HUMAN RIGHTS ACCOUNTABILITY?

1. INTRODUCTION

One common assumption that underlies the current business-and-human rights debate is that an extension of IHRL would ensure, or at least contribute to, greater accountability of business entities with respect to their impact on important human interests. I argue, however, that we need a more thorough understanding of what are the motivations that drive calls for greater corporate accountability to assess whether international human rights law, even if it were extended to apply to business enterprises directly, could indeed effectively contribute to greater accountability of businesses.

In the following, it is argued that one overarching concern that has motivated calls for business-human rights responsibility is the observation that states often fail to regulate businesses sufficiently to prevent or punish harmful corporate activities. I will identify some of the most commonly discussed reasons for this failure of national level regulation, and then ask whether an extension of IHRL to business entities would be able to provide a solution. I will discuss how IHRL is implemented and argue that while an extension of duties under IHRL to business entities would allow international human rights institutions to name and shame business entities directly, it would not lead to a straight enforcement of human rights duties by IHRIs. This is because IHRL relies for its implementation on state action. In other words, an extension of IHRL to businesses would not provide an immediate solution to national enforcement gaps where states are unable or unwilling to regulate companies.

In section 4, I will then argue that beyond the common concern from lack of national regulation, we can identify a number of distinct motivations that underlie calls for human rights accountability. While a comprehensive discussion of all the different ways in which business may harm human rights is beyond the scope of this thesis, in the following discussion I will draw on a number of typical situations in which business entities have been found to harm human rights and identify different reasons for why commentators call for business-human rights accountability: in some cases, I argue that (i) commentators draw on IHRL because IHRL provides international minimum standards that offer a frame of reference where national standards are lacking. Calls for human rights accountability' of businesses can also be (ii) calls for material compensation for damage caused by corporate activities ; or (iii) calls to punish corporate actors for wrongdoing, to prevent impunity for abusive behaviour where national criminal laws are not enforced. Finally, (iv) calls for corporate human rights accountability can also be calls not for legal accountability but for 'corporate social responsibility' more broadly speaking, for businesses to positively use their powers and capacities to contribute to the realization of important human interests.

For each of these, I will discuss to what extent IHRL is suitable to address these distinct motivations. I will argue that IHRL may provide a useful starting point for developing legal obligations for business entities, even though existing international human rights jurisprudence would need to be reinterpreted to apply to business entities (as opposed to states, as it has to date). However, as IHRL neither has a strong compensatory component, nor does it fulfil a punitive function, it is arguably less suited to address concerns from material compensation or the punishment of corporate wrongdoing.

I will conclude that in the current debate the practical advantages of an extension of direct duties for business entities under IHRL may have been exaggerated – contrary to what commentators often suggest such an extension would not automatically result in greater accountability of business entities. At most, IHRL can provide some guidance for the development of duties for businesses in the future; however, enforcement mechanisms other than the ones currently offered by IHRL would need to be developed for an effective implementation of such duties.

2. THE LACK OF ACCOUNTABILITY FOR HARMFUL BUSINESS ACTIVITIES

There has been a tendency in the current debate to address a broad range of different situations in which corporate activities can have a negative impact on individuals' interests under the common 'umbrella' of 'business and human rights'. The emphasis of commentators in the debate has tended to be on stressing that the reach of business virtually extends into all areas of individuals' lives and that consequently, business can impact on virtually all the important interests protected by human rights.³³⁷ In other words, 'business and human rights' tends to be considered as a unified topic.

The emphasis that business can impact on *all* the interests protected by human rights has arguably played an important role in raising public awareness of harmful corporate activities: while in the earlier days of business-human rights advocacy, the primary focus was on a comparatively narrow range of labour standards (like the prohibition of child or forced labour), it is now commonly understood that business can negatively impact people's interests in a much

³³⁷ “[C]ompanies can impact adversely just about all internationally recognized human rights, and in virtually all operational contexts.” UNHRC (2011) A/HRC/17/31, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, p.1.

broader way; such as through pollution caused by corporate activities, or through business complicity in the actions of abusive governments. This is valuable insofar as it highlights the many areas in which companies have been able to engage in harmful behaviour and so stresses the need for much more comprehensive and effective regulation of business enterprises.

However, the emphasis on stressing that businesses can potentially adversely affect *all those interests* that underlie IHRL has arguably also come at the cost of a more nuanced discussion of the particular concerns that business conduct poses in different situations. In this chapter, I argue that we need a more thorough understanding of what are the motivations that drive calls for greater corporate accountability to assess whether international human rights law, even if it were extended to apply to business enterprises directly, could indeed effectively contribute to greater accountability of businesses. In the following, it is argued that on the one hand, there one overarching concern that has motivated calls for business-human rights responsibility is the observation that states often fail to regulate businesses sufficiently to prevent or punish harmful corporate activities. I will identify some of the most commonly discussed reasons for this failure of national level regulation, and then ask whether an extension of IHRL to business entities would be able to provide a solution.

2.1 THE CAPACITY VIEW REVISITED

In chapter 1 I argued that what has generally motivated calls for business-human rights accountability under IHRL has been the observation that business entities (increasingly) have capacities to adversely impact on people's enjoyment of important interests. What motivates calls for business-human rights accountability is the desire to hold business to account for unacceptable behaviour, to prevent business from harming important human interests. IHRL, in turn, is understood as protecting exactly those interests and so commentators

conclude that an extension of IHRL duties to businesses directly would be the appropriate response. I called this the capacity view.

But of course, while the capacity view can be considered to lie at the core of most arguments for business - human rights - accountability, arguments are more complex than that - the capacity view only is only the beginning of the story. In section 2 I argue that one overarching concern that has motivated calls for business-human rights accountability under IHRL is the perception that MNCs and other business entities largely are not held accountable for harmful or abusive behaviour and identify some of the reasons for the lack of corporate accountability. Section 3 will then discuss whether an extension of direct duties under IHRL to business entities would be able to address the perceived unaccountability of multinational and other companies. I will argue that IHRL may to some extent contribute to enhancing accountability of business entities insofar as the 'naming and shaming' of corporate actors for abusive behaviour could provide incentives for business entities to act more responsibly. However, given a lack of direct enforcement of international human rights duties by international human rights institutions, even an extension of direct IHRL duties to MNCs and other businesses would not be able to solve the core problem of corporate impunity that commentators identify: the inability, and perhaps more often than not unwillingness, of governments to regulate corporations.

2.2 STATE FAILURE TO REGULATE

One argument that is commonly put forward by proponents of business accountability under IHRL is that states often fail to regulate businesses appropriately with regard to important human interests. As I explained in chapter 4B, states not only have duties under international human rights law not to harm the interests protected by international human rights law, but they also have extensive duties to protect individuals under their jurisdiction against any third

party under their jurisdiction, including business enterprises – for instance, they have duties to introduce legislation to prohibit abuse, monitor compliance by business, establish administrative and judicial mechanisms necessary to effectively investigate complaints, put in place mechanisms to bring perpetrators to justice, and facilitate the provision of effective remedies, including the provision of reparation to victims where appropriate. Commentators point out, however, that states often fall short of regulating business in the way prescribed by IHRL.³³⁸ This may be for different reasons. The paramount reason why governments fail to regulate business corporations in this regard is that the deregulation of the business environment is seen as a way to attract or retain (foreign) investment.³³⁹ For instance, the lowering (or abolishing) of labour standards, such as rules concerning decent minimum wages, health and safety standards for workers, or standards on collective bargaining rights that business entities need to comply with is seen as a way of attracting investors because it arguably lowers the running costs of operations for business. Even though arguments have been made that there is a business case for corporations to adhere to labour standards insofar as it tends to lower medium and longer term risks in practice (as workers are healthier and more content) there is still ample evidence for such a race to the bottom.³⁴⁰

³³⁸ Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’, *Human Rights Quarterly*, 19.4 (1997), 703-723 (p.718); Eric De Brabandere, ‘Human Rights and Non-State Actors in a State-Centric Legal System’, *Leiden Journal of International Law*, 22 (2009), 191-209 (p.192); Amnesty International, *The True ‘Tragedy’ – Delays and Failures in Tackling Oil Spills in the Niger Delta* (2011), p.28, <http://www.amnestyusa.org/research/reports/the-true-tragedy-delays-and-failures-in-tackling-oil-spills-in-the-niger-delta>

³³⁹ E.g., Christopher Albin-Lackey, *Without Rules – A Failed Approach to Corporate Accountability* (2013), <http://www.hrw.org/world-report/2013/essays/without-rules?page=1>. Also see Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), p.17 ; David J. Karp, *Responsibility for Human Rights – Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014), p.28

³⁴⁰ John G. Ruggie, *Just Business – Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), p.xxxiv.

In such situations, the corporate behaviour that is targeted by human rights critics is often legal under national laws. In other cases, national legislation to regulate businesses may exist but governments fail to enforce it— usually for the same reason of not wanting to deter actual or prospective investors.

2.3 MULTINATIONAL CORPORATIONS AND THE CORPORATE VEIL

Another point that tends to be made in relation to the argument from lack of domestic regulation concerns the particular case of multinational corporations (MNCs, also referred to in the literature as transnational corporations or TNCs). The corporate structure of MNCs makes it particularly challenging to effectively regulate these entities under national law. While multinationals operate as entities that are globally integrated in their operations, the different entities located in different countries have distinct legal personalities.³⁴¹ Simply put, this means that legally, the parent company tends not to be liable for actions or omissions of their subsidiaries, even when the parent company is the sole shareholder of the subsidiary. This phenomenon has also been referred to as the ‘corporate veil’ separating the parent multinational company from its affiliates.³⁴² This complicates the regulation of the overall activities of TNCs under domestic law,³⁴³ in particular in situations where states do not have strong incentives to regulate in the first place.

³⁴¹ Ibid., p.xxxiii and John Ruggie, ‘Business and Human Rights – the Evolving International Agenda’, *American Journal of International Law*, 101.4 (2007), 819-840 (p.826).

³⁴² Peter Muchlinski, ‘Human Rights and Multinationals: Is there a Problem?’, *International Affairs*, 77.1 (2001), 31-48 (p.46); Erika R. George, ‘See No Evil? Revisiting Early Visions of the Social Responsibility of Business: Adolf A. Berle’s Contribution to Contemporary Conversations’, *Seattle University Law Review*, 33 (2010), 965-1003 (pp.984-985).

³⁴³ George, *ibid.*

2.4 THE FAILURE OF VOLUNTARY CORPORATE SOCIAL RESPONSIBILITY INITIATIVES

In addition to arguments about state unwillingness, or inability, to regulate businesses, for the reasons identified above, and the argument from the corporate veil, commentators have argued that an extension of IHRL to business is needed because voluntary initiatives for corporate social responsibility have failed to substantively improve business behaviour.³⁴⁴ In the last decades, a range of voluntary initiatives were adopted and promoted by businesses as well as international organizations like the OECD, ILO or the UN Global Compact.³⁴⁵ It is argued, however, that such voluntary initiatives have not led to a significant improvement of business behaviour and have instead often been used by companies as window-dressing rather than to make an actual difference in business conduct.³⁴⁶

The idea here is that an extension of international human rights law to business entities would make obligations of business with regard to human rights binding and non-negotiable; they would no longer depend on the discretion of business entities themselves.³⁴⁷

³⁴⁴ Ruggie, *Just Business*, p.xxviii; Steven Ratner, 'Business', in *Oxford Handbook of International Environmental Law*, ed. by Daniel Bodansky, Jutta Brunnée and Ellen Hey (Oxford: Oxford University Press, 2007), pp.807-828; Albin-Lackey, *Without Rules – A Failed Approach to Corporate Accountability*; www.amnestyusa.org/our-work/issues/business-and-human-rights/corporate-accountability.

³⁴⁵ See chapter 1, section 2.1.

³⁴⁶ Deva writes that *"In view of the four decades of experimentation with voluntary initiatives, there is a legitimate skepticism about the efficacy of any new avatars of voluntary initiatives, including the GPs"*[GPs referring to the UN Guiding Principles. Surya Deva, 'The Human Rights Obligations of Business: Reimagining the Treaty Business' (2014), p.11, <http://business-humanrights.org/en/pdf-the-human-rights-obligations-of-business-reimagining-the-treaty-business> .

³⁴⁷ Deva writes in this context that it would signify *"that human rights are non-negotiable: they should not be subject to the consent, willingness or capacity of business to assume human rights obligations. Nor should the application of human rights to business be dependent on the presence of a business case. Rather, compliance with human rights should be a pre-condition for having the privilege to conduct business in society."*Ibid., p.2.

The previous sections have discussed a number of common situations that have given rise to calls for business-human rights accountability. The underlying motivation for why commentators have called for an extension of IHRL to businesses in all these situations has been that businesses can have significant impact on the enjoyment of important interests, but at the same time, business corporations have often been left unregulated and unaccountable for abusive or harmful behaviour.³⁴⁸ A number of reasons for this are commonly put forward: national level regulation has been lacking or not sufficiently enforced because governments are unable or unwilling to regulate business entities to avoid harm in the first place, or hold them to account where harm has already occurred. This situation is exacerbated for MNCs, which evade national-level regulation because of their complex legal structures. Finally, voluntary initiatives for and by business have not been effective in preventing abusive business practices.

An extension of IHRL to business, commentators (explicitly or implicitly) suggest, could address both: on the one hand, IHRL provides international standards that can be applied even when regulation at the national level fails (for the different reasons described above), and these standards are not just of a voluntary nature but legally binding³⁴⁹.

³⁴⁸ Also see on this point de Brabandere, 'Human Rights and Non-State Actors in a State-Centric Legal System', p.7.

³⁴⁹ David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', *International Law*, 44.4 (2003-2004), 931-1023 (p.934).

3. CAN IHRL ADDRESS THE GAP IN LEGAL REGULATION AT THE NATIONAL LEVEL?

However, what these arguments from the benefits of direct duties for business entities tend to overlook is how IHRL is implemented in practice. As I will explain in more detail in the following, international human rights standards are not enforced by international human rights institutions directly, but by the states that are parties to the respective human rights instruments. What this means is that international human rights law does not provide an immediate solution to the problem of lack of protection at the national level where states are unable or unwilling to regulate. Chapter 4A introduced two kinds of international human rights institutions (IHRIs) that implement international human rights law: the regional courts, and the global treaty monitoring institutions. While there are differences as to how these various IHRIs function in detail (e.g. how these institutions publicly declare a human rights violation, and the forms in which they provide guidance to states), I argue that that they all have two main avenues for implementing IHRL: on the one hand, IHRIs make it *public* that a violation has occurred, and on the other hand, they provide *authoritative guidance* for states as to how to meet their human rights obligations.

Perhaps the most obvious difference between the different IHRIs is that in the case of the regional human rights courts (that is, for the purposes of this thesis, the European Court of Human Rights and the Inter-American Court of Human Rights), the declaration of violation will be in form of a judgment which is legally binding on states.

The UN treaty monitoring institutions, by contrast, as well as the European Committee of Social Rights and the Inter-American Commission, issue their findings in the form of ‘Recommendations’, ‘Conclusions’, ‘Concluding Observations’, or ‘General Comments’. Recommendations, Conclusions, or

Concluding Observations are issued when a particular situation was examined following an individual complaint or a special inquiry, or in reaction to state reports on human rights in their country. General Comments, by contrast, are a specific form of guidance that can be issued by the UN human rights monitoring institutions that are independent of a specific state context – they constitute statements of the Committee’s understanding of the interpretation of a particular right. While not legally binding, Recommendations, Concluding Observations and General Comments all constitute official interpretations of states’ human rights obligations by the respective IHRIs and they have what may be called quasi-legal character. In other words, they provide authoritative guidance to states in a way that is similar to legal judgments.

3.1 PUBLIC AFFIRMATION THAT A VIOLATION HAS TAKEN PLACE

While different in form and degree of legal bindingness, the human rights judgments of the regional human rights courts serve essentially similar functions to the recommendations and comments by regional as well as global IHRIs. Firstly, they constitute a public declaration of the violation in question. Judgments as well as recommendations and comments are of a public nature and so it is openly affirmed that one or more individuals have been wronged by the state. This arguably serves the purpose of establishing the truth of the allegations – we may call this the declarative function of IHRL. Beyond its intrinsic function of vindicating the victim(s) of the given human rights violation, the declaration of the violation arguably also serves the purpose of putting pressure on states to remedy the situation that gave rise to the violation and to ensure that similar violations are prevented in the future. This has also been referred to in the literature as ‘naming and shaming’ of states.³⁵⁰

³⁵⁰ Note that other organizations, such as NGOs, may also engage in ‘naming and shaming’ of states for human rights violations – see Emilie M. Hafner-Burton, ‘Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem’, *International Organization*, 62(4) (2008), 689-716.

3.2 GUIDANCE FOR STATES ...

In addition to declaring that a human rights violation has taken place, the regional courts as well as the UN bodies generally recommend changes in policies, practices and legislation. Both at the global and at the regional level, recommendations will generally encompass two aspects: (i) measures to put an end to the abusive situation that gave rise to the specific human rights complaint at stake (or in the case of the UN human rights institutions, the European Committee of Social Rights or the Inter-American Commission, a violation that was identified on the basis of a state report or a Special Procedure) and (ii) measures to prevent the re-occurrence of violations in the future.³⁵¹

... on ending the given violation

So on the one hand, reports and judgments will give guidance as to how the respondent state is to rectify the unlawful situation that has given rise to the violation of the right(s) of the applicant/ the individual(s) concerned in the given case. Such measures may include changes in legislation, policies or practices of the government or other state actors (like courts and other judicial bodies). They may also require particular actions on the part of the violating state – such as the release from detention of an individual, the provision of medical and psychological care for torture victims, the reopening of domestic proceedings where the previous trial has been found unfair,³⁵² the destruction of information that is held on the human rights victim in a case of violation of privacy, or the revocation of a deportation order,³⁵³ the restoration of liberty of individuals who

³⁵¹See Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn., Oxford University Press, 2005), p.319.

³⁵² IACtHR case of *Caesar v Trinidad and Tobago*, C/123 (2005), para 2, quoted after Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, (2nd edn., Cambridge: Cambridge University Press, 2013), p.192.

³⁵³ Başak Çalı and Nicola Bruch (2011) ‘Monitoring the Implementation of Judgments of the European Court of Human Rights: A Handbook for Non-Governmental Organizations’, https://ecthrproject.files.wordpress.com/2011/07/monitoringhandbook_cali_bruch1.pdf

have been illegally detained, the return of property that was seized, protection for displaced persons to return to their home, the re-instatement of employment, or the cancellation of judicial, administrative, criminal, or police records where a conviction is overturned, or the return of lands to indigenous communities.³⁵⁴ In urgent situations, the Commission may request a state to adopt precautionary measures to prevent irreparable harm to persons.³⁵⁵

Measures can also include symbolic actions that aim to recognize the dignity of victims, such as the rectifying of misinformation that may have been spread about them or about the events at stake, and of providing some consolation to families and friends of victims,³⁵⁶ such as public acts like ceremonies to acknowledge responsibility for human rights violations, public state apologies to victims, the publication and dissemination of the judgment, for instance on national newspapers, measures to commemorate victims or events such as by building monuments or naming streets or schools after victims, or the location and identification of the remains of disappeared persons.³⁵⁷

... and on preventing the re-occurrence of violations

On the other hand, reports and judgments as well as global IHRIs regional will give guidance on what steps states should take to prevent the re-occurrence of human rights violations similar to the given case in the future.³⁵⁸ (In fact, the

³⁵⁴ Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, pp.196-203.

³⁵⁵ ACHR Art. 50(3). Also see Organization of American States, 'Petition and Case System' (2010), p.15, <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>

³⁵⁶ Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, p.204

³⁵⁷ *Ibid.*, pp.204-212.

³⁵⁸ See UN Human Rights Committee, General Comment No 31(80), CCPR/C/21/Rev.1/Add.13 (2004), 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', para 17 which states that "[i]n general, the purposes of the Covenant would be defeated without an

General Comments of the UN committees only provide such forward-looking guidance as they are not in response to a particular violation.) Again, such measures may be in the form of recommendations for changes to legislation, policies or practices of state actors. To ensure that violations are not repeated in the future, the American Court, for instance, has ordered states to engage in capacity building, in particular for police, prosecutors, judges, penitentiary officials, the military and other public authorities. It has also ordered legislative reform, including the adoption, amendment, or repeal of national laws – for instance, in *YATAMA v Nicaragua*, the Court ordered Nicaragua to reform its electoral laws so as to ensure that indigenous and ethnic minority communities could exercise their political and electoral rights.³⁵⁹ In the case of *Claude Reyes v Chile*, it ordered the state to adopt laws to realize the right of access to state-held information.³⁶⁰ They can also include the advice to provide additional training to state authorities (for instance, training on the prohibition of torture for police officers) or to develop awareness-raising measures concerning the type of violation.

In this sense, whenever an applicant brings a case, the outcome of the case will not only be relevant to him or herself, but it can have important implications for the institutional structures of the state more generally. So IHRL is explicitly not only targeted at expressing recognition of a given violation but it also serves the purpose of reforming the given institutional context, to ensure that the policies,

obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices." ACHR Art. 50(3) and Organization of American States, 'Petition and Case System' (2010), p.15, <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>.

³⁵⁹ IACtHR case of *Yatama v Nicaragua*, C/127 (2005), paras 258-259, 267; quoted after Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, p.214.

³⁶⁰ *Claude Reyes v Chile*, C/151 (2006), para 101, quoted after *ibid*.

laws and practices of that state are made more conducive to human rights.³⁶¹ We may call this the reformatory function of IHRL. This, again, fits with the interpretation of human rights responsibility in chapter 4B as statist, institutional responsibility.

3.3 NO DIRECT ENFORCEMENT OF HUMAN RIGHTS OBLIGATIONS

I have argued that IHRIs implement international human rights law in two main ways. Firstly, they publicize that a human rights violation has occurred, and secondly, they propose authoritative guidance for states as to how to implement their human rights obligations both with regard to the individual(s) immediately affected by the instance of the violation and how to avoid similar violations vis-à-vis anyone else in the future. However, the actual enforcement of human rights obligations ‘on the ground’, i.e. in a given country context, is left to states. And indeed, while IHRIs provide guidance on measures that states should take, states are left some discretion as to how, in detail, to implement the recommendations.

A number of minimum obligations are generally imposed by international human rights treaties: individuals need to be able to seek an effective domestic legal remedy where they find their rights violated; states have to investigate alleged violations; states need to compensate or rehabilitate victims of violations and prevent violations in the future. But how exactly to discharge these duties will be up to the state party.³⁶² States are also relatively free to decide, for instance, which institutions to authorize at the domestic level to fulfil human rights duties. So for instance, states may opt to have their human rights duties

³⁶¹ Çalı argues in a similar vein that one purpose of the European Human Rights System is to “trigger reform”. Başak Çalı (2008) ‘The Purposes of the European Human Rights System: One or Many?’, *European Human Rights Law Review*, 3 (2008), 299-306.

³⁶² See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), p. 185, for these minimum requirements.

discharged by administrative authorities, by national human rights commissions, or by ombudsman's offices or truth commissions, all of which may establish very different types of procedures or mechanisms.³⁶³

In other words, IHRI's cannot enforce human rights standards directly. While the regional courts and UN monitoring bodies provide guidance on policy, practice or legislation changes, it is the role of the state to decide on the implementation of any particular measures. The strongest teeth that human rights bodies have to enforce human rights duties is that there is a reputational cost associated to being pointed out as human rights violator. Neither international human rights courts nor treaty monitoring bodies can directly cancel legislation or implement changes in practices or policies.³⁶⁴

So where does this leave us with regard to the question of whether an extension of direct business duties under IHRL would be an effective way to increase business accountability? I argued that commentators suggest that IHRL could provide international and legally binding standards to address the perceived impunity of businesses due to a lack of national level regulation. But given that enforcement of IHR obligations is still left to national authorities IHRL does not provide for an immediate enforcement solution.

Also, IHRL is explicitly subsidiary to domestic law.³⁶⁵ Its purpose is not to replace domestic law but to review whether the judgments rendered by domestic

³⁶³ Ibid., ch.6.

³⁶⁴ Furthermore, as Çalı and Wyss note, international human rights institutions can only spring into action where states expressly agree to be subject to the given international human rights regime in question. See Çalı, Başak and Alice Wyss, 'Authority of International Institutions: The Case for International Human Rights Treaty Bodies', *UCL School of Public Policy Working Paper Series*, 29 (2008), 1-23 (p.1)

³⁶⁵ Paolo G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', *American Journal of International Law*, 97.1 (2003), 38-79 (esp. pp.57-58); also see Dean Spielmann, 'Whither the Margin of Appreciation?', UCL-Current Legal Problems Lecture (20

courts are in line with international human rights commitments.³⁶⁶ So international human rights law only comes into play when domestic remedies have been exhausted.³⁶⁷ This means that individuals (or other legal persons like NGOs) who have a human rights complaint must first pursue domestic legal avenues to decide on the situation.

Arguably, the fact that IHRI do not have powers to directly enforce human rights obligations, and enforcement is ultimately left to states, could be taken as an argument against the effectiveness of human rights treaties in general: as states are both the subjects but also the enforcers of international human rights law, it may be argued that states will only implement their human rights duties where they consider it in their interest. However, the case is arguably stronger for businesses. States by and large voluntarily sign up to IHRL which suggests that, at least in principle, they accept that they have human rights obligations, that it is at least part of their role to realize human rights. There is comparatively less agreement as to what obligations, if any, business entities have with regard to human rights. Even though there is a growing sense that business entities

March 2014) for an argument that the doctrine of the margin of appreciation can be regarded as an incentive for domestic judges to “conduct the necessary Convention review, realizing in this way the principle of subsidiarity”. Also see the ECtHR case of “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” v Belgium, A/6 (1968), para B10, quoted after Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, p.127.

³⁶⁶ *Handyside v The United Kingdom*, A24 (1976), paras 48-50 (1976). Para 49 of Handyside notes that it is not the Court’s task to “take the place of the competent national courts but rather to review [...] the decisions they delivered in the exercise of their power of appreciation.” Quoted after Pasqualucci, p.127.

³⁶⁷ In the case of the Inter-American system, domestic remedies are considered exhausted “when the judicial branch has issued a decision of last resort.” Under certain circumstances, it may not be necessary to exhaust domestic remedies – e.g. the *Inter-American Commission* may examine a petition in which domestic remedies have not been exhausted when domestic laws do not provide due process to protect the rights allegedly violated; the alleged victim has not been allowed access to domestic remedies or has been kept from exhausting them; or there is delay in the issuance of a final decision on the case with no valid reason.” See Organization of American States, ‘Petition and Case System’ (2010), pp.8-9, <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>.

should not only, or at all cost, pursue profits, profit is still considered the primary purpose of business entities by many, not least corporate actors themselves, and there is little agreement on how to balance this purpose against obligations with regard to human rights, as the debates surrounding the Draft Norms and Guiding Principles, among others, have demonstrated.

This said, like for states, the naming and shaming by international human rights institutions may also provide a strong incentive for companies to comply with the standards set out by IHRL. The language of human rights is arguably a powerful tool and it could certainly be argued that if IHRL was extended to business, and international human rights institutions would consequently address business-human rights issues more directly and more frequently, this in itself might lead to improvements in business behaviour simply because business has no incentive to be put on the spot in front of consumers.

4. CAN IHRL ADDRESS DISTINCT MOTIVATIONS FOR CORPORATE ACCOUNTABILITY?

In this section I will argue that beyond the overarching concern from lack of national regulation, we can identify a number of distinct motivations that underlie calls for business-human rights accountability, ranging from (i) business compliance with international minimum standards; (ii) the compensation of victims for harm; (iii) the punishment of corporations or individual corporate actors, to (iv) calls for greater corporate social responsibility or distributive justice more broadly.

To illustrate these motivations, I will draw on some of the most typical situations in which business entities have been found to harm important human interests. However, I should note at the outset that I do not thereby mean to suggest that each of these different situations of harmful corporate behaviour neatly

corresponds to one particular motivation. Indeed, in most if not all instances, several of the motivations will be in play, perhaps to different degrees.

4.1 CALLING FOR BUSINESS COMPLIANCE WITH INTERNATIONAL MINIMUM STANDARDS

One reason for commentators to refer to international human rights law where corporations engage in harmful behaviour is that IHRL is taken to provide internationally agreed minimum standards that can provide guidance where national regulation is lacking or unenforced. Take one of the most common scenarios that has prompted calls for business-human rights accountability: situations where companies violate labour standards in their operations. Common allegations include, for instance, that companies use child or forced labour, pay inadequate wages, or do not provide decent working conditions, which may include not adhering to basic health and safety standards. Companies in the footwear, clothing and sporting goods industries have received particular attention for inhumane working conditions in factories. Corporations have also been known to withhold workers' identity papers in order to force them into abusive contracts. They have been found to fail to provide safety training or safety equipment for hazardous jobs, or to prevent workers from organizing and bargaining.³⁶⁸

Arguably, commentators call for corporate accountability in such cases to achieve changes in corporate behaviour and to achieve that businesses respect certain minimum standards in their operations. International human rights law encompasses a range of rights that are directly related to employment and the conditions of employment – from the right to just and favourable conditions of work which ensures, among other things, fair wages that allow for decent living, safe and healthy working conditions, rest and leisure; the right to form and join

³⁶⁸ See above chapter 1, section 1.2 above for a more detailed discussion of such examples.

trade unions and to strike; rights to social security and insurance; or the specific rights of children not to be economically exploited or to perform any work that is hazardous or interferes with their education, health or development.³⁶⁹ And while I argued in chapter 4 that in order for IHRL to be applicable to business entities, international human rights institutions would need to first translate the specific duties that correspond to each of these rights, because duties have so far been interpreted against the specific backdrop of responsibilities and powers of states, it seems nevertheless plausible to argue that international human rights standards at least provide a good starting point for developing corporate duties in the workplace.³⁷⁰ Arguably, translation for rights that concern the workplace or conditions of employment more generally is considerably more straightforward than translation of other rights, such as human rights concerning political participation or civic status.³⁷¹ States, for instance, have duties to protect the right to remuneration that provides workers with fair wages and equal remuneration for work of equal value, or duties to adopt national occupational health and safety policies aimed at reducing accidents and injuries to health arising in the context of employment. While business entities would not have the same duties, e.g. to develop and implement policies, they could be assigned duties to pay fair wages, or to put in place appropriate health and safety provisions in the workplace (even where states fail to regulate these areas of employment). Indeed, a range of (non-binding) guidance materials for businesses have been developed by organizations such as the International

³⁶⁹ See chapter 4, section 2.5 above.

³⁷⁰ See, for instance, United Nations Office of the High Commissioner for Human Rights, the United Nations Global Compact, the International Business Leaders Forum and the Castan Centre for Human Rights Law of Monash, *Human Rights Translated – A Business Reference Guide* (2008), http://hrbdf.org/doc/human_rights_translated.pdf

³⁷¹ For a discussion of the latter, see chapter 4B, section 2.4 above.

Labour Organization (ILO) or the UN Global Compact Office and the UN Office of the High Commissioner for Human Rights.³⁷²

4.2 THE CASE FOR COMPENSATION FOR CORPORATE HARM

In some cases, calls for corporate accountability have essentially been calls for material compensation for damage or harm incurred through corporate activities. In many of the cases that are highlighted by human rights critics, business enterprises have come under scrutiny for the adverse social or environmental consequences of their activities. In particular firms in the oil, gas or mining sector have been criticized in this regard because their operations often involve forced resettlements of individuals or entire communities. They have also been found to pollute the environment that people rely on for their livelihoods. So for instance, the U.S. petrochemical corporation Chevron's drilling practices in the Ecuadorian Amazon have been related to severe pollution and health problems in the indigenous communities and the people in the area. In the Niger Delta, oil spills by the Royal Dutch Shell company have resulted in ongoing damage to fisheries and farm lands. This, in turn, has had negative impacts on people's livelihoods in a number of ways – to name just a few of the consequences that critics have pointed out, people who worked as fishermen and farmers have largely lost their jobs, food prices have risen significantly, and drinking water has been contaminated which causes cancer and other serious health problems to the population who consumes the water.

³⁷² See the ILO's eight conventions that cover the right to freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

<http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> These principles are also covered in the ILO's *Declaration on Fundamental Principles and Rights at Work* (1998). Also see United Nations Office of the High Commissioner for Human Rights et al., *Human Rights Translated – A Business Reference Guide* (2008), http://hrbdf.org/doc/human_rights_translated.pdf.

As in the case of labour standard violations, one objective to call for corporate human rights accountability in such cases may be that international human rights law provides some of the standards that are being violated in such cases. E.g., some of the jurisprudence on the rights to an adequate standard of living, to housing, or also on the right to freedom of religion (where places of residence have religious or spiritual value to residents) may provide useful guidance for developing standards of corporate behaviour in such instances and to help prevent and mitigate adverse social and environmental consequences of corporate activities in the future.³⁷³ For instance, international human rights jurisprudence on the right to housing prohibits states from forcefully evicting individuals, and sets out the exceptional circumstances and conditions under which resettlement may be legitimate. So again, IHRL might provide a starting point for outlining duties that businesses could be assigned with regard to the important human interests involved.

However, calls for accountability in such cases are arguably also, and importantly, about the provision of adequate material compensation where damage has already occurred.³⁷⁴ It seems fair to argue that the argument in favour of human rights accountability here is essentially an argument from corrective justice: companies should be responsible to provide compensation where they cause material damage to individuals.

Would an extension of direct duties of business under IHRL be useful in such situations? Arguably, the contribution that IHRL can make in this regard is limited. International human rights institutions may award reparations³⁷⁵ -

³⁷³ Amnesty International, *The True 'Tragedy' – Delays and Failures in Tackling Oil Spills in the Niger Delta*; Amnesty International, *Petroleum, pollution and poverty in the Niger Delta* (2009), esp. p. 57, <http://www.amnesty.org/en/library/info/AFR44/017/2009>

³⁷⁴ Amnesty International, *Petroleum, pollution and poverty in the Niger Delta*, p.60.

³⁷⁵ The ECtHR's authority to afford reparation is laid down in Article 41 of the ECHR which states that "[i]f the Court finds that there has been a violation of the Convention or the protocols

victims of human rights violations can be compensated for the legal costs they incur in bringing a human rights case and they may sometimes receive compensatory payments for damages resulting from the violation. However, material compensation is certainly not a core function of IHRL and there are a number of limitations to the ability of IHRIs to achieve such compensation. The European Court of Human Rights, for instance, has been argued to have taken a rather cautious approach to compensation; for one, the ECtHR reserves discretion to decide on a case-by-case basis whether it deems it necessary to afford what it calls ‘just satisfaction’³⁷⁶ at all, and such just satisfaction is not always afforded in the form of pecuniary damages. In some cases, the ECtHR may decide that the declaratory judgment establishing the violation(s) as such constitutes just satisfaction, leaving it up to the responded state to decide what, if any, redress to offer to the victim(s).³⁷⁷ And the requirement to prove a causal link between the harm suffered and the given human rights violation³⁷⁸ has meant that awards of pecuniary damages have been less frequently awarded than non-pecuniary damages (that aim, for instance, to compensate victims for moral injuries, like harm to reputation, psychological harm, humiliation etc.).³⁷⁹ The ECtHR generally only exercises its power to order damages when it is “satisfied that the injured party cannot obtain adequate reparation under the national law of

thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” Article 63(1) of the American Convention states “*If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measures or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*”

³⁷⁶ Ibid.

³⁷⁷ Ingrid Nifosi-Sutton, ‘The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective’, *Harvard Human Rights Journal*, 23 (2010), 51-73 (pp.52-53).

³⁷⁸ *Goodwin v The United Kingdom*, Grand Chamber, Reports 2002-VI, paras 48-50; quoted after *ibid.*, p.54.

³⁷⁹ Shelton, *Remedies in International Human Rights Law*, p.298 and p.319.

the State concerned”,³⁸⁰ and furthermore, the ECtHR has been criticized for not ordering damages consistently even where redress is unavailable domestically.³⁸¹

This said, in particular the Inter-American Court of Human Rights established some case law where, for instance, it ordered compensation for violations of the rights to traditionally used and occupied territories – for instance, in the case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* where the IACtHR held that Nicaragua had violated the property rights of the Awas Tingni community by granting logging concessions for the community’s territory to a foreign company and failing to recognize the community’s customary land tenure system. The IACtHR ordered Nicaragua to “[c]arry out the delimitation, demarcation and titling of the corresponding lands of the members of the Awas Tingni Community [...] with full participation by the Community and taking into account its customary laws, values, customs and mores” and to pay \$50,000 in reparation for immaterial damages, to be used for the collective benefit of the community.³⁸²

It would be conceivable that international human rights institutions could develop similar jurisprudence targeted at business entities. However, current IHRL does not yet offer guidance on the responsibilities that business entities could legitimately be imposed – again, state and business duties will arguably look different in many respects. States, for one, are the kinds of agents that can make policy decisions as to whether or not a specific piece of land is made

³⁸⁰ Murray Hunt, ‘State Obligations Following from a Judgment of the European Court of Human Rights’, in *European Court of Human Rights: Remedies and Execution of Judgments*, ed. by Theodora A. Christou and Juan Pablo Raymond (London: British Institute of International and Comparative Law, 2005), p.31; quoted after Nifosi-Sutton, ‘The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective’, p.54.

³⁸¹ Nifosi-Sutton, *ibid.*, p.55.

³⁸² *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, C/79 (2001); quoted after Diana Contreras-Garduño and Sebastiaan Rombouts, ‘Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights’, *Utrecht Journal of International and European Law*, 27 (72) (2010), pp.4-17 (p.15).

available to private investors, or as to how to regulate property rights, including property rights of communities that have systems of communal land ownership. But states also have responsibilities to ensure that the human rights of individuals in its territory are respected and realized – so when making decisions regarding land use, perhaps in the interest of economic development, they have obligations to take into account their human rights duties and decide whether these obligations are compatible with its decision to grant concessions. Business entities may have duties not to pursue a specific investment if it becomes known to them that such investment could only be pursued at the cost of resettling native communities from lands that are of important economic or cultural value to them, perhaps they might even legitimately be assigned some duties to investigate the potential adverse impact of their operations in advance of pursuing a particular investment.

However, their duties are arguably less comprehensive than the ones of states – they do not have the same extensive duties of care to ensure the well-being and rights of individuals that states have. In some cases, especially where business entities invest abroad, they might not even have the relevant access to information on the detailed impact of their operations. At the same time, businesses do not have the same legitimacy – given a lack of the appropriate accountability mechanisms to the population at large³⁸³ - to make the kinds of decisions that states may make. International human rights bodies generally leave a margin of discretion to states as to when individual rights may be balanced against competing policy considerations, including considerations of economic development³⁸⁴ and so human rights institutions will provide guidance in relatively general terms to states as to when decisions to grant concessions for land use are in line with their human rights duties. For business entities, by

³⁸³ Also see argument in chapter 5, section 3.3 on this point.

³⁸⁴ See chapter 4B, section 2.7 above.

contrast, we would want much more detailed guidance on what conditions have to be met for an investment to be legitimate.

Finally, and this relates back to the argument above that an extension of IHRL to business entities would not be able to close the enforcement gap, the implementation of compensation, even where it is ordered by an IHRI, is left to states.

4.3 THE CRIMINAL CASE FOR 'HUMAN RIGHTS RESPONSIBILITY'

I argue that yet another motivation for critics to call for business accountability has been to morally hold corporations to account. Commentators often stress in calling for human rights accountability that businesses should not get away with harmful behaviour, that human rights duties for business entities are needed to counter widespread corporate impunity.³⁸⁵ While the theme from lack of accountability plays a role in all of the examples of corporate harm I have discussed, the argument from corporate impunity is arguably particularly strong in cases where business entities have been involved in particularly serious types of harm. Often, this has been the case where business entities are implicated, in one way or other, in human rights violations by governments.³⁸⁶ Such cases

³⁸⁵ E.g. Surya Deva, *Regulating Corporate Human Rights Violations* (Oxford: Routledge, 2012); Kinley and Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', p.934. Also see Saladin Meckled-García, 'How to Think About the Problem of Non-State Actors and Human Rights', *Proceedings of the XXII World Congress of Philosophy*, 11 (2008), p.44 on the observation that commentators propose international human rights provisions to businesses as a way to address a gap in accountability.

³⁸⁶ A study conducted by the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, which reviewed a sample of 320 cases posted on the Business and Human rights Resource Center website (www.business-humanrights.org) between February 2005 and December 2007. This website was considered by the Special Representative to be the most comprehensive and objective source available, given the lack of a universal database for corporate abuses. This study found that 60 percent of cases featured direct business involvement in alleged abuses and 40 percent indirect involvement. See A/HRC/8/5/Add.2 (2008) Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development –

have also been referred to as situations of business complicity in human rights violations.³⁸⁷ In such instances, companies may not directly cause the abuse at stake but contribute to, or benefit from, abusive state behaviour. While complicity can come in many different degrees, and the different types of complicity do not fall into clear-cut categories, Clapham and Jerbi have suggested a useful distinction between direct, beneficial and silent complicity.³⁸⁸

Direct complicity occurs where corporations are found to knowingly and actively help to commit violations. So for instance, companies have supplied regimes with the materials and services needed to commit killings – as in the case of *van Anraat*,³⁸⁹ a Dutch manufacturer who directly and knowingly delivered the chemicals required to produce mustard gas to Saddam Hussein.

Corporations have also been implicated in violent clamp-downs of protests against their operations, resulting in severe physical harm to or even death of protesters, as the example of the oil company Royal Dutch Shell in Nigeria cited in chapter 1 illustrates.³⁹⁰

Corporations have also benefitted from human rights violations on part of the government even where they may not have been actively involved in committing the harm – illustrated by the case discussed in chapter 1 where a number of

report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse.

³⁸⁷ See UNHRC (2008) A/HRC/8/5/Add.2, ‘Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuses’

³⁸⁸ Andrew Clapham and Scott Jerbi (2000) ‘Categories of Corporate Complicity in Human Rights Abuses’, *Hastings International and Comparative Law Review*, 24 (2000-2001), 339-349.

³⁸⁹ *Public Prosecutor v Frans Cornelius Adrianus van Anraat*, District Court of The Hague, 23 December 2005, Case No. AX6406 and Court of Appeal of The Hague, 9 May 2007, Case No. BA6734

³⁹⁰ See discussion at pp.18-19.

multinational oil companies benefitted from forced and child labour supplied by the Burmese state-owned oil company Myanma Oil and Gas Enterprise (MOGE) for a joint venture.³⁹¹

There have also been serious labour standards abuses that have triggered calls against corporate impunity, such as the case of the collapse of an eight-story garment factory in Bangladesh producing clothes for many European and US brands after a fire in 2013, killing and injuring thousands of employees.³⁹² In such cases, where corporate activities – more or less directly – contribute to such serious harm, the reason to call for human rights responsibility is arguably not so much about referring to the standards established by IHRL – violations like torture or killing will be illegal under virtually any national criminal legal system. In that sense, there is no need to refer to IHRL for external standards. And in some of the examples mentioned above, there have indeed been criminal suits – for instance, in the case of Frans van Anraat, the Dutch supplier of chemicals for the production of mustard gas to Saddam Hussein who was sentenced to 17 years of prison after the District Court of The Hague found him guilty of complicity to war crimes.³⁹³ However, the concern is that businesses will often not be held accountable under national criminal systems and so IHRL is called on to provide international responsibility to substitute for domestic criminal responsibility.

An extension of direct duties under IHRL to business entities, however, is arguably not fit to address the underlying concerns here. For one, I argued that

³⁹¹ See pp.19-20.

³⁹² Also see above at p.16 for more detail.

³⁹³ *Public Prosecutor v Frans Cornelius Adrianus van Anraat*, District Court of The Hague, 23 December 2005, Case No. AX6406 and Court of Appeal of The Hague, 9 May 2007, Case No. BA6734.

IHRL does not provide for enforcement mechanisms independently of national enforcement. IHRL does also not provide for any mechanisms that would hold the individuals who were directly involved in the violation to account – for instance, there are no individual punishments, such as incarceration, associated to human rights violations. Also, as I argued in more detail in chapter 4B, the principles of responsibility of IHRL would need to be re-thought entirely to be fit to establish criminal-type responsibility for any actor. As I argued above, because human rights responsibility has been centred around the idea of state institutional responsibility, the *modi* of responsibility have explicitly not been concerned with establish individual guilt – so for instance, the individual who committed the violation does not even have to be known to the international human rights institution determining that a violation has taken place. In other words, IHRL does explicitly not play a punitive role.³⁹⁴

4.4 CALLS FOR BROADER CORPORATE SOCIAL RESPONSIBILITY

In some cases, calls for corporate human rights accountability may be less calls for *legal* accountability, either in the criminal or in the civil sense, and may instead have another important purpose: to draw attention to the possible moral implications of business activities and to appeal to the corporate social responsibility in a broader way. Consider, for instance, the third type of complicity identified by Clapham and Jerbi, silent complicity. In cases of silent complicity, corporations fail to use their influence to condemn or criticize human rights abuses committed by governments. This may occur when employees of the company are affected by abuses, such as where human rights or labour activists that work for the company are imprisoned and the company decides not to take any action. Corporations have also been accused of silent complicity for

³⁹⁴ In the case of *Avsar v Turkey*, Reports 2001-VII, the ECtHR stated that “[t]he Court is not concerned with reaching any findings as to guilt or innocence in that sense.” Also see discussion in chapter 4B, section 4 above.

operating in countries with abusive governments, or for fuelling abusive regimes or ongoing violent conflicts. So for instance, US and European companies have been criticized for trading weapons, diamonds and timber from conflict states like Angola, the Democratic Republic of Congo (DRC), Sierra Leone, Côte d'Ivoire and Liberia.³⁹⁵ Complicity may be considered silent in such cases assuming that corporations were not involved in the actual abuses during the conflicts, nor in planning the abuses – the charge then is that the companies did not use their economic weight to influence the government to end conflicts.

I should emphasize that the three categories of complicity are coarse and certainly do not capture all the possible different ‘shades’ of complicity. And there may sometimes be reasonable room for disagreement of what kind of complicity is at stake – in the case of weapons and natural resource trade from conflict regions, for instance, complicity may also be considered beneficial (and not just silent) if the ongoing conflicts were effectively conducive to the cheap supply of natural resources to companies. And if the argument can be made that corporations provided financial support without which conflicts would likely have ended much earlier, in other words, that corporations effectively sustained armed conflicts, we may even think of company involvement in these instances as a form of direct complicity. In this scenario, corporations at least to some extent provided the economic resources necessary for the government to continue to commit human rights violations.³⁹⁶

³⁹⁵ Wolfgang Kaleck and Miriam Saage-Maass, ‘Corporate Accountability for Human Rights Violations Amounting to International Crimes: the Status Quo and Its Challenges’, *Journal of International Criminal Justice*, 8.3 (2010), 699-724.

³⁹⁶ UN Security Council, UNSC S/2003/1027 (2003) ‘Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo’ found over 150 companies involved in illegal exploitation of natural resources in some way, and thereby enabling armed groups to buy weapons and commit crimes. Quoted after Wim Huisman and Elies Van Sliedregt, ‘Rogue traders: Dutch businessmen, international crimes and corporate complicity’, *Journal of International Criminal Justice*, 8(3) (2010), 803-828 (p.804).

However, where complicity is more akin to silent complicity, there is often room for debate over what kind of responsibilities corporations can be assigned in the first place, and in turn, what should be the appropriate regulatory response. Legal regulation of actors makes sense where obligations can be defined and generalized reasonably accurately in advance but this may not be possible in all the spheres of life where businesses can affect social and individual human interests. Questions of when businesses should or should not engage in a country given that country's human rights record, or of when corporations should seek to use their political influence to improve the human rights situation might be among those questions that defy easy, or generalisable, answers.

This is not to say that business entities cannot be thought to have any moral responsibilities in such instances, and calls for business responsibility in those cases may fulfil a valuable function to appeal to the social or moral conscience of business actors to seek to ensure that their activities do not have the kinds of adverse impacts described above. But an extension of IHRL to business entities would arguably not be an appropriate or effective response. Above I discussed at length that even for the less controversial areas of business responsibility, an extension of human rights duties from states to businesses would require the translation of such duties – and in areas where it is very contested what such duties should be in the first place such translation would be much more problematic and unlikely to gather the support needed by states to lead to results in practice at least in the short and medium run.

The use of patents by pharmaceutical companies serves as another example that has motivated calls for human rights responsibility. Patents have been criticized as artificially driving up prices for medicine and in turn hampering access to medicine for the global poor; and thereby negatively affecting people's interest in health, and even their interest in life. In particular, criticism has been voiced

with respect to pharmaceutical firms manufacturing any life-saving medications, such as medication to treat HIV/AIDS. The idea is that the deprivation of medicine causes avoidable suffering which could be remedied if certain policies or institutions were changed. The argument in favour of business accountability here is at its core an argument from social justice. The idea is that corporations that make huge profits should not do so at the expense of fundamental human interests, or use at least some of those profits to positively contribute to the realization of important socio-economic interests. In other words, calls for human rights responsibility here are calls for ‘corporate social responsibility’ in a broader sense.

There certainly is a good moral argument to be made that corporations like pharmaceutical companies, which have direct influence on essential human interests, and which given their gigantic budgets could easily afford to make medication more accessible for the poor, should do so. However, again the question has to be whether an extension of IHRL to business corporations would be able to provide a solution to this situation. In chapter 4, I argued in detail that IHRL, at least in its current form, does not provide guidance on the obligations that could be imposed on business entities, as opposed to states.

Again, reference to IHRL may be useful insofar as it outlines some of the most important human interests and could in that way be taken to serve as a starting point to develop guidance for business entities as to how they could - given the extensive capacities and budgets of many corporations – contribute to progressively realize these interests. The Guidelines prepared by the UN Special Rapporteur on the right to the highest attainable standard of health,³⁹⁷ for instance, propose a number of steps that business may take to increase access to

³⁹⁷ UN General Assembly, UNGA A/63/263 (2008) ‘Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines’.

medicines of the poorest and most vulnerable.³⁹⁸ But the duties that states currently have with regard to the provisions of health and healthcare are arguably quite different from the duties that could be imposed on businesses and so again, as I argued in more detail in chapter 5, an extension of direct duties to business would only be justified if duties were reinterpreted for business.

4.5 THE CASE OF BUSINESS ENTITIES EXERCISING STATE FUNCTIONS

In some cases, commentators have called for business-human rights accountability where corporations take on functions that have traditionally been the exclusive domain of states. A commonly cited example in this context concerns abuses by private military and security companies (PMSCs) that play an increasing role in providing services to states in conflict zones around the world.³⁹⁹ In the aftermath of the invasion of Iraq in 2003, for instance, between 15,000 and 20,000 private contractors were employed for a range of services from handling military logistics to acting as translators and interrogators in detention facilities, and one case that gained particular attention by human rights activists and other commentators was the ill-treatment and torture of inmates of Abu Ghraib prison in Iraq in which contractors from two companies, Titan Corp. and CACI, were deeply implicated.⁴⁰⁰ And businesses have not only assumed state-like functions in conflict contexts. Private companies have been charged by governments to fulfil functions ranging from the provision of health care,

³⁹⁸ They stipulate, for instance that “*compan[ies] should integrate human rights, including the right to the highest attainable standard of health, into the strategies, policies, programmes, projects and activities of the company*” and “[w]henever formulating and implementing its strategies, policies, programmes, projects and activities that bear upon access to medicines, the company should give particular attention to the needs of disadvantaged individuals, communities and populations, such as children, the elderly and those living in poverty.”, *Ibid.*, pp.16-17.

³⁹⁹ Peter W. Singer, *Corporate Warriors: The Rise of the Privatised Military Industry* (Ithaca: Cornell University Press, 2003).

⁴⁰⁰ Philip Alston, ‘The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’’, in his *Non-State Actors and Human Rights*, ed. by Philip Alston (Oxford: Oxford University Press, 2005), p.9.

Also see <http://www.amnestyusa.org/military-contractors/page.do?id=1101665>.

education, or the operation of detention facilities.⁴⁰¹ In the United States, in some private residential areas (so-called ‘common-interest developments’) local government and police functions are effectively privatized and no longer exercised by the state.⁴⁰²

The argument in favour of business-human rights accountability here is that business entities should be held to the same standards that state actors would be held to if they were to exercise these functions.⁴⁰³ Applying human rights standards directly to business in such instances would be a way of preventing that human rights standards are undercut by states outsourcing their functions to corporations. Would an extension of international human rights law to business be the right response to address these kinds of situations? Firstly, it is important to stress that IHRL already imposes duties on states to ensure that private actors that fulfil what are essentially public functions do so in compliance with IHRL.⁴⁰⁴ As I discussed above,⁴⁰⁵ public functions are the kinds of functions that states, by nature, have duties to perform and cannot absolve themselves from.

This means that states remain responsible for private actors empowered to perform public functions. So for instance, when states decide to hire private security firms to run their prisons or to perform other *de facto* police or military functions, or when airlines perform immigration control functions on behalf of the state, it remains the responsibility of the state to ensure that the companies

⁴⁰¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), p.8.

⁴⁰² Evan McKenzie, *Privatopia* (New Haven: Yale University Press, 1994), pp.15-16; quoted after *ibid.*, pp.10-11.

⁴⁰³ Swiss Confederation, Federal Department of Foreign Affairs and Geneva Academy of International Humanitarian Law and Human Rights, *Protecting Dignity: An Agenda for Human Rights* (2011), p.15, http://www.udhr60.ch/docs/Panel-humanDignity_rapport2011.pdf

⁴⁰⁴ Clapham, *Human Rights Obligations of Non-State Actors*, p.11.

⁴⁰⁵ See discussion in chapter 4B, section 3.3 above.

charged with providing these public services act in accordance with the state's human rights obligations and the state will incur direct responsibility under IHRL for any conduct of the company that is not in line with these obligations (as long as the business acts on the instructions or under the control of the state, this is regardless of whether the business was formally contracted to fulfil public functions).⁴⁰⁶

The case becomes more difficult, of course, in contexts where the relationship between the state and the corporation that *de facto* fulfils the 'state function' is less clear. Karp, for instance discusses the case of companies that operate in the Amazon rainforest in Brazil. In this region, despite Brazil not qualifying as a fragile or weak state generally speaking, the state can be considered as largely absent. Multinational corporations operating in this region commonly provide hospitals and educational facilities, for their employees but also for local communities more broadly, and construct public infrastructure like roads or railways. In other words, businesses here act as *de facto* providers of what are generally agreed to be public services or public goods – and in that sense assume state-like functions.⁴⁰⁷ However, these companies are not officially contracted to fulfil these functions. In this situation, it is less clear whether the state bears direct responsibility to ensure that such services are delivered in line with international human rights obligations.

So might it be justified to apply IHRL directly to corporations in such instances? In cases where business entities fulfil functions which are very similar to functions traditionally fulfilled by states, it may intuitively make sense to hold business entities to the same standards. And the arguments from a need for

⁴⁰⁶ See discussion in chapter 4B, section 3.3 above

⁴⁰⁷ Karp, *Responsibility for Human Rights – Transnational Corporations in Imperfect States*, pp.122-125.

translation⁴⁰⁸ would not seem to apply: existing international human rights law jurisprudence on how states must and must not treat individuals in detention, for instance, could be quite straightforwardly applied to private contractors who are involved in the operation and running of detention centres. Similarly, it might seem quite uncontroversial to ask companies that provide education services to supply them in line with international human rights standards for states, such as not to discriminate against students on the basis of gender, ethnicity or any other of the protected characteristics in IHRL.

However, firstly, an extension of IHRL would not be able to close the ‘impunity gap’ in the sense of ensuring that business entities are *legally* held to account. As was argued above, IHRL is enforced by states rather than international human rights institutions directly and so in fragile state contexts like Iraq or the Brazilian Amazon region it seems particularly problematic to assume that an extension of duties to businesses would have an immediate enforcement effect. The core problem in such fragile state contexts is a much broader problem of failure of accountability mechanisms, and not a problem of a lack of legal standards that would apply. In fact, as has been pointed out by a range of commentators, in the case of the abuses by private military contractors in Iraq one major problem in holding them accountable has been that on the one hand, they were granted immunity from Iraqi legal process by the Coalition Provisional Authority,⁴⁰⁹ and at the same time their home governments have failed to hold them accountable for crimes committed despite the existence of clear domestic legal standards. As non-governmental organizations like Human Rights Watch have pointed out, contractors could be prosecuted under a number of U.S. federal laws;⁴¹⁰ however, there has been a deep reluctance on the part of

⁴⁰⁸ See in particular discussion in chapter 5, section 3.1 above.

⁴⁰⁹ Alston, ‘The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’, p.10.

⁴¹⁰ <http://www.hrw.org/legacy/english/docs/2004/05/05/iraq8547.htm>, quoted after *ibid*.

states to hold private military contractors to account. In such contexts, it seems unlikely that an extension of IHRL, which relies on much softer implementation mechanisms than the national laws that could be applied if states were willing to take action, would provide an effective solution.

But secondly, a direct extension of human rights duties to businesses would raise important normative questions: while businesses can *de facto* exercise the kinds of functions that are typically the domain of states that does not mean they necessarily have the same kinds of duties. Returning to the example of businesses providing education services in the Brazilian Amazon: perhaps a case can be made that *as long as* companies do provide such services, they should comply with the duties that states have with regard to the provision of education, such as the principles of non-discrimination mentioned above.⁴¹¹ However, what happens in the case of companies ending their operations in the area? It seems much less plausible to argue that these companies should have duties to continue the provision of education services – their duties seem, at least in some way, contingent on their actual engagement in the area in the first place. This, by contrast, is not true for states – states, as the kinds of institutions they are, have obligations to provide for education that are independent of their doing so or not. Asking companies to continue to provide schooling in areas of the country where they do not even have operations would seem to confuse their role with the role of a state.⁴¹²

⁴¹¹ See the argument by Karp that *the facto* provision of public goods by business entities can justify increased responsibility to protect and provide for human rights of these entities – he argues that “*along with the provision of collective goods, which can be ‘good’ for a collective, comes enhanced responsibility to prevent the ‘bad’ that can befall individuals in the process.*”, Karp, *Responsibility for Human Rights – Transnational Corporations in Imperfect States*, pp.124-125.

⁴¹² *Ibid.*, p.150;

5. CONCLUSION

I argued that one assumption that often seems to be made in the current business-and-human rights debate is that an extension of direct duties for business entities under IHRL would be a way of addressing the perceived impunity that these entities have often enjoyed due to a lack of regulation by states. However, while IHRL establishes international and legally binding duties, which means that it provides for legal standards beyond national systems, I argued that IHRL nevertheless relies for its enforcement on the actions of states. International human rights institutions (IHRIs) do not have powers of direct enforcement. They have two main avenues of implementing human rights standards: to make violations public and ‘name and shame’ states, and to provide guidance to states as to how to better honour their human rights obligations. An extension of direct duties for businesses under IHRL would allow IHRIs to name and shame business entities directly and to develop guidance for businesses with regard to their impact on important human interests – to some extent, this may provide valuable sticks as well as carrots to companies to act more responsibly; however, likely not to the extent needed to make a huge difference to corporate behaviour.

Furthermore, I argued that many of the underlying concerns that have motivated calls for ‘business human rights accountability’ could also not be addressed effectively by an extension of IHRL to these actors. I argued that IHRL neither has a strong compensatory component, nor does it have a punitive function in the way that criminal law does – given that in many cases that have been framed as ‘business-human rights cases’ in the current debate, underlying concerns are to materially compensate victims or to punish corporate actors for harm done, I argued that IHRL would not provide the appropriate response.

Overall, it seems fair to conclude that in the current debate the practical advantages of an extension of direct duties for business entities under IHRL may

have been exaggerated – contrary to what commentators often suggest such an extension would not automatically result in greater accountability of business entities. Through the naming and shaming mechanisms of IHRIs, it might provide some incentives for businesses to change their behaviour. And IHRL could arguably provide some guidance for the development of duties for businesses in the future. However, enforcement mechanisms other than the ones currently offered by IHRL would need to be developed for an effective implementation of such duties.

CHAPTER 7: HOLDING BUSINESSES ACCOUNTABLE – CONCLUSION AND THE WAY FORWARD

In this thesis, I discussed whether international human rights law (IHRL) should be extended to apply to multinational corporations and other business entities directly - a question that I argued is currently much discussed in policy debates as well as the academic literature. I argued that commentators have tended to assume that such an extension would be an appropriate response to the growing influence of business enterprises, without considering

- (1) What implications the extension of IHRL to business entities would have for the role that IHRL currently plays as a specific area of international law; and
- (2) Whether IHRL would at all be a suitable tool to regulate businesses, firstly, in the sense of whether existing human rights standards could be applied to business entities; and secondly, whether an extension of IHRL to business entities would indeed address the concerns that motivate calls for such an extension in the first place.

Broadly speaking, this thesis has aimed to make two contributions to the ongoing business-and-human rights debate: on the one hand, I offered a methodology for thinking about the kind of legal reform that an extension of IHRL to business entities would imply. I argued that the view that underpins much of the current debate is that business organisations should become direct duty bearers under IHRL because of their increasing capacities to impact, or harm, the interests protected by IHRL (I called this the capacity view).⁴¹³ The capacity view, I argued, implies a consequentialist understanding of IHRL that takes this area of international law to be concerned with bringing about certain consequences – that is to protect fundamental human interests against, and

⁴¹³ In chapter 1, section 3.1.

impose duties on, anyone who has the relevant capacities to impact on these interests.

While IHRL, and indeed all legal regulation, is in some sense concerned with bringing about certain consequences, I made the case for not thinking about areas of law only in terms of the interests they seek to further, that is, in terms of the consequences they aim to bring about. I argued that different areas of law are distinguished by core principles, structural and substantive, and that these principles define each area's functional role. The existence of different areas of law thereby allows us to differentiate between different ways that agents can be responsible, and between distinct reasons for holding agents responsible. In other words, different areas of law can express different types of agent liability. I explained why it is not only possible, but indeed valuable, to understand areas of law in terms of the particular type of responsibility they establish and argued that trying to decide issues and cases unconstrained by the functional role of an area of law will lead to fundamental problems of consistency and coherence.

I then applied the interpretivist methodology proposed for determining the functional role of an area of law to IHRL and argued that - given how the scope of human rights duties has been interpreted in international human rights law and jurisprudence, and given how responsibility for human rights violations is generally determined - the functional role of IHRL is best understood as holding state entities to account for the use of their special powers and responsibilities, that is, with regulating the particular relationship between individuals and governments.

I argued that business entities do not have the same powers and responsibilities and so it would challenge the functional role of IHRL to extend it to apply directly to corporations and hold them to account for their abuses. I argued that for human rights duties to be applicable to businesses, a number of changes to IHRL would be necessary that would change IHRL in such a way that its current

functional role and value of expressing the distinct institutional responsibilities of states would be undermined. (I argued this to be the case even if duties under IHRL were only partially extended to business entities as, for instance, the UN Guiding Principles suggest when proposing to extend only ‘duties to respect’ human rights to business entities.)

I then discussed whether IHRL, even if it was extended to apply to business entities directly, would be able to address the concerns that have motivated calls for such an extension in the first place. I argued that one overarching concern that has motivated calls for business-human rights responsibility is the observation that states often fail to regulate businesses sufficiently to prevent or punish harmful corporate activities, but that given the implementation mechanisms of current IHRL an extension of direct human rights duties to business entities would not be able to address the problem from lack of national enforcement. At most, I argued, direct duties for businesses would allow international human rights institutions to name and shame corporate entities more directly – this might have some beneficial effects in terms of incentivizing more responsible business practices, however, likely not be a perfect substitute for other, more directly enforceable, regulation of corporate actors.

I further identified a number of other motivations that underlie calls for business-human rights-accountability. I argued that in some cases, commentators draw on IHRL because this area of international law establishes international minimum standards that can provide a frame of reference where national standards are lacking. Calls for human rights accountability of businesses can also be calls for material compensation for damage caused by corporate activities; or calls to punish corporate actors for wrongdoing and to prevent impunity for abusive behaviour where national criminal laws are not enforced. Lastly, calls for corporate human rights accountability can also be calls not for legal accountability but for corporate social responsibility more broadly speaking. In

such cases, the language of human rights is invoked to call on businesses to positively use their powers and capacities to contribute to the realization of important human interests. Discussing to what extent IHRL is suitable to address these distinct motivations, I concluded that IHRL may to some extent provide a frame of reference for judging corporate behaviour, and provide a starting point for developing obligations for businesses. In the same vein, it may provide some guidance to develop corporate social responsibility initiatives that positively contribute to the realization of important interests. However, IHRL does not currently offer clear standards that could directly be applied to businesses. Existing international human rights jurisprudence would first need to be reinterpreted before it could be applied to business entities (as opposed to states, as it has to date). And furthermore, IHRL neither has a strong compensatory component, nor does it fulfil a punitive function, and so it is arguably not well suited to address concerns from material compensation or the punishment of corporate wrongdoing.

In sum, I argue that in the current debate, the practical advantages of an extension of direct duties for business entities under IHRL may have been exaggerated – contrary to what commentators have tended to suggest (or imply), such an extension would not automatically result in greater accountability of business entities. IHRL can provide a starting point for the development of duties for businesses in the future; however, enforcement mechanisms other than the ones currently offered by IHRL would need to be developed for an effective implementation of such duties.

These pragmatic obstacles are not, of course, insurmountable. The law is a social construct and as such can be changed – and so the practical obstacles described here might simply be taken to identify the challenges that need to be addressed to make IHRL more effective in addressing the problems posed by corporate

abusive behaviour in the future. It would be perfectly conceivable, for instance, for international human rights institutions to begin to develop the appropriate jurisprudence for businesses. We could also imagine new treaty bodies, or even a new world court of human rights,⁴¹⁴ to be established to address the particular challenges posed by MNCs and other business entities. For reasons of political consensus, or rather the lack thereof, such reforms might take time and not be short term solutions,⁴¹⁵ and it is also unlikely that an international body would offer immediate easy access, let alone swift procedures and remedies, to potential applicants, at least not overnight.⁴¹⁶ But that alone would not be a reason *not* to pursue this route at least for the longer run. And such new institutions might be designed from the start to meet what were identified as shortcomings here – for instance, we could imagine a treaty body that would have powers to make decisions regarding material compensation to be paid by companies for violations of standards, or one that could impose criminal law type sanctions on business entities.

However, I also argued that there is a *normative* case to keep a distinction between state responsibilities for human rights on the one hand, and business/private actor responsibilities for important human interests on the other. I argued that states, given their particular institutional role, have powers as well as responsibilities that are qualitatively distinct from the powers and responsibilities of business entities and that an extension of direct human rights duties to businesses would blur this distinction and undermine the very role of

⁴¹⁴ As suggested by Scheinin, see chapter 1, section 1.2 (fn.25).

⁴¹⁵ See, for instance, the argument by Muchlinski that the current Ecuadoran proposal for a new international human rights treaty for businesses (see discussion in chapter 1, section 2.1 on ‘Current developments towards an extension of IHRL’) is unlikely to be successful in the near future given little support from the main home countries of MNSs. Peter Muchlinski, ‘Beyond the Guiding Principles? Examining new calls for a legally binding instrument on business and human rights’ (2013), <http://www.ihrb.org/commentary/guest/beyond-the-guiding-principles.html>

⁴¹⁶ *Ibid.*

IHRL which is precisely to express these particular responsibilities that states have in their function as states.

And it is important to stress that to argue that IHRL should not be extended to apply to business entities directly is not to argue that businesses should be left unregulated: there are many alternative ways that could be pursued to better regulate businesses without undermining the functional role of international human rights law.

1. STRENGTHENING STATES' HUMAN RIGHTS DUTIES TO REGULATE

To name just some of those, one avenue might be to strengthen IHRL so as to better address the challenges posed by the growing influence of business entities without, however, imposing *direct* human rights duties on these entities. Under current international human rights law, states already have the responsibility to protect their citizens from harm committed by third party agents – and part of the answer may lie in better implementing such state responsibilities. For instance, states might agree on optional protocols to the various international human rights treaties that would determine more specifically the steps that states need to take to regulate business entities. One limitation in the current regulation of business entities that has been identified by commentators, for instance, is the lack of state human rights duties to regulate companies extra-territorially,⁴¹⁷ so one thing that such optional protocols might do is to impose more explicit duties on states to regulate businesses domiciled in their territories when they operate abroad.⁴¹⁸

⁴¹⁷ Also see John Ruggie, 'Background Paper: The Role of States in effectively Regulating and Adjudicating the Activities of Corporations With Respect to Human Rights' (2007), esp. pp.6-8. <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Copenhagen-8-9-Nov-2007-backgroundunder.pdf>

⁴¹⁸ For an extensive discussion of extraterritoriality in six different regulatory areas: anti-corruption, securities, antitrust, criminal law, civil cases generally and the environment, see Jennifer A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights

Short of extraterritorial jurisdiction, there are a number of other ways in which states can influence or regulate the activities of business entities abroad through domestic regulation. For instance, they may require parent companies to take specific steps towards managing their subsidiaries abroad. They may require companies to report on foreign activities, or demand that products that are imported from abroad fulfil specific standards. There are some regulatory areas where this is already done, such as the environment or anti-corruption.⁴¹⁹

Some alternative legal avenues that have been pursued by scholars and practitioners have been criminal law, both domestic and international, as well as tort and extra-territorial tort legislation. It is beyond the scope of this thesis to discuss the practicalities and challenges of each of these in detail and the purpose here is merely to highlight these areas of law as potential alternatives to an extension of IHRL. However, several commentators have suggested that criminal and tort law mechanisms are likely among the most promising legal regimes to contribute to greater accountability of corporations, at least in the short and medium run.⁴²⁰

Sphere from Six Regulatory Areas.’, *Harvard University Corporate Social Responsibility Initiative Working Paper No. 59* (2010), 1-222.

⁴¹⁹ Ibid. Also see John Ruggie, ‘Exploring extraterritoriality in business and human rights: Summary note of expert meeting’ (2010), esp. p.2, on measures that states can take to incentivise businesses to act in compliance with certain standards. <http://business-humanrights.org/sites/default/files/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf>

⁴²⁰ Ruggie has argued in this regard that given recent developments in ICL and extraterritorial tort legislation in recent years, it can be assumed that corporations will be subject to increased liability, whether this may be criminal or civil liability depending on whether international standards are incorporated by national states into their criminal codes or as civil causes for action. They may also have civil proceedings brought against them for acts that constitute wrongs under domestic law, such as assault or false imprisonment. John G .Ruggie, ‘Business and Human Rights – the Evolving International Agenda’, *American Journal of International Law*, 101.4 (2007), 819-840 (p.17).

In a similar vein, the International Commission of Jurists has found that “*criminal law (principally international criminal law, supplemented by criminal law concepts common to national systems) and the law of civil remedies found in both common law countries and civil law jurisdictions [...] currently offer some of the richest avenues towards ensuring the legal accountability of companies when they are complicit in human rights violations committed by governments.*” ICJ Expert Legal Panel on Corporate Complicity in International Crimes,

2. INTERNATIONAL CRIMINAL LAW

Individual businessmen have been prosecuted for international crimes in a number of cases. The prosecutions of German businessmen for involvement in Nazi crimes after the Second World War are perhaps among the most well-known cases.⁴²¹ To name some more recent examples, Alfred Musema, the director of a tea company in Rwanda, was convicted for genocidal acts by employees of his firm who had used company vehicles to set up roadblocks and kill Tutsi.⁴²² In 2007, Dutch businessman Frans van Anraat was found guilty for complicity in war crimes for delivering chemicals to the regime of Saddam Hussein for the production of chemical weapons used against civilians in the Kurdish-Iraqi town of Halabja and in Iran.⁴²³ The private military company *Blackwater* that provided security services for the U.S. State Department in Iraq, as well as its director and several of its private contractors have been sued through a number of suits for a shooting incident in Iraq in October 2007 during which 17 Iraqi civilians were killed. One suit was brought by the US non-governmental Center for Constitutional Rights and a law firm under the Alien Tort Claims Act⁴²⁴ and the company Blackwater (now known as 'Xe Services') settled in 2010 with the victims for an undisclosed amount. The US Department

Corporate Complicity and Legal Accountability Vol. 1: Facing the Facts and Charting a Legal Path (Geneva: International Commission of Jurists, 2010), p.5. They also address complicity in abusive behaviour by armed groups or other business entities.

⁴²¹ *United States v. Carl Krauch et al.* (I.G.Farben Case); *United States v. Alfred Krupp* (Krupp Case); *United States v. Friedrich Flick* (Flick Case), in Robert A. Wright, *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission, Volumes I, IX, and X* (London: His Majesty's Stationery Office, 1946-1949). Quoted after Wim Huisman and Elies Van Sliedregt, 'Rogue traders: Dutch businessmen, international crimes and corporate complicity', *Journal of International Criminal Justice*, 8(3) (2010), 803-828 (p.804).

⁴²² Judgment, Musema (ICTR-96-13-T), Trial Chamber , 27 January 2000; Judgment, Musema (ICTR-96-13-A), Appeals Chamber, 16 November 2001; both quoted after Huisman and Sliedregt (p.805).

⁴²³ District Court of The Hague, 23 December 2005, Case No. AX6406; Court of Appeal of The Hague, 9 May 2007, Case No. BA6734; both quoted after Huisman and Sliedregt, p.805.

⁴²⁴ *Estate of Himoud Saed Abtan et al. v Prince et al.*, United States District Court District of Columbia, 2009, *Civil Action No. 07-1831 (RBW)*; also see <http://ccrjustice.org/ourcases/current-cases/abtan-et-al-v-blackwater-usa-et-al>

of Justice has also filed criminal charges against individual Blackwater employees involved in the shooting incident, charging them with voluntary manslaughter and attempted manslaughter.⁴²⁵

To be sure, for ICL or national criminal law to serve as an effective tool for greater business accountability, both areas of law will need to be much developed and better implemented. ICL only covers a comparatively narrow range of areas where corporations can harm important human interests, and generally still suffers from many constraints to effective implementation. I argued that one reason that an extension of IHRL to business entities would not bridge the accountability gap, as is sometimes suggested by proponents by such an extension, is that IHRL relies for its implementation on states, and where states are unwilling to regulate businesses in the first place, they would likely remain reluctant to hold businesses accountable even if the latter suddenly had human rights duties under international law. The same objection of course applies to international and national criminal law which also relies for its implementation on the political will of states.

It also remains disputed from a legal doctrinal perspective whether or not corporate entities, as non-natural persons, can be held criminally responsible at all.⁴²⁶ And even though the extension of international criminal law has been

⁴²⁵ At the time of writing the criminal suits are ongoing. See <http://business-humanrights.org/en/blackwater-usa-lawsuit-re-16-sep-2007-baghdad-incident-1> . Also see Huisman and Van Sliedregt, 'Rogue traders: Dutch businessmen, international crimes and corporate complicity', p.816 and in particular fn. 54.

⁴²⁶ In some countries, the dominant view is that business entities, as legal rather than natural persons, cannot be ascribed intent or culpability. See Joanna Kyriakakis, 'Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law', in *International Criminal Law and Philosophy*, ed. by Larry May and Zachary Hoskins (Cambridge: Cambridge University Press, 2010), pp.108-140, on the issue of assigning criminal responsibility to corporate entities. Also see Thomas Weigend, 'Societas Delinquere Non Potest? A German Perspective', *Journal of International Criminal Justice*, 6 (2008), 927-945; Celia Wells, *Corporations and Criminal Responsibility* (2nd edn., Oxford: Clarendon Press, 2001), p.86.

subject of debate for a number of years,⁴²⁷ to date, no international forum recognizes legal liability of a company entity.⁴²⁸ However, as the number of jurisdictions in which charges for international crimes can be brought against corporations is increasing, scholars have identified a growing potential for businesses to be held accountable for international crimes.⁴²⁹

But while doctrinal as well as practical questions certainly remain to develop ICL as an effective mechanism for holding businesses to account, a greater use of ICL with regard to corporations might be among the possible avenues that could be pursued. And as ICL, other than IHRL, has been developed to address private actors and to establish private actor responsibility this would arguably not affect the conception of responsibility in ICL in the same way that an extension of IHRL would.

3. CIVIL LAW AND EXTRA-TERRITORIAL TORT LEGISLATION

Another avenue that might be further pursued in parallel to more defined state human rights duties to regulate businesses, and international criminal regulation, might be tort regulation of MNCs and other business entities. This may be particularly attractive insofar as it would allow businesses to be sued for damages. I argued above that calls for an extension of IHRL to corporations have often been voiced with regard to the harmful social and environmental

⁴²⁷ Also see Andrew Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups', *Journal of International Criminal Justice*, 6(5) (2008), 899-926.

⁴²⁸ ICJ Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity and Legal Accountability Vol. 1: Facing the Facts and Charting a Legal Path*, p.4.

⁴²⁹ For a detailed survey of 16 countries from different regions and legal systems, see Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (Norway: Fafo Institute for Applied International Studies, 2006). The authors find that 11 out of the 16 states were parties to the ICC, 9 had fully incorporated all three crimes of the ICC, and 6 provided for corporate criminal liability. Quoted after Ruggie, 'Business and Human Rights – the Evolving International Agenda', p.17.

impact of corporate activities, such as when operations of oil, gas, or mining companies involve forced resettlements, or when corporate operations pollute the environment with detrimental consequences for individual livelihoods.

One avenue to pursue tort liability of companies, and in particular multinational corporations, for harmful conduct has been extra-territorial tort legislation that allows compensation claims be brought against a company in its home country for its own wrongdoings or those of business partners (such as subsidiaries, contractors, or joint venture partners abroad). The UK and the US in particular have witnessed this kind of transnational litigation. UK courts have entertained claims grounded in the law of negligence when the parent company based on the UK culpably failed to prevent violations perpetuated through the activities of its subsidiaries.⁴³⁰ Under the US Alien Tort Claims Act (ATCA),⁴³¹ US courts have admitted civil suits for serious violations of international law perpetuated overseas by US-based companies.⁴³²

⁴³⁰ See the UK cases of *Connelly v. RTZ* (1996) 3 WLR 373; *Lubbe v Cape Plc* (2000) 1 WLR 1545; and *Sithole & Ors v Thor Chemicals Holdings Ltd & Anor* TLR (1999).

⁴³¹ The ATCA states that U.S. “*district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*” (Alien Tort Claims Act, 28 U.S.C. § 1350 (2000)). The ATCA dates from 1789, however it was not much used until 1980 when a U.S. federal court in *Filártiga v. Peña-Irala* let a Paraguayan woman to bring suit against a Paraguayan government official who had tortured and killed her brother (*Filártiga v. Peña-Irala*, United States Court of Appeals for the Second Circuit, 1980, F.2d 876), quoted after Hannah R. Bornstein, ‘The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority’, *Indiana Law Journal*, 82 (2007), 1077-1100 (p.1077); also see John Cerone, ‘The ATCA at the Intersection of International Law and U.S. Law’, *New England Law Review*, 42 (2007-08), 743-754 (p.750).

The U.S. Supreme Court subsequently ruled, against critics of the Statute, that the ATCA creates a private right of action, and in the following led to the ATCA not just being used in a number of cases against individuals, but also against corporations – *Sosa v. Alvarez-Machain*, United States Supreme Court, 542 U.S. 692 (2004), 697; see Bornstein, ‘The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority’, p.1077.

⁴³² Radu Mares, *The Dynamics of Corporate Social Responsibilities* (Leiden: Martinus Nijhoff Publishers, 2008); Richard Meeran, ‘The Unveiling of Transnational Corporations’, in Michael K. Addo, *Human Rights Standards and the Responsibility of Transnational Corporations*, (The Hague: Kluwer Law International, 1999), pp.161-169 and Richard Meeran, ‘Liability of Multinational Corporations: a Critical Stage in the UK’, in *Liability of Multinational*

An ATCA claim was brought against a corporation for the first time⁴³³ in the case of *Doe I v Unocal Corp.*⁴³⁴ The plaintiffs alleged that the company Unocal was responsible for the death of family members, assault, rape, torture, forced labour and the loss of homes and property as it had relied on the Myanmar military to ‘secure’ the area where a subsidiary of Unocal was building a pipeline in joint venture with a Burmese state-owned company,⁴³⁵ and the Unocal litigation ended in 2005 in a favourable settlement for the Burmese plaintiffs.⁴³⁶ Other lawsuits have been brought against corporations under the ATCA regarding a range of issues, such as violations of labour standards,⁴³⁷ or environmental harm and forced displacement caused by the activities of mining companies.⁴³⁸

Corporations under International Law, ed. by Menno Kamminga and Saman Zia-Zarifi (The Hague: Kluwer Law International), pp. 251-264.

⁴³³ Igor Fuks, ‘*Sosa v. Alvarez-Machain* and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability’, *Columbia Law Review*, 106 (2006), 112-143 (p.118).

⁴³⁴ *Doe I v Unocal Corp.*, United States Court of Appeals for the Ninth Circuit, 2002, 395 F.3d 978-89; quoted after Bornstein, ‘The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority’, p.1077.

⁴³⁵ *Ibid.*; also see Fuks, ‘*Sosa v. Alvarez-Machain* and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability’, p.118.

⁴³⁶ Bornstein, ‘The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority’, p.1078. Bornstein notes that while the settlement was favourable for the plaintiffs, it did not create a precedent in favour of corporate liability under the ATCA.

⁴³⁷ Marisa Anne Pagnattaro, ‘Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act’, *Vanderbilt Journal of Transnational Law*, 37 (2004), 203-226 (pp.214-219) for a discussion of relevant cases on labor standards violations that followed *Doe v Unocal*. Quoted after Fuks, ‘*Sosa v. Alvarez-Machain* and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability’, p.119.

⁴³⁸ For instance, the case of *Beanal v Freeport-McMoran*, United States Court of Appeals for the Fifth Circuit, 1999, F.3d 161, quoted after Bornstein, ‘The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority’, p.1085; Also see Cerone, ‘The ATCA at the Intersection of International Law and U.S. Law’ (above no.), p.750, who cites the case of *Flores v Southern Peru Copper Corp.*, United States Court of Appeals for the Second Circuit, 2003, F.3d 140, an action against an American mining company for adverse health effects caused by pollution from the company’s operations in Peru.

One of the most recent and important cases brought under the ATCA went all the way to the Supreme Court. In *Kiobel v Royal Dutch Petroleum Co.*,⁴³⁹ the plaintiffs were Nigerian citizens who sought damages from the oil company Royal Dutch Shell for aiding and abetting the Nigerian government in the 1990s in committing violations of customary international law; in particular, that Royal Dutch Shell had compelled its Nigerian subsidiary to brutally crush peaceful demonstrations against oil development in the Ogoni Niger River Delta.

While the Supreme Court dismissed the case, this dismissal was not based on a rejection of ‘corporate liability’ as such. Rather, the Supreme Court found the connection of the company Royal Dutch Shell to the US insufficient to ground a case under the ATCA. The fact that the Supreme Court did not explicitly address ‘corporate liability’, but that it did consider the question of Royal Dutch Shell’s presence in the U.S., has been interpreted by commentators as suggesting that the Supreme Court did not disagree with the possibility of corporate liability under the ATCA in principle.⁴⁴⁰

Like domestic and international criminal regulation, domestic tort as well as extraterritorial tort legislation would still need to be developed in many ways to become an effective mechanism for holding corporations accountable for harmful behaviour. This is not the place to discuss in detail the various legal-technical as well as political obstacles for this to happen.⁴⁴¹

⁴³⁹ *Kiobel v Royal Dutch Petroleum Co.*, United States Court of Appeals for the Second Circuit, 2010, F.3d 111.

⁴⁴⁰ This was particularly important because a US Court of Appeals in this case had held that corporations cannot be held liable under the ATCA because the ATCA requires courts to apply norms of international law that are universal, however, the Court held that under international law “*corporate liability is not a discernible - much less a universally recognized - norm of customary international law*”. Also see Michelle Harrison, ‘After Kiobel, What’s happening with Corporate Liability in the Second Circuit?’ (2013), <http://www.earthrights.org/blog/after-kiobel-whats-happening-corporate-liability-second-circuit>

⁴⁴¹ One discussion, for instance, has concerned the list of potential causes of action under the ATCA. See, for instance, Fuks, ‘*Sosa v. Alvarez-Machain* and the Future of ATCA Litigation:

However, if successful, such tort litigation could provide for significant compensation of victims (unlike IHRL, which is not primarily compensatory in nature).⁴⁴² This, in turn, would not only be beneficial from the immediate victim's perspective, but would also arguably provide a stronger disincentive for business enterprises to avoid harmful behaviour in the first place, and perhaps even incentivize large business enterprises that by virtue of their size have political influence to lobby in favour of regulation.⁴⁴³

4. CONCLUSION

In sum, I have argued in this thesis that for both practical and normative reasons an extension of IHRL to apply to multinational corporations and other business entities directly would not be appropriate. There is, however, a pressing need for the better regulation of MNCs and other business entities and the ongoing business-and-human rights debate has made an important contribution to highlighting the many ways in which corporate activities can be detrimental to fundamental human interests. Rather than extending international human rights law as such, however, I have argued that using or extending other areas of law that have different functional roles to IHRL, and the coherence and consistency of which would arguably not be challenged by such an application, would be more suitable and effective in achieving more responsible corporate practices and holding business entities to account for harmful behaviour.

Examining Bonded Labor Claims and Corporate Liability'. For detailed legal discussions of the ATCA, see also, for instance, Bornstein, 'The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority'; Cerone, 'The ATCA at the Intersection of International Law and U.S. Law'.

⁴⁴² Pagnattaro, 'Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act', pp.203 and 218, discusses an ATCA case settlement that resulted in a fund of over 20 million US dollars for plaintiffs. Quoted after Fuks, '*Sosa v. Alvarez-Machain* and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability', p.116.

⁴⁴³ Fuks (ibid.), p.117.

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