In Defence of Direct Obligations for Businesses Under International Human Rights Law

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Abstract

This article presents three arguments on why businesses have direct obligations under existing international law. Nevertheless, in the present state of international law, the obligations of businesses are limited and wholly dependent on the state's further action of implementation and enforcement. To reach this conclusion, the article asserts that businesses have partial legal personality in international law; that legal obligations and the enforcement model must be distinguished as two separate issues; and that human rights are requirements of justice that emanate from the dignity of each human person to any social actor, including businesses and other non-state actors. The article attempts to contribute to the debate about a binding instrument on business and human rights and presents an alternative understanding of international law that can assist domestic tribunals in applying international human rights standards to businesses as they carry out activities in their jurisdictions.

Keywords: corporate accountability, corporate international obligations, corporate legal personality, human rights obligations, international human rights law

I. Introduction

This article[1] explores whether international law can allocate direct obligations to businesses as a partial solution to the 'governance gap'[2] or the regulatory problem

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[1] My deep thanks to the editor of the Journal, Michael Santoro, for his numerous extraordinarily helpful comments and additions. Any errors are unfortunately my own.

[2] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, 'Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse (By John Ruggie)', UN. Doc. A/HRC/8/5/Add.2 [hereinafter Ruggie Report Add.2 2008] (23 May 2008).

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created because businesses have overgrown domestic legal systems.[3] To respond to the question of whether businesses have obligations under international law, we must 'confront the problem of how international law comes into being in the first place and how it works, if at all'.[4] This is because it challenges two central ideas of international law: namely, that only states or international organizations are subjects of international law and that international law can reach non-state actors only in an indirect way. This article argues that there are sufficient grounds to sustain that existing international law – in particular, international human rights law (IHRL) – already imposes some obligations on businesses, but these are limited and wholly dependent on the states' further action of implementation and enforcement. The conclusions of this article attempt to contribute to the debate about a binding instrument on business and human rights clarifying the departure point of the debate, that is, whether an international instrument could directly bind businesses and present an alternative understanding of international law that can assist domestic tribunals in applying international human rights standards to businesses performing activities in their jurisdiction.

The argument that businesses can – and, in fact, do – bear international human rights obligations in this article is composed of three parts: (1) that businesses are (partial) legal persons under international law, capable of bearing rights and obligations; (2) that international human rights law allocates obligations to non-state actors, even though their enforcement depends on state and municipal law; and (3) that all human rights impose correlative obligations on all social actors, regardless of their nature as states or non-state actors, but those obligations depend on the role and the circumstances of that particular actor. Each of the parts of the main argument builds upon the other parts in an accumulative form, and each of them is absolutely necessary to form the argument. Graphically, the parts form a layer moving from the most basic and indirect reasons to the most direct arguments that support the overall argument. Although the last part is the one that directly provides reasons to support the main argument of the article, it would be insufficient without building upon the other two parts.

Accordingly, the paper has four sections: one for each part of the argument, plus the first section, which explains that the argument of the article is a departure from the traditional model of international law. The second section develops the argument that international legal subjectivity should be understood as a matter of degrees rather than as an absolute distinction between subjects and objects of international law. The section also explains the idea of participation in international law as an alternative to the subject-object dichotomy, but departs from such a proposition because it avoids the indispensable debate about legal subjectivity altogether. The third section argues that the existence of an international obligation must be distinguished from the enforcement mechanism of that obligation and addresses two possible objections to that proposition. This distinction

[3] 'Multinational corporations have long outgrown legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms.' Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 54–60.

[4] Ralph Steinhardt, 'Multinational Corporations and Their Responsibilities under International Law' in Lara Blecher, Nancy Kaymar Stafford and Gretchn C Bellamy (eds.), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (New York: Aba Book Publishing, 2015) 27–50, 28.

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allows us to conclude that businesses have direct international obligations, despite their having to be implemented through domestic law. The fourth and last section defends a distinctive human rights theory that departs from the liberal construction of human rights, which understands rights as limits to state power. In contrast, it is argued that human rights are requirement of justice imposing obligations on all social actors, although in different degrees depending on their role.

II. Challenges to the Traditional Model of International Law

The traditional model of international law (also called the traditionalist,[5] classic,[6] anachronic,[7] orthodox,[8] or strict[9] model) holds that international law is the law that governs the relationship between states and that states are the only subjects of international law.[10] Thus, international law does not create norms to govern the behaviour of human beings or businesses, with few exceptions such as piracy and war crimes.[11] This model is based on three propositions: (1) that the primary rules of international law do not address non-state actors; (2) that according to the secondary rules of international law, which specify the legal consequences of violating the primary rules, only states can be responsible for breaching international law;[12] and (3) that the effects of the obligations imposed by international law on private parties necessarily depend on the domestic norms that regulate the effects of international law in a particular legal system, which may vary from state to state.[13]

The traditional model of international law has undergone a process of transformation since the emergence of international humanitarian law, international human rights law, and international criminal law. These bodies of law debunked the state-centred fixation of international law and put the human person in its place.[14] Although we are far from living under a regime of international law where states are no longer the major protagonists (which might not even be desirable), we have seen in the last decades an important shift in tone and concern in the process of creation and in the content of international law.[15]

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5 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) 36.

6 Carlos Vázquez, 'Direct vs. Indirect Obligations of Corporations under International Law Essays' (2004–2005) *Columbia Journal of Transnational Law* 933.

7 Steinhardt, note 3, 28.

8 Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443–546.

9 Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, 1st edn (New York: Routledge, 2016) 93.

10 Malcolm N Shaw, *International Law*, 6th edn (Cambridge: Cambridge University Press, 2017) 197.

11 Steinhardt, note 3, 29.

12 Vázquez, note 5, 933.

13 Ibid, 935.

14 Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Ius Gentium* (Martinus Nijhoff Publishers, 2010) 275–289.

15 Menno T Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T Kamminga and Martin Scheinin (eds.), *Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009) 1–22.

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The contemporary global reality shows that the state has lost its monopoly over the control of the process in which international law is created to other non-governmental actors that contribute in relevant ways to international trade, human rights, commercial transactions, and other fields.[16] Although the state retains the primary responsibility for law-making under international law, it is no longer true that other entities are immune to, or indifferent from, international law.

The state-centred model of international law has been changing because it is, first, insufficient for understanding the reality of the world, and, more importantly, incapable of confronting real global human problems because the nation-state is not a complete political community capable of upholding and granting the conditions necessary for the flourishing of individual persons and communities.[17] The inability to regulate businesses is one of those transnational problems that the traditional model of international law cannot solve because it relies on nation-states that are limited by jurisdictional norms and sometimes unable or unwilling to regulate corporations doing business in their territories.[18]

Thus, the reality of human rights corporate abuses that cannot be addressed by nation-states alone questions whether the traditional model of international law can address the new global realities. In the following sections, I will propose three conceptual changes that depart from the state-centric model of international law and human rights. These ideas support the overall argument in favour of the existence of direct international human rights obligations of businesses. The ideas are that: (1) the concept of international legal personality has changed from an absolute dichotomy to a matter of degrees; (2) international obligations must be differentiated from the model of implementation or enforcement; and (3) because of the nature and special status of human rights norms in international law, these norms directly allocate obligations to non-state actors, including businesses.

III. Legal Personality Under International Law

The traditional model of international law understands that the subjects of international law are those entities that possess legal personality. A subject of international law 'can affect and be affected by international law and can enforce international law by bringing some international claims'.[19] On the other hand, individuals and other private actors are only objects of international law because they lack the capacity to bear rights or responsibilities.[20] The subject-object distinction has been the historical perspective of international law where sovereign states are those subjects with the power to change

[16] Bernaz, note 8, 1–15.

[17] See Paolo G Carozza, 'The Universal Common Good and the Authority of International Law' (2006) 9 *Logos: A Journal of Catholic Thought and Culture* 28–55.

[18] Bernaz, note 8, 257–280.

[19] Jose E Alvarez, 'Are Corporations Subjects of International Law?' (2011) 9 *Santa Clara Journal of International Law* 7.

[20] See Philip C Jessup, 'Subjects of a Modern Law of Nations' (1946) 45 *Michigan Law Review* 383–408.

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norms and rules,[21] while international law objects must submit to the power of the subjects.[22]

From this perspective, the only real subjects of international law are states and their creations, such as international organizations consisting of states as members.[23] Accordingly, businesses are not legal persons under international law because of the sharp subject-object distinction that does not allow for middle ground entities with partial capacities.[24] This is a problem as, in order to impose human rights obligations on businesses, it is necessary to first recognize that they can be bearers of such duties, which means that they have legal personality.[25]

Two approaches challenge the sharp subject-object distinction of the traditional model of international law. The first approach is to avoid the discussion of international subjectivity and focus on the debate about rights and duties that can be allocated to non-state actors because that is more functional. The second option is to reflect on the notion of international subjectivity and legal personality in order to explain how it is possible to include other actors such as individuals, non-governmental organizations, and businesses as subjects of international law.

A. Participants of International Law

The first approach, initially proposed by Rosalyn Higgins[26] and later followed by others such as Theodore Meron[27] and Jose Alvarez,[28] asserts that the distinction between subject and object is not useful, and proposes substituting the category of subjects with 'participants' because it fits better with real-world practice:

> [I]t is not particularly helpful, either intellectually or operationally, to rely on the subject/object dichotomy that runs through so much of the writings. It is more helpful, and closer to perceived reality, to turn to the view of international law as a particular decision-making process. Within that process … there are variety of participants, making claims across state lines, with the object of maximizing various values … In this model, there are no 'subjects' and 'objects', but only *participants.* Individuals are participants, along with states … multinational corporations, and indeed private non-governmental groups.[29]

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[21] Arno Dal Ri Júnior and Erika Louise Bastos, 'Transnational Corporations Subjectivity based on the Criteria of the Bernadotte Case and the Traditional International Law Doctrine' (2018) 18 *Anuario Mexicano de Derecho Internacional* 162.

[22] Alvarez, note 18, 23.

[23] Ibid, 8.

[24] See Nkambo Mugerwa, 'Subjects of International Law' in Max Sorensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968) 247–249; Ratner, note 7, 475.

[25] David Kinley, *Human Rights and Corporations* (Ashgate Publishing Limited, 2009) 945.

[26] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 2nd edn (Oxford: Clarendon Press, 2010) 49–50.

[27] See, generally, Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1992).

[28] Alvarez, note 18, 8.

[29] Higgins, note 25, 50.

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According to this understanding, international personality is not a formal conception but a functional one that can easily accommodate international actors such as corporations. The notion of participation is determined by the rights and duties that particular actors bear. Thus, the emphasis of this theory lies in the fact that businesses are already right holders under different regimes of international law. Therefore, there is no intellectual barrier to conclude that businesses can also be duty-bearers under international law. In fact, businesses are only a part of several actors that participate in the decision-making process of international law. Consequently, Alvarez argues that 'international lawyers should spend their time addressing which international rules apply to corporations rather than whether corporations are or are not subjects of international law'.[30]

Alvarez does not seem to take into account that, in order to discover which rules apply to corporations, he is necessarily accepting that businesses have the capacity to bear international obligations. He does not want to call it personality. He prefers to speak of participation. However, participation is not an explanation, but only a description of the fact that businesses bear rights and obligations. Is the fact that businesses have rights and obligations under international law the cause of their participation or is it the consequence thereof? The notion of participation is unable to provide an explanation for why some rules and not others should apply to a corporation.[31] Furthermore, this pragmatic approach cannot explain the differences between participants, such as why businesses should bear some duties but not the same duties that states bear under international law.

The distinction between subject and object, as Higgins recognizes it, is as central to legal philosophy as the distinction between who is an agent and who is not, and thus, who can bear responsibilities.[32] Disregarding the discussion altogether of what makes someone or something a subject might be functional but deeply problematic in the long-term because it does not provide any criteria to determine the differences between participants, the reasons to recognize new participants, or the reasons some participants can do things that others cannot. Although this first approach provides an alternative from the subject-object dichotomy prevalent in the traditional model of international law, it cannot offer a basis to distinguish between participants and their obligations. The question about legal personality still needs to be addressed in order to differentiate between states and businesses, and their responsibilities under international law.

B. Partial Legal Personality

As the second approach does not refrain from the discussion about legal subjectivity, it promises to be more useful because it provides a framework to define when and how personality is recognized. This approach defines legal subjectivity as a matter of capacities that different actors, and not only states, might have. Although this

[30] Alvarez, note 18, 31.

[31] Alvarez's solution to demonstrate that certain international obligations apply to corporations is to draw analogies with specific treaty regimes that already allocate obligations to corporations. See ibid.

[32] Higgins, note 25, 50.

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perspective departs from the acceptance of the existence of subjects and objects of international law, it challenges the sharp division between these categories.

The most common definition of legal personality is based on the International Court of Justice (ICJ) case *Reparations for Injuries*, where the ICJ held that the United Nations was a 'subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims'.[33] According to the ICJ decision, three widely accepted criteria determine what it means to have international legal personality: that legal persons (1) can bear rights, (2) can bear duties, and (3) have the capacity to bring international claims. In other words, international personality is composed of international legal subjectivity, international legal capacity, and international *jus standi.*[34]

Some scholars argue that the definition of the *Reparations for Injuries* creates confusion because the ICJ 'did not explain the exact meaning of, nor the relationship between the three constitutive elements of the concept of legal personality'.[35] What if a particular entity does not possess all three criteria? What if an entity can bear responsibility but cannot participate in international proceedings to enforce those responsibilities? Does having international rights necessarily mean having international responsibilities?

Professor Carl A Nøggard offered a different methodological approach to the question of legal personality.[36] He argued that a legal person is the subject of rights and proceedings, and/or duties and responsibilities. Thus, there are four sub-classes of legal persons: (1) a person who has a substantive right, (2) a person who can bring claims before a tribunal or has recognized standing, (3) a person of whom a legal rule expects a certain conduct, and (4) a person who can be sued and held responsible before a tribunal.[37]

Similarly, Andrew Clapham, following Daniel O'Connell,[38] argues for the possibility to 'move beyond the self-imposed formalistic legal problem of subjectivity and concentrate on capacity'.[39] In a very similar way in which Nøggard reframed the notion of legal personality, Clapham sustains that it is possible to 'talk about limited international legal personality'[40] for businesses to the degree 'necessary to enjoy some … rights, and conversely to be prosecuted or held accountable for violations of the relevant international duties'.[41] This approach challenges the idea that legal personality is the consequence of having state-like features because trying to fit non-state actors in a conceptual box shaped according to the state is simply unreasonable.[42] On the

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33 *Reparation of Injuries Suffered in Service of the U.N.* [1949] ICJ (Ad. Op.) 174–178.

34 Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerpen: Intersentia, 2002) 24.

35 Ibid, 25.

36 Carl Aage Nørgaard, *The Position of the Individual in International Law* (Munksgaard: Copenhagen 1962).

37 Jägers argues that by applying Nørgaard's analytical approach, one could reach the conclusion that legal personality is not a conceptual obstacle in order to conceive human rights obligations of corporations. Ibid, 33; Jägers, note 33, 25–26.

38 Daniel Patrick O'Connell, *International Law*, Vol 2 (Stevens, 1970) 81–83.

39 Clapham, note 4, 77.

40 Ibid, 78.

41 Ibid, 79.

42 Ibid, 80.

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contrary, it is much more reasonable to redefine legal personality according to the entities' capacities:

> Capacity implies personality, but always it is capacity to do those particular acts. Therefore, personality as a term is only shorthand for the proposition that an entity is endowed by international law with legal capacity. But entity A may have capacity to perform acts X and Y, but not act Z, entity B to perform acts Y and Z but not act X, and entity C to perform all three. Personality is not, therefore, a synonym for capacity to perform acts X, Y and Z; it is an index, not of capacity *per se*, but of specific and different capacities.[43]

Accordingly, it is necessary to recognize that there are entities that do not enjoy all the capacities that states enjoy under international law, but they enjoy legal personality as they have the capacity to carry out certain acts. Businesses and other non-state actors could be granted some of the capacities that entail legal personality but not others, such as law-making powers or direct participation in international tribunals.[44] In this way, the primacy of states on the international plane would be preserved. In other words, the state would retain full legal personality, while other actors would have some degree of legal personality.

Where does that capacity come from? Positivists will argue that, necessarily, there must be a law that confers such capacity. Another position is one that asserts that the law only recognizes social realities following extra-legal principles.[45] The fact that some international legal sub-regimes confer such capacities on businesses is a consequence of the recognition of the reality that businesses are real social actors capable of producing social acts independently of their members, with a clear influence on the decision-making process in various areas of international law such as trade, investment, telecommunications, intellectual property, and antitrust.[46]

In the same way that individuals have acquired international legal personality through their participation in international human rights mechanisms, and have become bearers of responsibilities, for example, under international criminal law, the fact that businesses do have rights and duties under international law as a matter of practice indicates that corporations' legal personality has implicitly been recognized. Indeed, the practice of states, international organizations, and some international tribunals, supports the idea of corporations' partial legal personality as they have recognized rights, duties and *jus standi* to businesses under international law.

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43 O'Connell, note 37, 81–82.

44 Dal Ri Júnior and Bastos, note 20, 178.

45 This has been argued by many theorists of the corporate real personality such as Otto von Gierke, Frederick W Maitland, John Neville Figgis and Peter French. See, generally, Victor Manuel Muñiz-Fraticelli, *The Structure of Pluralism: On The Authority of Associations* (Oxford: Oxford University Press, 2014) Ch 9; see also Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2013) 87.

46 Erika George, 'The Enterprise of Empire: Evolving Understandings of Corporate Identity and Responsibility' in Jenna Martin and Karen E Bravo (eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: Cambridge University Press) 28; Jeffrey L Dunoff, Steven D Ratner and David Wippman, *International Law, Norms, Actors, Process: A Problem-Oriented Approach* (Wolters Kluwer, 2015) 1036.

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For example, businesses can bring claims in international forums in Investor-State Dispute Settlement (ISDS)[47] mechanisms under Bilateral Treaties (BITs), and before the European Court of Human Rights (ECHR).[48] Moreover, businesses have been indirect claimants in the World Trade Organization (WTO) dispute settlement system.[49] Similarly, according to a treaty created by the World Bank, businesses can submit disputes to binding arbitration by the International Centre for the Settlement of Investment Disputes (ICSID) against states for violation of their rights.[50] In addition, businesses may bring disputes with states and other private entities to the International Tribunal for the Law of the Sea about activities in the Area.[51]

Furthermore, businesses have legal (material) rights under international trade agreements or international investment law.[52] For example, under NAFTA and other international trade agreements, businesses have the right to seek recompense from any foreign state that breaches their obligations to permit free cross-border trade.[53] Similarly, businesses have recognized rights under foreign investment law such as not to be expropriated without fair compensation, protection against denial of justice, and not to be discriminated against.[54]

Moreover, businesses have been increasingly subjected to some form of international accountability or proceedings. For example, businesses have been subjects of UN Security Council resolutions,[55] and declared as criminal organizations under the Nuremberg Tribunal.[56] Businesses are also subjected to examination by international organisms such as the European Commission under articles 81 and 82 of the Treaty on the Functioning of the European Union[57] or to procedures under the conventions of the

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[47] Office of the United States Trade Representative, Investor-State Dispute Settlement (ISDS), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds; 'The arbitration game', *The Economist* (11 October 2014), https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration (accessed 28 August 2017).

[48] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, 230 (signed on 4 November 1950, entered into force on 3 September 1953), art 34; First Additional Protocol to the European Convention (adopted on 20 March 1952), art 1; see *Boumois v France* App. No. 55007/00 (2003) ECHR; *SCP Huglo, Lepage y Asociados, Consejo v France* App. No. 59477/00 (2005) ECHR; *Klithropiia Ipirou Evva Hellas A.E. v Greece* App. No. 27620/08 (2011) ECHR.

[49] WTO|Disputes – Dispute Settlement CBT – 'Introduction to the WTO Dispute Settlement System', https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm (6 August 2019).

[50] Ratner, note 7, 481; Bernaz, note 8, 89.

[51] Convention of the Law of the Sea (signed on 10 December 1982, entered into force on 16 November 1994), art 187.

[52] See, generally, Francisco Orrego Vicuna, 'Of Contracts and Treaties in the Global Market' (2004) 8 *Max Planck Yearbook of United Nations Law* 341–358.

[53] North American Free Trade Agreement, 2 ILM 289, 605 (signed in 1992, entered into force on 1 January 1994) chapter 11, art 1110.

[54] Ratner, note 7, 481.

[55] UN Security Resolution 1306, 83 S/RES/1306 (adopted on 5 July 2000) paras 1–10; see also UN Security Resolution 1718 S/RES/1718 (adopted on 14 October 2006) in which the Security Council has ordered states to freeze assets of private entities.

[56] Article 9 of the Charter provided: 'At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization'. Charter of the International Military Tribunal 59 Stat. 1544, 82 U.N.T.S. 279 (8 August 1945), art 9; see, e.g., *United States v Krauch*, reprinted in 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1081 (1953), http://www.mazal.org/archive/nmt/08/NMT08-C001.htm.

[57] Treaty on the Functioning of the European Union OJ. C 326 (signed on 13 December 2007) 47–390.

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International Labour Organization (ILO)[58] and the Organization for Economic Co-operation and Development (OECD).[59]

Ultimately, businesses participate in law-making processes. For example, the ILO grants business entities direct voting rights, and businesses have been included in state delegations to international organizations and forums that set global standards related to climate change, internet protection, and telecommunications.[60] Similarly, businesses must follow legal standards according to international legal rules such as those concerning international environmental law or corruption.

All of the above examples demonstrate that, as a matter of practice, businesses are already capable, in different ways, of bearing rights and duties and participating in an active or passive role in international proceedings. Although this practice is not what makes businesses legal persons – that would be tautological – it reflects the understanding and acceptance of various international sub-regimes of the reality of corporations as *loci* of moral and legal responsibility because of their capacity to act in such a way that their actions cannot be reduced to the aggregation of individual acts.[61] Therefore, businesses might not have all the international rights, responsibilities, or even the *jus standi* that states have, but they already have some 'degree' of legal personality.

C. Objections to Recognizing International Legal Personality of Businesses

The reluctance to grant international legal personality to business entities derives from the concern of the pervasive influence of non-state actors in the international arena that would come with the recognition of legal personality. First, the main objection made by Professor Jose Alvarez is that recognizing the international legal subjectivity of businesses opens the door to equating businesses to human persons, thus allowing, for example, investment arbitral panels drawing from regional human rights tribunals' jurisprudence enhancing the rights of investors *vis-à-vis* the host state.[62] Alvarez asserts that this would lead to undesirable situations in which investment tribunals must, for example, protect foreign businesses from disruptive protestors or trade unions because, according to the Inter-American Court of Human Rights in *Velazquez Rodriguez*,[63] states have the obligation to prevent private action in violation of the rights protected in the American Convention of Human Rights, such as private property.[64]

Alvarez's concerns are a result of the confusion between legal personality and human personhood, the latter of which is the basis of human rights. Granting legal personality

[58] See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, MNE Declaration (revised on March 2017), 4th edn.

[59] George, note 45, 27.

[60] Ibid, 29–30.

[61] See, generally, Muñiz-Fraticelli, note 44, Ch 9; see also List and Pettit, note 44; John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011) 148–154.

[62] Alvarez, note 18, 28.

[63] *Velásquez Rodríguez v Honduras* 1988, Corte IDH (2019).

[64] Ibid, 29. It is unclear which specific human right Alvarez has in mind that disruptive protestors could harm, but one could assume that it could be private property as enshrined in Article 21 of the American Convention.

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does not involve granting human personhood, which would give rise to human rights claims in favour of businesses. These are two different concepts. Legal personality is a legal concept (a creation of the law) that comes in degrees, while personhood is an ontological reality from which follows a moral status that is always absolute; there are no half-persons. As Patricia Werhane points out: '… [E]ven if corporations are legal persons, this does not imply that they have any *moral* status. Legal personhood is a convenient mechanism, particularly in regard to large companies for which it is impossible to hold all individuals involved in a project liable.'[65] Because legal personality is fiction (a creation of the law), there is nothing in principle that would hinder states from conferring legal personality on businesses under international law.[66]

A second objection to recognizing legal personality for businesses is whether it is fair to extend some aspects of legal personality to businesses but not to others, such as participating in the creation of the international norms that would regulate them. In other words, would it not be suspicious to grant businesses legal personality merely to extend accountability?

The reconceptualization of legal personality defended here does not derive from the necessity to extend accountability to businesses, but from the recognition of two realities. First is the reality of the existence of businesses as real social actors beyond the mere aggregation of individuals, which allows them to be subjects of rights, obligations and liability independently of their members.[67] Second is the practice of states and international organizations, which already demonstrates that businesses and other non-state actors have been granted capacities to do certain acts in international law.

First, even if the legal personality is regarded as fiction, the entity personified is undeniably a 'full-fledged, living reality that exists as an objective fact'.[68] That reality of the existence of a business is confirmed by the relevant economic, political and social roles that these associations play in society[69] and the existence of collective intentionality

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[65] Patricia H Werhane, 'Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights?' (2016) 1 *Business and Human Rights Journal* 5–20. Following Thomas Donaldson, Werhane proposed the idea that although corporations are not moral personas, they can be considered secondary moral agents to which society can ascribe moral responsibilities and have secondary moral rights.

[66] Legal personality is a legal concept, while personhood is an ontological reality from which a moral status follows. The notion of legal personality stems from Roman law, specifically from the Latin word *persona,* which was the 'mask' worn during theatre plays. The mask indicated or defined someone's particular *status* in relation to others in society, such as the status of a free man or a slave (*status libertatis*), of citizens or aliens (*status familiae*), and of members of a family (*paterfamilias* or *filiusfamilias*). See, generally, Richard Tur, 'The "Person" in Law' in R Peacocke, Grant Gillett and Ian Ramsey Centre (eds.), *Persons and Personality: A Contemporary Inquiry* (Oxford: Wiley-Blackwell, 1987) 116, 117. Personhood is an ontological reality of every human being that refers to its substantive nature or ontological identity (factual truth) as a rational agent who has the capacity to think and choose. John Finnis, 'Euthanasia and Justice' in *Human Rights and Common Good. Collected Essays* (Oxford: Oxford University Press, 2011) 211.

[67] Some of the major works defending the reality of the corporation are: Frederic William Maitland, Introduction to Otto von Gierke: *Political Theories of the Middle Ages* (Frederic William Maitland tran., Cambridge, University Press, 1900); Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2013); Victor Manuel Muñiz-Fraticelli, *The Structure of Pluralism on The Authority of Associations* (Oxford: Oxford University Press, 2014); Harold J Laski, 'The Personality of Associations', 29 *Harvard Law Review* 404–426 (1915); Arthur W Jr Machen, 'Corporate Personality', 24 *Harvard Law Review* 253–267 (1910).

[68] Susanna K Ripken, 'Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle', 15 *Fordham Journal of Corporate & Financial Law* 97–178 (2009) at 112.

[69] Ibid.

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and action of its members.[70] These roles and interactions define businesses as something more than just a creation of the law. Corporations and other business associations exist from the perspective of those who experience associated life, and to 'overlook their presence would be to miss out on a significant aspect of the social world'.[71] The legal status that is granted to businesses (their legal personality) is only a juristic accommodation in the social reality of a group agency that has the need for a recognized institutional status in order to operate in the legal realm. In other words, legal personality is the consequence of the recognition of the social reality of businesses' real capacity to benefit or harm communities that surround them and society in general and to bear rights and obligations independently of their members.[72]

Second, as has been demonstrated above, businesses are already bearing rights and obligations and participating in international procedures and in the process of law-making through lobbying. This practice adopted in various special regimes of international law demonstrates that businesses have already been recognized as international legal persons by states and international organizations. This recognition is a reaffirmation of the reality of businesses as real social actors. Furthermore, as a matter of fact, businesses already have the capacity to participate in the process of law-making through lobbying. Thus, the idea that it is unjust to regulate businesses under norms that were created without the participation of the businesses falls flat. Nevertheless, this refers to a wider problem of the democratic deficit of international law that has been discussed elsewhere; thus, discussing it is beyond the scope of this article.[73]

It is important to clarify that my argument is not that, because businesses have some recognized rights under international law, they should also have human rights obligations. Businesses have the capacity to bear rights and obligations under international law because that capacity is correlative. In other words, one can neither have rights without obligations nor obligations without rights. However, it does not follow that having the right to sue a state before an arbitration panel means that businesses have obligations in other regimes of international law such as protecting the environment. It is mistaken to presume that, because someone has property rights, it must have human rights obligations. The capacity to bear rights and obligations is correlative, but the criteria to determine what rights and obligations are allocated to or recognized for non-state actors are found outside the narrow correlation of rights and obligations.[74] The

[70] For a definition of collective intentionality, see John R Searle, *Making the Social World* (Oxford: OUP, 2010) at 43–45.

[71] Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2013) at 4.

[72] See Frederic William Maitland, Introduction to Otto von Gierke, *Political Theories of the Middle Ages* (Frederic William Maitland tran., Cambridge: Cambridge University Press, 1900) at 314–15.

[73] See Sarah H Cleveland, 'Our International Constitution' (2006) 31 *Yale Journal of International Law* 1–126, 101; Paul B Stephan, 'International Governance and American Democracy Symposium: AEI Conference Trends in Global Governance: Do They Threaten American Sovereignty' (2000) 1 *Chicago Journal of International Law* 237–256.

[74] This construction of rights and duties correlation is based on the 'Hohfeldian Analytical System' of rights. See WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916) 26 *Yale Law Journal* 710–770. For a general discussion about correlative duties to human rights, see Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton, NJ: Princeton University Press, 1996) 35, and Thomas Donaldson, *Ethics of International Business* (New York, NY: Oxford University Press, 1992).

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source of human rights and their correlative obligations is human dignity,[75] not the rights or obligations that businesses have as economic actors. Accordingly, the immediate purpose of mentioning the practice of various special regimes of international law is to prove that businesses have legal personality, not that they have direct human rights obligations. The third and last argument presented in this article refers to this, but it would be impossible to reach this third argument without first demonstrating that businesses have the capacity to bear rights and obligations, including the correlative obligations to human rights.

In short, the traditional model understanding of international subjectivity has been challenged to give way to more flexible concepts that can integrate businesses as subjects of international law. Rosalyn Higgins, followed by Alvarez, argued that, rather than speaking about legal persons, we should refer to 'participants', whereby an actor can participate in different ways in the creation and development of international law without necessarily recognizing that it has a set of capacities, but just that it has rights and obligations. This approach avoids the discussion about international subjectivity and leaves many questions unanswered, despite its functionality. Another perspective is that legal personality is not a unified concept but a set of capacities or features related to, but independent of, each other, which a legal person can have all together or only one. This second approach, which challenges the traditional model of international law, enables us to distinguish between actors and their different responsibilities and rights in international law. According to this understanding, legal personality is a matter of degrees rather than a binary answer such as that of the traditional subject-object dichotomy. Accordingly, businesses are partial international legal persons from which their capacity to bear direct obligations under international law derives.

IV. Obligation *versus* Enforcement

The argument that obligations for non-state actors are indirect assumes that an obligation is both the legal standard of behaviour and the enforcement mechanism. As only states may enforce obligations under the traditional model of international law, obligations for non-state actors will always be indirect. The second argument in defence of the direct obligation of businesses under international law is that legal obligations and the enforcement model must be regarded as two separate issues.[76] When these concepts are treated as separate matters, the idea that international law only imposes indirect obligations on non-state actors falls flat because an international obligation can directly bind a non-state actor despite that its enforcement mechanism depends on national law.

[75] See Paolo G Carozza, 'Human Rights, Human Dignity and Human Experiences' in Christopher McCrudden (ed.), *Understanding Human Dignity* (The British Academy, 2013) 615, 622; John Finnis, *Human Rights and Common Good. Collected Essays* 7 (Oxford: Oxford University Press, 2011); Patrick Lee and Robert P George, 'The Nature and Basis of Human Dignity' (2008) 21 *Ratio Juris* 173–193.

[76] Ratner, note 7, 476–481.

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This distinction between obligation and enforcement is supported by the idea that the language of some international instruments at times identifies the obligations of non-state actors or provisions with a horizontal effect; yet the liability for the violation of those obligations must be enforced through domestic law. According to Steven Ratner, those who think that the absence of an international enforcement mechanism means that the obligation is indirect

> [confuse] the existence of responsibility with the mode of implementing it. It suggests that international law does not itself impose liability on the corporations – even though this is the very language of some of the treaties – because the mechanism for enforcement is through a private lawsuit in one or more states. The treaties do impose responsibility upon the polluters, however; the use of domestic courts to implement this liability does not change this reality, just as the use of such courts to implement international criminal responsibility – through, for example, obligations on states to extradite or prosecute offenders – does not detract from the law's imposition of individual responsibility.[77]

Similarly, Andrew Clapham argues that the lack of jurisdiction to try a corporation does not mean that the corporation does not have a direct legal obligation or that the corporation cannot breach international law. Instead, it means that the obligation must be enforced through different forums, e.g., national domestic courts, international human rights treaty monitoring bodies, or even through mechanisms established under non-binding schemes for investigation such as that of the OECD.[78] In other words, the fact that non-state actors 'cannot be parties to a case before the International Court of Justice does not mean that they do not have rights and obligations under international law; disputes have to be settled in a different forum'.[79]

Another perspective on the argument of obligation and enforcement distinction is found in the doctrine of *Drittwirkung* or the horizontal effect of international norms used especially in relation to the European Court of Human Rights (ECHR).[80] There are two kinds of *Drittwirkung*. Direct *Drittwirkung* is the possibility that a person has to bring claims against another private party because of a violation of international norms (or constitutional norms). Indirect *Drittwirkung* means that the international norm has an effect on the relationship between private parties as well as between the state and the individual. However, in the latter case, the victim cannot bring a claim against the private party. The absence of direct enforcement against private parties does not remove the horizontal effect of the norm; rather, it means that the enforcement is carried out indirectly through the responsibility of states.[81] In terms of common ground, the two modalities of *Drittwirkung* both maintain that non-state actors have to respect obligations and

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77 Ibid, 481.

78 Clapham, note 4, 31–32.

79 Ibid, 36.

80 See Andrew Clapham, 'The "Drittwirkung" of the Convention' in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds.), *European System for the Protection of Human Rights* (Deventer: Martinus Nijhoff, 1993) 163.

81 Jägers, note 33, 37.

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correlative rights independently of the state, whether they are enforced directly or indirectly.

In a third different but closely related argument, David Bilchitz claims that we need to distinguish between bound entities and enforcement agencies. According to Bilchitz,

> Bound entities are all those agents who are bound by general obligations to avoid violating fundamental rights as well as, possibly, to assist in the realization thereof. The extent of the obligations of bound entities under the human rights treaties may vary according to the nature of the entity concerned: individuals may not, for instance, have exactly the same obligations as states, and corporations may also not have exactly the same obligations that states have.[82]

In contrast, enforcement agents 'are tasked with ensuring that bound entities meet their obligations. Such agents may also be held responsible for failing to perform their task in this regard, thus allowing third parties to violate human rights'.[83] For example, police officers are both enforcement agents and bound entities. The distinction between bound entities and enforcement agents clarifies that international law obliges both but requires different obligations for each. This is because 'the lawful jurisdiction of the state over third parties means that state action in this regard can bind those within its jurisdiction to certain direct obligations under international law'.[84] Accordingly, businesses might not be held directly accountable to international tribunals because the state is primarily responsible for upholding human rights. Thus, the state must be the one to grant an effective remedy in its national courts for violations against international law, if they are directly applicable within domestic law.[85]

The distinctions between obligation and implementation, direct and indirect *Drittwirkung*, or bound entities and enforcement agents point towards the same idea that there are international obligations with horizontal effects that directly bind non-state actors, but international tribunals cannot necessarily enforce those obligations. The legal force of an international obligation is not affected by the contingency that the implementation and enforcement of such a norm have to be performed by states and domestic tribunals in the absence of international tribunals with that jurisdiction.

In short, businesses, along with other non-state actors are already bearers of international obligations in a direct way because international legal regimes (e.g. environment law, anti-corruption law, international humanitarian law) implicitly or explicitly establish particular standards of behaviour or patterns of actions that can be understood independently of those expected from the state.[86] The obligation of the states might be complementary, but it cannot substitute those of non-state actors. Nevertheless, in the absence of an international procedure and forum in which those obligations can be

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[82] David Bilchitz, *The Ruggie Framework*, 24.

[83] Ibid, 27.

[84] Ibid, 30.

[85] David Kinley, 'Human Rights as Legally Binding or Merely Relevant?' in Stephen Bottomley and David Kinley (eds.), *Commercial Law and Human Rights* (Ashgate/Dartmouth, 2002), 25.

[86] See Ratner, note 7, 443–545.

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implemented and enforced, the states remain the responsible enforcement agents through their different organs. The horizontal effect of the norm comes from the nature of the right that it protects rather than from the implementation procedure.

The theoretical distinction between international obligations and their enforcement mechanisms has relevant practical implications for the ongoing debate about the international legally binding instrument. The treaty on BHR discussed by the Intergovernmental Working Group[87] could take one of two possible positions on this matter. First, it could embrace a traditional perspective and establish that only states have direct international obligations, while businesses are only obliged to behave in accordance with domestic norms created by states. Second, it could create specific provisions that clearly allocate obligations to businesses independently of the obligations of states or of the existence of international enforcement mechanisms, following the approach of the United Nations Guiding Principles on Business and Human Rights (UNGPs).[88] Indeed, The UNGPs are the first international document in which the corporate responsibility to respect human rights as a duty independent of the state has been expressly set forth.[89] Nevertheless, it is important to remember that the UNGPs do not create international obligations because they are soft law.

At the time of writing this article, the treaty discussion seems to be leaning towards the first position. In 2017, the discussion of the Intergovernmental Group reflected in a document entitled 'Elements for the draft legally binding instrument' showed some ideas for allocating direct international obligations to businesses.[90] However, the Zero Draft Treaty published in July 2018 by the Intergovernmental Group establishes obligations for state parties to create a legislative or administrative measure in order to regulate Transnational Corporations, but it does not allocate direct obligations to businesses. If the Zero Draft Treaty becomes the final treaty on BHR, the international community would have lost an opportunity to clarify which legal obligations for businesses are correlative to the internationally protected human rights. Clarifying such obligations would avoid (1) the problem of inconsistency among the various human rights standards applied to business activities in different domestic jurisdictions, and (2) the inability or unwillingness of some states to enact obligations in such matters.

A. First Objection

Two arguments can be made against differentiating between obligation and enforcement. First, when a state binds an entity within its jurisdiction, the obligation is to comply with

[87] Established in 2015 by the UN Human Rights Council. Compilation of commentaries on the 'zero draft', UN Human Rights Council, 4th Session of the Open-ended Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights, October 2018.

[88] The UNGPs were endorsed by the UN Human Rights Council in June 2011. Human Rights Council, Res. 17/4 adopted by the Human Rights Council: *Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess., Agenda Item 3, U.N. Doc. A/HRC/RES/17/4, 2011.

[89] Guiding principles on business and human rights, UN Human Rights Office of the High Commissioner (OHCRH), endorsed in its resolution 17/4 of 16 June 2011.

[90] Elements of the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, OHCRH chairmanship of the OEIGWG established by Human Rights Council, Res. a/hrc/res/26/9 (29 September 2017).

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the law that it creates. Thus, the fact that national law incorporates the same legal standard of behaviour of international law is different from saying that individuals or businesses are directly bound by international law. Accordingly, even if international instruments impose obligations on business entities, both their enforcement and their legal force depend on state and domestic law. Therefore, business entities or other non-state actors have very few or no *direct* international obligations.[91] Accordingly, we could reasonably say that international law does not bind non-state actors, and that the contrary would be a 'doctrinal excess'.[92]

According to Vázquez, the difference between direct and indirect obligations is crucial for corporate managers. If obligations are only indirect, corporate managers/businesses only need to be aware of domestic norms in the states in which they operate and how they integrate international law into their systems. Yet when obligations are direct, businesses could become subjects of international institutions or procedures.[93]

To be able to respond to the first objection against the division between enforcement and obligation that leads to the conclusion that businesses have direct obligations under international law, we must clarify the terms under debate. The central issue is to understand what we mean by direct or indirect obligation. Depending on the meaning, we can understand if the fact that businesses must comply with international legal standards internalized in domestic law is the same as saying that international law has no mandatory character for businesses.

The direct or indirect character of an international obligation depends on how necessary the mediation of domestic law is in order to bind non-state actors, including businesses. Thus, an *indirect obligation* is an international norm that depends on domestic law to have legal force.[94] Therefore, there are two possible opposing views regarding the existence of direct international obligations for businesses. The first view, which usually operates under the traditional model of international law, sustains that non-state actors are bound by international law *only indirectly* (with some exceptions) because domestic law must necessarily mediate – although to different degrees depending on the state – in order to endow the international obligation of *legal force.*[95] Thus, the legal force of an international obligation depends on its domestic implementation according to the internal hierarchy system of norms. Accordingly, (*direct*) international obligations for non-state actors do not exist because the 'state is a "screen" between them and international law'[96] as the state is the only international subject.

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[91] Vázquez, note 5, 941.

[92] Ibid, 942.

[93] Discussing what he classifies as 'the legal impossibility argument' that private non-state actors simply cannot incur responsibilities under international law because international law only binds states. Ibid; see Clapham, note 4, 35–41.

[94] Vázquez argues that a direct obligation is one that is enforced by an international mechanism. Although he accepts that some intentional norms could later be enforced by subsequent new international tribunals as occurred with the ad hoc tribunals such as the ICTFY and Rwanda Tribunal, he argues that it would still be very 'tricky' to identify direct applicable norms to private entities. The reasons that he gives to support this claim are that the language directed at states in all treaties evidence an unexpressed understanding of the parties that only apply to states, and that it has to be shown that norms themselves directly applied to a corporation at the time of the conduct because of prohibition against retroactive legislation. Vázquez, note 5, 941.

[95] See Mugerwa, note 23, 249.

[96] Ratner, note 7, 475.

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A second account of the same view is that non-state actors, including businesses, are only *indirectly* bound by international law because *the enforcement* (which consists of mechanisms to ensure compliance and to hold violators of the standard accountable) of almost every legal standard of behaviour directed to non-state actors contained in international sources is dependent on domestic law.[97] Therefore, the international obligations for businesses have legal force independently of their domestic implementation, but they are *indirect* as there is no international enforcement mechanism available. While in the first account the definition of obligation necessarily includes the penalty for non-compliance, the definition in the second account does not include the penalty. However, this second account fails to distinguish between the obligation and its enforcement. Thus, if the enforcement is not done directly through an international procedure, the international obligation is necessarily indirect.

In contrast, the second view sustains that international law can directly bind non-state actors, that is, without the mediation of domestic law. The reason for this is that the binding character of international law is independent in its enforcement mechanism. While the international obligation has a mandatory character for non-state actors, its mechanisms may or may not depend on domestic law, but not its legal force. Accordingly, the feature that should define the indirect or direct character of an international obligation for a business is whether the conduct (action or omission) required by the norm necessarily implies the intervention of the state or not. This is the central element of an obligation. From this perspective, the *indirect obligations* of businesses are those in which the state's direct participation is an essential element of the prohibited or required conduct.[98]

The first view is mistaken because it confuses the mechanism of the legal implementation of an obligation and the existence of an obligation with its inherent mandatory or binding character.[99] Without this difference, international law would not really be law at all because it would necessarily depend on domestic law to have any legal meaning. This is a caricature of reality, not its portrait. The first view inexactly describes a more complex reality because, although domestic law plays a necessary role, international law exists in a sphere outside the state, independent of the claims of domestic law.[100] This does not diminish the relevance of implementation mechanisms and the role of domestic law in this matter. However, it is one thing to say that the international obligation does not exist, and another thing to say that there has been no implementation through domestic law.

The underpinning issue in this debate is the concept of law itself – whether a sanction is an essential element to determine the existence of a mandatory obligation, in other words, of the law. For positivists like Austin, international norms are not really law because, unlike domestic norms, they are not enforced through coercion.[101] However, Hart understood that, although coercion is a feature of the law, the existence of an

[97] Vázquez, note 5, 951.

[98] Steinhardt, note 3, 40; Ratner, note 7, 481.

[99] This holds because there are no legal obligations without legal force. Finnis, note 60, 311.

[100] Steinhardt, note 3, 40.

[101] John Austin, *The Province of Jurisprudence Determined* (Charleston, SC: Bibliolife Network, 2013) 201.

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obligation by virtue of a mandatory rule and the prediction that a person might suffer punishment for his or her disobedience might diverge.[102]

The legal force of an obligation does not derive from the existence of punishment, but from the understanding that obedience to the law is necessary to act in favour of the common good of our communities, including the international community.[103] In his famous essay, *To Perpetual Peace*, Kant argued that governments should act according to international law as a path toward 'perpetual peace'. Kant's argument on why nations should obey international law comes from a vision of the international system as a way of securing peace, justice, and a democracy founded on respect for human rights.[104] Similarly, for Grotius and Henink, the authority of the law to bind even sovereign states is grounded in the acceptance of that authority by the international community, not in the sanction or punishment that usually comes from the disobedience of it.[105] In sum, the mandatory nature of the law, including international law, derives from the necessity to coordinate our actions and the actions of the different international actors in order to achieve those ends that conform to the universal common good such as peace, security and justice, which could not be achieved solely through individual effort.[106]

In conclusion, the legal force of an obligation does not depend on a concurrent fear of sanction or by any other coercive force with which the obligation is enforced. On the contrary, the legal force of an obligation derives from a rational necessity to cooperate with the common good. This is better understood if one has previously internalized the relevance of contributing to the instantiations of a human good in one's own or another person's life.[107] In the case of international law, the legal force of international obligations derives from the rational necessity of co-ordination of the conflicting interests of members of the international community that have traditionally been states.[108] In other words, the authority of the law does not come from the mere prediction of the punishment that will come from disobedience to it, but from the legitimacy and reasonableness of the obligation imposed by the law in order to achieve the common ends of our communities, such as 'perpetual peace', human rights respect, or to address extreme poverty and to remedy environmental degradation.

Two clarifications are necessary to understand better the idea of a 'universal common good' as an argument for the authority of international law. First, the universal common good, and thus the scope of international law, should be limited to those aspects that are

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[102] HLA Hart, *The Concept of Law*, 3rd edn (Oxford: Oxford University Press, 2012) 82–85, 216–219.

[103] Finnis develops the argument that a person must obey the law for the sake of the common good, and that the reasonableness of the law is precisely the ultimate source of its legal force combined with its positive stipulation. See Finnis, note 60, 305, 313–318.

[104] Immanuel Kant, 'To Perpetual Peace: A Philosophical Sketch' [1795], in *Perpetual Peace and Other Essays* 107 (Ted Humphrey tran., 1983).

[105] Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford and New York: Oxford University Press, 2008) 6–8.

[106] Robert P George, 'Natural Law and International Order' in David Mapel and Terry Nardin (eds.), *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 1999) 50. See also Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011), 399–407.

[107] Finnis, note 60, 331–336.

[108] Ibid.

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truly shared among nations with diverse cultures and traditions. These commonalities are the real needs and desires of human communities directly related to our life as social dependent rational beings. Put in another way, the universal common good is not a utopian idea without real meaning.

Second, the common ends that form what we may call 'universal common good' should be recognized and comprehended from human experience, not from abstract or ideological notions of what the common good is. For example, the systematic and widespread violation of human rights around the world has shown us that it is very difficult for a state to guarantee such respect and protection without necessarily being affected or affecting other states in that common goal. The tragedy of human persons sacrificed by the selfish interests of powerful economic actors around the world makes it clear that there is a failure of individual states that should regulate transnational businesses but cannot regulate effectively. The failure of states and the necessary cooperation between them and other international actors justify the authority of international law in this case. In other words, respect for human rights is one of the ends, which human experience has shown us, that must be achieved through cooperation because of their interdependence.

This is not an argument for law without sanction. In fact, Kelsen and Henkin recognized that international law has sanctions that impose a cost for breaching the law. According to Kelsen, war (use of force) and reprisals (countermeasures) are the primary enforcement tools of international law.[109] In addition, judicial adjudication through international tribunals and arbitration is another mechanism for the implementation of international obligations. Ultimately, as Koh recognizes, the main form through which international law is enforced is a complex transnational process of interaction, interpretation and internalization in domestic law, which implies 'judicial incorporation, legislative embodiment, or executive acceptance' of international law.[110] Therefore, international law allocates mandatory obligations to states, which are implemented through various forms, including, but not exclusively, through the process of internalization of international law in domestic law.

The relevance of this argument is that the main form of enforcement of the international obligations of businesses depends on its internalization in domestic law, but what is indirect here is not the obligation (as incorrectly would sustain the second account of the first position), but the enforcement mechanism or sanction for non-compliance. For the time being, those sanctions or implementation mechanisms are dependent on states' further action, but this could change over time. The fact that this could change reinforces the argument that the international norm can directly bind businesses because what has been already defined is the substantive conduct internationally required from businesses that are independent of the existence of the states' related obligations.

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[109] Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford and New York: Oxford University Press, 2008) 7.

[110] Harold Hongju Koh, 'Why Do Nations Obey International Law: Review Essay' (1996–1997) 8 *Yale Law Journal* 2599–2660.

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If there are obligations (albeit indirect), it means that the object of a treaty on business and human rights could be to clarify or expand existing international obligations, since the obligations already exist on an international level. According to the first proposition, a treaty that directly regulates businesses is incompatible with international law. Therefore, the obligation will always be that state parties regulate businesses through domestic norms. According to the second proposition, a treaty that directly regulates a corporation is possible as the existence of a legal obligation does not depend on its enforcement. However, in this case, a domestic mechanism will still be needed to render the obligation effective – except, of course, if the treaty would create an international mechanism that monitors and punishes the failure to comply.

In summary, existing international law allocates direct obligations to businesses and other non-state actors, independent of the domestic implementation. However, those international obligations are imperfect in the sense that the obligations exist even without sanctions, but they require, for example, that legal action be brought to a court. Although international law already allocates direct obligations to businesses, current international law is insufficient to effectively respond to corporate human rights violations and the right to effective remedy of the victims because the enforcement model is still dependent on the will of the states.

B. Second Objection

The second objection to the difference between the obligation and the model of enforcement is that, arguing that international law directly binds non-state actors leads to an integrational process in which international law directly reaches the legal and natural persons in a territory without the mediation of states such as occurs in the EU legal system or federal states.[111] Indeed, David Bilchitz explains that corporations are bound by international law by way of an analogy with a national constitution that binds corporations even if they do not participate in the process of its creation. Accordingly, a reasonable concern would be that accepting the direct obligations of businesses under international law signifies that the international legal system is transitioning to an integrational process or international constitutional regime, which would represent a structural transformation of the current international system, which might be undesirable to pursue.

This structural transformation would be undesirable because international law is a subsidiary system whose purpose is to assist nation-states in their legitimate and diverse way to pursue their common good in accordance with their culture, history and particularities.[112] The creation of an international constitutional system creates the danger of substituting the states with an international bureaucracy in the decision-making process of fundamental issues that should be left to the community that is closer to the person.[113] Furthermore, an international constitutional system could lead

[111] Vázquez, note 5, 953–954.

[112] Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 57–58.

[113] Andreas Follesdal, 'Subsidiarity and the Global Order,' in *Global Perspectives on Subsidiarity*, Michelle Evans and Augusto Zimmermann (eds.) (Dordrecht: Springer, 2014) 207.

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to a process of unrealistic uniformization of legal systems irrespective of legal traditions and cultural diversity, thus giving way to new forms of colonization.[114]

Although this concern is not without merit, accepting the direct obligations of businesses is not necessarily a drastic transformation of the international legal system because contemporary international law already directly binds corporations, without necessarily implying a transition to an international constitutional regime. The language of various treaties is clear that the obligation of the states with respect to third parties is to enforce the liability of legal entities for violations *against provisions of the same treaty.* This means that the treaty itself creates the standard of behaviour that must be applied to non-state actors.

Article 2(1)(d) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states that 'each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'.[115] The language clearly creates an obligation for the states to incorporate measures to eradicate racial discrimination caused by private individuals or groups into domestic law. Thus, there is an implicit obligation of the private actor to abstain from discrimination, but its specification depends on domestic law and state willingness. In international environmental law, we see a similar approach in which the treaty language allocates obligations directly to the polluter who could be a legal person. This is the case, for instance, in article 2(14) of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal; the European Convention against Terrorism Article 10(1);[116] and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography.[117]

Nevertheless, in accordance with the negative aspect of the principle of subsidiarity, the liability mechanism or enforcement model of those international legal standards of conduct is entrusted to the states.[118] Even if international law is no longer state-centred (at least in theory), the state retains the primary responsibility for the common good of its political community, and the state is better placed to decide what kind of legal regulations must be approved to enforce such standards. The state's duty to protect means enforcing international legal standards and holding third parties who *have violated international legal standards* accountable. This does not mean that international law could not enforce these standards directly. According to the positive aspect of the principle of subsidiarity, when the state is unwilling or unable to enforce those legal standards, it is reasonable to

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[114] For a critique on the project of international human rights from cultural diversity perspective, see Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2013).

[115] Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965, entered into force 4 January 1969), art 2(1)(d).

[116] European Convention on the Suppression of Terrorism, 137 UNTS 93, ETS No. 90 (adopted on 27 January 1977, entered into force on 4 August 1978), art 10: 'Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention'.

[117] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography G.A. res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49 (adopted on 25 May 2000, entered into force on 18 January 2002), art 3(4): 'Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative'.

[118] See, generally, PG Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 2003.

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suggest that such enforcement mechanisms must be changed in order to allow international institutions to deal with it directly.[119]

Those international legal standards of conduct bind non-state actors through different legal channels depending on the domestic norms that govern the relationship between national law and international law. For example, in some countries, the provisions of international law will be incorporated into domestic law-making almost instantly, such that as soon a treaty is ratified, the non-state actor will be bound by the provisions of the same treaty and when the treaty says so.[120] In other countries, the legal standard will only bind non-state actors when the treaty has been approved through domestic law. Furthermore, in some countries, the international legal standard of behaviour can be raised before a national court in order to request compensation for the violation of such standards, whereas in other jurisdictions it is not possible to do so directly.[121]

This reasoning is possible only if one accepts that the legal standard of behaviour can be distinguished from the model of enforcement and implementation of existing international law that is based on state sovereignty. This model exists on historical and normative grounds, and arguing that states should no longer be the primary forum of international law implementation would problematically ignore the importance of states to control fundamental questions about how general principles should be implemented in accordance with social, political and cultural contexts. However, the model of enforcement does not condition the existence of the legal norm that directly places an obligation to behave in a particular way on non-state actors. Accordingly, it would be reasonable to accept that non-state actors are, in fact, governed by international legal standards of behaviour regardless of the mechanism of enforcement, and that does not necessarily mean a tremendous transformation of the international legal system but a flexibilization of state sovereignty through the application of the principle of subsidiarity.

V. Nature of Human Rights

The third and last argument in favour of direct obligations for businesses under international law is not in the sphere of general public international law, as are the two previous arguments, but under the philosophical discussion about the nature of international human rights norms. The argument is that, historically, human rights were constructed as limits to state power, but this liberal understanding must be overcome because it responds to the circumstance in which these norms were positivized, not to the nature of human rights. According to the 'dignitarian' perspective of human rights present in the DNA of the international human rights project,[122] human rights are a requirement of justice that

[119] Ibid.

[120] Jägers, note 33, 37; see, generally, Anthea Roberts, *Comparative International Law* (Oxford, Oxford University Press, 2018). Ch 10.

[121] See, generally, Jörg Fedtke and Dawn Oliver, *Human Rights and The Private Sphere: A Comparative Study*, Vol 3 (London: Routledge, 2011).

[122] 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Universal Declaration of Human Rights, UN A/RES/3/217A (adopted on 10 December 1948), preamble.

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emanates from the dignity of each human person to any rational actor;[123] they are not *public* liberties of non-interference from the state.[124]

Indeed, the language of the Universal Declaration of Human Rights (UDHR) expresses the idea that the state is not the only duty holder of internationally recognized human rights. The UDHR preamble states that 'every individual and organ of society' shall strive to promote and respect the rights enshrined in this declaration. Its language is wider and allows for broader interpretation and development than the two international Covenants. Moreover, a combined reading of the preamble with articles 29 and 30 of the declaration leads us to conclude that this instrument was intended to extend human rights obligations to entities beyond the state. The combination of articles extends the moral, if not legal, authority of the UDHR to businesses in the sense that they acknowledge that everyone has duties towards the community and prohibits any 'group' from engaging in activities aimed at infringing upon the rights and freedoms recognized in the declaration.

Louis Henkin understood that the 'organ of society' in the UDHR refers to everyone in society and does not exclude businesses.[125] Although some scholars argue that the declaration only expresses a desire that businesses, as part of society, strive to protect and respect human rights,[126] the UDHR should be read as criteria to interpret and understand the subsequent human rights treaties, not as a mere statement of good purpose or goals. This interpretation allows us to see international human rights law as an interdependent and connected system, not as a project that fragmentarily advocates the rights of particular groups or generational rights.

This notion of human rights embedded in the UDHR understands human rights as a demand for justice based on the distinctive dignity of the human person. This demand not only constitutes a requirement for the conduct of the state but also places the requirement of action on every person living in a society. Nevertheless, depending on the role of each social actor, the correlative obligations to human rights will be different. It would be unreasonable to have the same expectations for businesses as for the states, or vice versa.

Thus, naturally, human rights have always had equal implication for the relationship between 'private' actors such as the employer and the employee or the corporation and the worker. In other words, any social actor that belongs to the political community, whether the state or a corporation, can be subject to duties correlative to human rights. Accordingly, any construction of duties correlative to human rights that are exclusively oriented towards the states is mistaken.

However, the allocation of correlative duties to human rights on business has to be done, taking into consideration the kind of correlative duties human rights entail, and the

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123 Finnis, note 60, 206–207.

124 For a liberal understanding of human rights, see Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969); Ronald Dworkin, *A Matter of Principle* (Harvard: Harvard University Press, 1985) 188, 98; John H Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1–47, 20.

125 Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets – Keynote Address' (1999) 25 *Brooklyn Journal of International Law* 17–26.

126 Justine Nolan, 'Mapping the Movement: The Business and Human Rights Regulatory Framework' in Dorothée Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice* 38 (Routledge, 2016) 32.

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inherently different nature and purpose businesses have from the states. In *Basic Rights*, Henry Shue claimed that every human right (despite it being a security or a subsistence right) entails three kinds of duties: avoid, protect, and aid, which has been translated as respect, protect and guarantee.[127]

The UNGPs have adopted the same idea of correlative obligations of human rights and clarified that businesses are expected to respect all human rights, which means avoid violating or assisting other violating human rights. On the other hand, the correlative obligations to protect and guarantee should be left to the states due to their purpose and powers, which enables them to meet those obligations.

Corporations cannot be expected to have the same obligations as the states since their responsibilities are informed directly by their economic mission. However, it does not necessarily follow from the economic nature of businesses that their correlative duties are restricted to respect. There might be situations in which a business could be reasonably required to do more than only avoiding violating human rights depending on (1) its power or control over the situation, (2) the relationship with other actors including the victim (e.g., proximity, dependence), and (3) and previous voluntary commitments it has made that could amplify its obligations (e.g., contracts). However, any correlative obligation of a business has to pass through the test of 'fairness-affordability'.[128] The test is an expression of the idea that 'ought implies can', which means that 'no person or entity can be held responsible for doing something it is not in their power to do.'[129] Therefore, businesses' correlative duties must be determined in accordance with the capacities and rights they have in order to be able to meet their obligations, which are different from the powers and capacities of the states.

Other authors have argued for a more expansive understanding of the human rights duties of businesses, as well.[130] For example, Michael Santoro's 'Fair Share Theory' of human rights responsibility claims that corporations have a secondary duty to attempt to remedy human rights violations in which they did not participate directly or indirectly, besides their primary duty not to directly violate or assist others in violating human rights. This secondary duty is determined according to three criteria: (1) the relationship to the human rights victim, (2) the potential effectiveness of the corporation actions in promoting human rights, and (3) the ability of the corporation to withstand the cost of retaliation by other actors (e.g., government) that might come from promoting human rights.[131]

Nevertheless, it is easily observed that international human rights law has specified nation-states as the main duty holders for the protection of internationally recognized human rights. The reason for this is that the specification of the duty holder is part of a wider specification of rights, and its content can take very different reasonable forms that

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[127] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton, NJ, Princeton University Press, 1996) 81.

[128] Thomas Donaldson, *Ethics of International Business* (New York, NY: Oxford University Press, 1992) 75.

[129] Ibid.

[130] See Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

[131] Michael A Santoro, *China 2020: How Western Business Can – and Should – Influence Social and Political Change in the Coming Decade* (Cornell University Press, 2009) 15–16.

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are dependent on (1) circumstances of times and place, and (2) other principles necessary for reasoning that are not expressed in rights terms.[132]

Because of the way in which international law came into being and was later developed, international instruments are state-centred. However, this can and has been changing in the past decades precisely because it is not an issue of the nature of human rights, but of the kind of law through which they were positivized.

In fact, the international human rights treaties have traditionally been read as not allocating obligations to businesses, but instead that they require the state to regulate and adjudicate in order to protect the rights recognized in the international documents. However, treaty bodies have started to refer more directly to the role that businesses play in the realization of the rights included in those instruments.[133] In doing this, it seems there has been a process of reconciliation of the Covenants and other treaties of the universal system of human rights with the original idea of the UDHR, which understood human rights as a norm directed to all organs of society.

Similarly, the Interamerican Court of Human Rights (ICHR) has found that businesses or private entities have various direct obligations correlative to the rights protected in the American Convention on Human Rights, such as to give information to patients to enable them to make informed decisions on their health,[134] to respect the right to work and freedom of expression of their sindicalized workers,[135] or the obligation not to harm the environment or negatively affect the rights that indigenous communities enjoy.[136] Such jurisprudential developments evidence an increasing willingness of the ICHR to recognize the negative capacity that businesses have nowadays to violate internationally protected human rights without state participation.[137]

However, because of its limited jurisdiction, the ICHR – like any other international human rights tribunal – can only adjudicate the responsibility of states for not protecting those within their jurisdiction from businesses, but cannot decide on the responsibility of the business. Similarly, although existing international human rights norms could be applied directly to businesses because of their nature, these norms must be enforced by the states as a component of their duty to protect.[138] This does not mean that all international

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132 Finnis, note 60, 218–219.

133 Committee on Economic, Social and Cultural Rights, 'General Comment No. 12: Right to Adequate Food' 20th sess U.N. Doc. E/C.12/1999/5 (12 May 1999); see also Committee on Economic, Social and Cultural Rights, 'General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant)', U.N. Doc. E/C.12/2002/11 (20 January 2003); see Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 25, Article 4, paragraph 1 of the Convention (temporary special measures)' U.N. Doc HRI/GEN/1/Rev.8; see Report prepared for the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' Core Human Rights Treaties Individual Report on the International Covenant on Civil and Political Rights Report No. 3' (June 2007).

134 *Caso I.V. v Bolivia.* Serie C No. 329 (2016) Corte IDH 158, 189.

135 *Caso Lagos del Campo v Perú.* Serie C No. 340 (2017) Corte IDH 142.

136 *Caso Pueblos Kaliña y Lokono v Surinam.* Serie C No. 309 (2015) Corte IDH 223.

137 See, generally, Andrés Felipe López and Milagros Ibrzábal, 'La Sexta Etapa (2013-Actualidad): La Corte de La Igualdad' in Alfonso Santiago and Lucía Bollocchio (eds.), *Historia de La Corte Interamericana de Derechos Humanos (1978–2018)* (La Ley, 2018). See also María Carmelina Londoño-Lázaro, Ulf Thoene and Catherine Pereira-Villa, 'The Inter-American Court of Human Rights and Multinational Enterprises: Towards Business and Human Rights in the Americas?', (2017) 16 *The Law & Practice of International Courts and Tribunals* 437–463.

138 Jägers, note 33, 45–46.

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human rights norms have been written in a way in which we could determine the concrete obligation that businesses have, and thus we need to read those instruments very carefully to deduce the responsibilities of businesses.

Some authors argue that certain human rights norms apply to non-state actors, including businesses, because of their *special status in international law*,[139] such as *jus cogens* or peremptory norms. The violation of these norms constitutes 'wrongs *per se*' because they are 'conducts that are internationally wrongful even in the absence of state action'.[140] However, the argument of this article is that *all* human rights norms apply directly to non-state actors and not only those with a special status in international law. The only difference between the norms with a special status in international law and other human rights norms is that the former would impose very similar obligations to businesses like the ones imposed on states because they are usually framed in a language of prohibition such as not to commit genocide, or enslave another human being that allows less diversity on the correlative obligations.

VI. Conclusion

Although international law, including IHRL, has developed in a particular historical way in which the state has been the main duty-holder and only subject of international law (except for international organizations), international law is undergoing a conceptual and structural evolution required to address non-state actors' accountability. This conceptual evolution implies a re-reading of international legal subjectivity as an index of certain capacities that can be recognized in different degrees as challenging the sharp distinction between subjects and objects of international law. According to this conceptual evolution, businesses and other non-state actors have the capacity to bear international rights and obligations, and to participate in international proceedings, but do not bear the same rights or obligations of states and do not have the capacity to create international law, which is still reserved for states only.

Similarly, international law obligations and their legal force must be differentiated from the forms of enforcement and implementation of those obligations. If we can agree on that distinction, it is possible to deduce from the growing consensus in international practice and the open language of various treaties that international law already allocates obligations to non-state actors, including businesses. Nevertheless, the enforcement and implementation of those obligations depend upon state action and domestic law, which incorporates international law in various forms and degrees. Such a model of implementation upon which current international law operates might be modified in the future through the expansion of the jurisdiction of international human rights tribunals, the creation of new international courts, or of new human rights monitoring bodies with quasi-judicial functions dedicated to business and human rights. Although the analysis of such proposals goes beyond the scope of this article, the point is that those ideas depart from the proposition that international law binds businesses (and other non-

[139] Ibid, 33, 46. See also Jernej Letnar Černič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights* (Europa Law Publishing, 2010) 17.

[140] Steinhardt's framework is based on the decision in *Kadic v Karadzic* of the Second Circuit Court of Appeals of the United States; Steinhardt, note 3, 33.

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state actors) in various ways but there is not yet an enforcement mechanism of international law that can adjudicate the international responsibility of these actors.

Ultimately, the conceptual and structural evolution of IHRL necessary to address businesses' negative human rights impact implies returning to the original notion of human rights present at the beginning of the international human rights project in the UDHR. According to this perspective, human rights require actions or omissions not only of states but also of all social actors that have the capacity to impact the enjoyment of human rights. In the same sense that we do not expect only those in government to act justly, human rights are a requirement of justice for business and for any other economic and social actor. The IHRL specified the state as the only duty-holder because of the circumstances and perspective of international law at the time when those rights where positivized and a limited philosophical understanding of human rights as a limit to state power. In contrast, this article defends an account of human rights based on the dignity of the human person that allocates correlative obligations to all social actors. Accordingly, not only do human rights with a special status in international law (e.g., prohibitions to commit genocide, slavery, or torture) directly bind businesses, but all internationally recognized human rights have the capacity to allocate obligations to businesses. However, we must be careful in the application of this conclusion, as we need to read very carefully the written text of existing international instruments in order to determine which specific obligations are applicable to businesses, which could differ from the obligations of the states.

The above conclusions have two further consequences. First, with regard to the debate about a treaty on business and human rights, the idea that IHRL already allocates direct human rights obligations to businesses should orient the discussion towards whether those obligations are sufficiently delimited, and more importantly, if it is worth it to create new international enforcement mechanisms for those obligations. Furthermore, as businesses are partial international legal subjects, the treaty should allocate obligations to businesses independently of the obligations of the states, and clarify that, in some circumstances, businesses have human rights obligations beyond the minimum duty to *respect* taking into consideration the power or control over the situation, and the relation to the victim and other actors the business has. Clarifying what human rights obligations business have would avoid (1) the inconsistency among the various human rights standards of different domestic jurisdictions, and (2) the inability or unwillingness of some states to enact obligations in such matters.

Second, domestic tribunals should understand international human rights treaties as already allocating some human rights obligations to businesses. Thus, depending on each state's particular legal system and legal source hierarchy, domestic tribunals could use IHRL to interpret, complement, or, in the absence of domestic human rights norms targeting businesses, directly apply international human rights standards in order to remediate impunity of corporate negative human rights impacts. Nevertheless, domestic tribunals should bear in mind that these international obligations are limited, are dependent upon states' implementation, and must be clearly differentiated from those obligations that are inherent of the states.