

Investor Responsibility for Human Rights

Does an institutional financial investor have an obligation according to international law to provide remedy to the victim of a human rights violation caused by a business it has invested in?

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1 Introduction

1.1 The Topic of the Thesis and its Topicality

In the year of 2000, there were 40.000 corporations whose activity crossed national borders, and 51 of the 100 largest economies in the world were global corporations¹. The scope and economic power of commercial actors put them in a position to inflict great harm both to the communities in which they operate and to their many employees.

In 2014, Gize Araya, Kesete Fshazion and Mihretab Tekle filed a civil lawsuit against Nevsun Resources Ltd. – a Canadian registered company; claiming to be victims of the companies use of forced labour at the Bisha mine in Eritrea². The British Columbia Supreme Court in Vancouver, Canada, decided on the 21st of November 2017 that the case should go to trial³. This on-going conflict illustrates how businesses can violate human rights through their operations.

The company that violates human rights is owned by someone. Ownership can be (either partly or fully) in the hands of an institutional financial investor.

The institutional financial investor will either gain profit or suffer an economic loss, directly depending on the actions and success of the business it has invested in. Formulated in extreme terms; the institutional investor can be a profiteer of human rights violations. The investor does, however, not have to be a passive “receiver” of profit or loss; and if it is, this will be an active choice. This argument is based on recognition of the fact that an institutional financial investor, as an investor in a company, holds a unique position to influence the company’s behaviour. Investor influence can be executed directly through how it handles its shareholding position, or through its communication of expectations towards how the company shall carry out its operations. Further, and in a more indirect way, the institutional financial investor can

¹ Sarah Anderson and John Cavanagh, *The Top 200: The rise of Global Corporate Power*, 2000
<<https://www.globalpolicy.org/component/content/article/221/47211.html>> accessed 11 December 2017.

² *Araya v. Nevsun Resources Ltd.*, Notice of Civil Claim for the Supreme Court of British Columbia, Vancouver Registry No. 148931, 20 November 2014 part 1 para. 2.

³ *Araya v. Nevsun Resources Ltd.*, Decision by the Court of Appeal for British Columbia, Case No. 2017 BCCA 401, 21 November 2017 para. 198.

through its decision on whether or not to invest in the business in the first place, have an impact on how companies operates.

The brief introduction to how an institutional financial investor through its own operations can influence how its clients handles human rights issues, give proper context to present the question asked in this thesis:

Does an institutional financial investor have an obligation according to international law to provide remedy to the victim of a human rights violation caused by a business it has invested in?

The question is a topic of international human rights law, falls within the business and human rights agenda. To answer the question, it is necessary to map out whether or not institutional financial investors bear international human rights obligations. The topic of the thesis is thereby a part of the more general question of whether or not business enterprises are subjects of international law. The aim of the paper is to clarify how far international law has come at date (*de lege lata*) in regard to holding institutional financial investors internationally responsible for its human rights impacts.

However, the formulation of the question of the thesis also gives room to touch some related questions of international law. Firstly, what will the possible remedy obligation of an institutional financial investor entail? Secondly, to what extent can a contribution to an internationally wrongful act trigger international responsibility? Why the topic of the thesis is formulated to include these two questions will be explained by be subsequent explanation of the thesis' topicality.

Topicality

The Thun Group of Banks (the Thun Group) issued the *Discussion Paper on the implications of UN Guiding Principles 13 & 17 in a corporate and investment banking context* (the *Discussion Paper*) in January 2017⁴. The Thun Group do in this paper state how they as institutional financial investors understand their own remedy obligations according to the

⁴ Thun Group, *Discussion Paper*, 25 January 2017 <https://business-humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf> accessed 11 December 2017.

United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs) (2011). The Thun Group argue that “a bank would generally not be considered to be causing or contributing to adverse human rights impacts arising from its clients operations”⁵, which in turn mean that it will not bear a remedy responsibility according to the Framework. The issuing of the paper started a discussion on how the UNGPs is to be understood in this regard, and have put the institutional financial investors contribution to a human rights violations at the centre of attention of the business and human rights agenda.

The concept of remedy has further been a focus area of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (the UN Working Group) this past year. It released its report on what “effective remedy” entails according to the UNGPs in July 2017⁶.

The theses aim to clarify what the concepts of both a “contribution” and a “remedy” entails in the UNGPs, to give a contribution to the on-going debate within the field of international human rights law. However, the main focus of the theses remains to map out whether or not international law imposes binding human rights obligations on institutional financial investors.

1.2 Limitations of the Scope of the Topic

As the institutional financial investor is an owner of the business that violates human rights, questions of identification between the investor and the business can occur. This paper does not pay specific attention to such a situation, and does not examine what is required for an identification to occur. This is due to the simple fact that it is the investors’ own act – its contribution – that is the issue of examination.

The grounds the institutional financial investor can claim to preclude the wrongfulness of its contribution, is not examined. Circumstances that in general can preclude wrongfulness according to international law are consent, self-defence, countermeasures, *force majeure*, distress and necessity⁷.

⁵ *Ibid.*, p. 6.

⁶ UN Working Group, Report A/72/162, 18 July 2017.

⁷ Draft Articles on State Responsibility & Commentary [hereinafter DASR] (2001) art. 20-25.

Further, it is not paid any specific attention to the fact that some human rights violations, for instance murder and torture, can trigger rules of international criminal law. The remedy obligation examined can be triggered both in such cases and in other cases.

Lastly, the scope of this thesis will be limited to the question of how a responsibility of an institutional financial investor to provide remedy would interact with other possible responsible parties. Situations of shared responsibility can possibly occur both between the institutional financial investor and the business that causes the violation, and between the institutional financial investor and the state. The general rule in international law is that each responsible party “is separately responsible for conduct attributable to it”⁸, and that the responsibility of each party is to be “separately invoked”⁹. These general rules are developed in terms of states international responsibility, and it is not evident that the same rules will be applied where other parties share responsibility for a violation. This should be a topic of further examination, but because of the word limit of the thesis, it will not be addressed herein.

1.3 Definition of some Central Terms

The term *human right* is used in its broadest sense. As long as a right is generally recognized to be a right of such kind in international law, it will fall within the scope of the term as it is used herein. Characteristic for human rights is that such rights “derive from the inherent dignity of the human person” and that they are “inalienable rights of all members of the human family”¹⁰. A *violation* of human rights can consist of either an act or an omission.

One who has had its international human rights violated is referred to as a *victim* or a *right holder*; the terms are used in the same sense.

Remedies “refer to the range of measures that may be taken in response to an actual ... violation of human rights”¹¹. The term *reparation* is used in the same sense as the term remedy, but is only used where the duty bearer is a state.

⁸ *Ibid.*, art. 47, Commentary No. 3.

⁹ *Ibid.*, art. 47, Commentary No. 7.

¹⁰ The International Covenant of Civil and Political Rights [hereinafter CCPR] (1966), preamble para. 2.

¹¹ Dinah Shelton, *Remedies in International Human Rights Law*, Second Edition, 2005 p. 8.

An *institutional financial investor* is understood to be an entity that “accept[s] funds from third parties for investment in their own name but on such parties’ behalf”¹². Pension funds, mutual funds and insurance companies are examples of institutions included in the definition. The term *state-run institutional financial investor* is used to describe an institutional financial investor that is qualified as a “state-owned enterprise”. What is required for such a qualification to occur is topic of examination in the thesis, and it is thereby not necessary to give a more precise definition of the term “state owned enterprise” in the Introduction.

Lastly, it is necessary to clarify some terms that will be used in relation to an investor’s connection to different states. An investor’s *home state* is herein defined as “the State’ under the laws of which [the investor] is incorporated and in whose territory it has its registered office”¹³. A *host state* is the state in which the foreign investor operates.

1.4 Outline

The thesis entails 7 chapters.

Chapter 2 examines the sources of international law, and clarify which sources are of relevance for the question of investor responsibility. *Chapter 3* briefly introduces the main actor in international law, the state, and its human rights obligations. The concept of remedy is the topic of *chapter 4*; which examines both how a remedy obligation is triggered in international law and how the obligations should be met.

The question of whether or not the obligation to provide remedy extends to institutional financial investors is asked and answered in *chapter 5*. *Chapter 6* takes a closer look of one type of institutional financial investors; those that are state-run. The question asked is if state-run institutional financial investors, because of its close connection to a state, bear more comprehensive human rights responsibilities than other investors. *Chapter 7* entails a short conclusion on the issue raised in this paper.

¹² The Organisation for Economic Co-operation and Development [hereinafter OECD], *The Role of Institutional Investors in Promoting Good Corporate Governance*, 2011 p. 9.

¹³ *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgement, ICJ Reports 1970 p. 3 (para. 70).

2 Sources of International Law

2.1 The Sources of International Law and their Relative Worth

The Statute of the International Court of Justice (1945) art. 38 states that the Court shall apply “international conventions”, “international custom” and “general principles of law” in their decision-making. It may in addition use “judicial decisions” and “teachings” as “subsidiary means for the determination of rules of law”. The article is considered to give “a complete statement of the sources of international law”¹⁴, and thereby state which sources hold the potential to solve questions of international law.

A question that is often asked in relation to sources of international law is if there is a hierarchy among them. The full debate falls out of the scope of this paper, but the upper and lower extremes of the claimed hierarchical order will be briefly accounted for. Norms of *jus cogens* is in the upper end of the hierarchy¹⁵. A norm of *jus cogens* is, in the Vienna Convention on the Law of Treaties (1969) art. 53, defined as “a norm [of international law] from which no derogation is permitted and which can be modified only by a subsequent norm of ... the same character”. The prohibition of genocide is an example of such a norm¹⁶.

Soft law is in the other end of the proposed hierarchical order¹⁷. There is no universal definition of the concept of soft law, but it can be said to be “normative provisions contained in non-binding texts”¹⁸ that “do not create enforceable rights and duties”¹⁹, in opposite to hard law that is “treaty rules which States expect will be carried out and complied with”²⁰.

¹⁴ Ian Brownlie, *Principles of Public International Law*, Seventh Edition, 2008 p. 5.

¹⁵ Dinah Shelton, “Normative Hierarchy in International Law”, in *American Journal of International Law*, Vol. 100, Issue 2, 2006 pp. 291-323 (p. 292).

¹⁶ See, for instance, *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgement, ICJ Reports 2006 p. 6 (para. 64).

¹⁷ Shelton, 2006 p. 292.

¹⁸ *Ibid.*, p. 292.

¹⁹ Richard R. Baxter, “International Law in her Infinite Variety”, in *International and Comparative Law Quarterly*, Vol. 29, Issue 3, 1980 pp. 549-566 (p. 549).

²⁰ *Ibid.*, p. 549.

The relationship between soft law and hard law can be viewed as a continuum, where different components can be used to place a norm at scale from no-binding to binding²¹. However, the short version is that soft law is not legally binding. This does not mean that it is worthless. Soft law "can generate a political impact ... and can give rise to customary international law through state practise"²², and is thereby an important source to map states' intentions and to get a picture of what might become a binding obligation in the future.

For an institutional financial investor that only aims to uphold norms that entail legal sanctions in the case of violation, it is an either-or understanding of the relationship between soft and hard law that is crucial. Such an investor will not act in compliance with its corporate social responsibility; or it must be said to understand its corporate social responsibility in the same narrow (and aged) terms as Milton Friedman – it is merely to gain profit while playing by the rules²³. It must be highlighted that maximum income is not incompatible with business compliance with soft law expectations²⁴. Where an institutional financial investor fails to be observant to its soft law responsibilities it may suffer reputational damage, which in turn may cause economic loss. This is a consequence of the fact that businesses are no longer measured only by incomes²⁵; society expects businesses to be responsible actors in a broader sense.

The way Den Norske Bank (DNB), a Norwegian bank, handled its creditor position in the Dakota Pipeline Project in 2016/2017 shows that human rights expectations towards institutional financial investors can have influence on the investors financial decisions. The Dakota Pipeline Project is claimed to violate the human rights of the Sioux Tribe in the Standing Rock Reservation²⁶, and DNB received massive public criticism for its stake in the

²¹ Kenneth W. Abbott et al., "The Concept of Legalization", in *International Organization*, Vol. 53, Issue 3, 2000 pp. 401-419 (p. 401).

²² Shelton, 2006 pp. 292-293.

²³ Milton Friedman, "The Social Responsibility of Business is to Increase Profits", in *The New York Times Magazine*, 13 September 1970 <<https://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.htm>> accessed 11 December 2017.

²⁴ Kamminga and Zia-Zarifi, 2000 p. 26-27.

²⁵ For instance, *The Corporate Human Rights Benchmark* assesses the largest publicly traded companies on human rights indicators. Results from 2017 are available at <<https://www.corporatebenchmark.org>> accessed 11 December 2017.

²⁶ See, for instance, Amnesty International, *Standing Rock*, <<https://www.amnestyusa.org/standing-rock/>> accessed 11 December 2017.

project²⁷. The bank decided to sell off its loan, proclaiming the wish to “signal how important it is that the affected indigenous population is involved and that their opinions are heard in these types of projects”²⁸. It is interesting to note that DNB did not explain its sale of the loan as an economic issue.

2.2 Sources of Relevance for the Topic of the Thesis

Sources of international human rights law are of the most immediate interest for the question of business responsibility towards victims of human rights violations. However, international investment law also provides contribution to the question.

Sources of International Human Rights Law

Many human rights instruments impose obligations on party states to ensure that private actors do not violate human rights within its jurisdiction²⁹, and thereby indirectly state that businesses should respect human rights³⁰. Obligations in such treaties are, however, formulated in terms of state duties and do not provide independent basis to hold an institutional financial investor internationally responsible for human rights violations. How such instruments, through the direct obligations they impose on states, can influence the responsibility of private actors, is primarily discussed in relation to state-run investors in chapter 6, but the topic is also touched in chapters 3 and 4.

The main focus of this thesis is directed at the legal sources that directly regulate business behaviour at the international level. It is in this regard worth taking a closer look at the

²⁷ See, for instance, Tor E. Schanche, “Raser mot DNB for omstridt oljerørinteresse”, in *Norsk Rikskringkasting*, 2 November 2016 <<https://www.nrk.no/sapmi/dnb-avviser-kundeflukt-til-tross-for-oljeror-storm-fra-publikum-1.13207547>> (in Norwegian) accessed 11 December 2017.

²⁸ Cecilie Skjennald, “DNB has Sold its Part of Dakota Access Pipeline Loan”, in *DNB Feed*, 26 March 2017 <<https://dnbfeed.no/nyheter/dnb-has-sold-its-part-of-dakota-access-pipeline-loan/>> accessed 11 December 2011.

²⁹ See, for instance, CCPR (1966) art. 2(1) and art. 5(1); and the International Convention on the Elimination of All Forms of Racial Discrimination (1965) art. 2(1)(d).

³⁰ David Weissbrodt, “Roles and Responsibilities of Non-State Actors”, in *The Oxford Handbook of International Human Rights Law*, 2013 pp. 719-736 (p. 728).

UNGPs, which was briefly mentioned already in the Introduction; as this is the basic document of today on the matter³¹.

The UN Human Rights Council endorsed the UNGPs through resolution in 2011³². The Framework applies to “all States and all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure”³³, and it is thereby clear that institutional financial investors falls within the scope of the Frameworks application. The UNGPs builds on three main pillars: state responsibility to protect human rights, business responsibility to respect human rights, and access to remedy³⁴. It is Pillar 2 and 3, which is of most immediate interest for direct businesses responsibility for human rights impacts. Pillar 2 requires businesses to respect all “internationally recognized human rights, [which includes] at a minimum ... those expressed in the International Bill of Human Rights³⁵ and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work [1998]”³⁶. A business has, according to the Guiding UNGPs Pillar 3, a responsibility to provide remedies when it identifies that it has failed to respect human rights³⁷.

The UNGPs were adopted without a vote, and it is explicitly stated in the instrument that it does not create new obligations³⁸. The UNGPs is thereby a soft law regulation. Despite its lacking ability to impose legally binding obligations, it is a “widely accepted framework”³⁹,

³¹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award [hereinafter *Urbaser v. Argentina*], 8 December 2016 para. 1195 cf. footnote 434.

³² UN Human Rights Council [hereinafter UNHRC], Resolution A/HRC/RES/17/4, *Human rights and transnational corporations and other business enterprises*, 6 July 2011 para. 1.

³³ UNGPs (2011) General Principles, para. 2.

³⁴ *Ibid.*, General Principles, para. 1(a), (b) and (c).

³⁵ Included in the International Bill of Human Rights is: the Universal Declaration of Human Rights [hereinafter UDHR] (1948), the International Covenant on Economic, Social and Cultural Rights [hereinafter the CESCR] (1966), and the CCPR (1966) and its two optional Protocols.

³⁶ UNGPs (2001) Principle 11 cf. principle 12.

³⁷ *Ibid.*, Principle 13 cf. Principle 22.

³⁸ *Ibid.*, General Principles, para. 4.

³⁹ Larry C. Backer, “Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind them All”, in *Fordham International Law Journal*, Vol. 38, Issue 2, 2015 pp. 457-542 (p. 458).

and a range of institutional financial investors have announced their intentions to act in compliance with it⁴⁰.

The UN Human Rights Council established the UN Working Group through resolution⁴¹. The UN Working Group shall according to its mandate “promote the effective and comprehensive dissemination and implementation of the Guiding Principles”, and give “advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights” upon request⁴². As part of its institutionalizing of the UNGPs, the UN Working Group issued the report on the concept of remedy in July 2017. The report builds on existing human rights law and experiences of communities affected by business violations and aim to set out what constitutes “effective remedy” according to the Framework⁴³. It is thereby clear that the report does not only reproduce rules of customary international law in regard to remedy; but that it also entails elements of legal development based on how the general obligation to provide remedy should be applied in the specific case where a business is the one who bear the responsibility.

The UNGPs must be viewed in context with other legal instruments in its field. The Organization for Economic Co-operation and Developments Guidelines for Multinational Enterprises (2011 Edition), and the International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Responsibility (2017 Edition), both refers to the UNGPs and thereby reinforces the international standing of this instrument.

Further, the business and human rights agenda have called for attention to be paid to a human rights instrument which history goes back to before businesses human rights abuse was a focus area of international human rights law. The Universal Declaration of Human Rights (1948) can potentially be a source of relevance for the question of business responsibility, and will therefore be a topic of closer examination in this thesis.

Sources of International Investment Law

⁴⁰ e.g. DNB. See DNB, *Responsible Investment: Human Rights*, September 2017 <https://www.dnb.no/portalfront/nedlast/en/about-us/corporate-responsibility/2017/Criteria_and_expectations_Human_right.pdf> accessed 11 December 2017.

⁴¹ A/HRC/RES/17/4, 6 July 2011 para. 6.

⁴² *Ibid.*, para. 6(a) and (b).

⁴³ *Ibid.*, para. 1, 9 and 10.

International investment law regulates the relationship between a host state and a foreign investor. “[T]he host country determines the conditions of establishment of foreigners within its territory”, according to customary international law⁴⁴. A range of bilateral investment treaties (BITs) is therefore submitted to both “encourage and protect investments in the territories of the contracting states”⁴⁵. The states conducting such agreements are often “unequal”; as they are often “a capital exporting developed state and a developing state keen to attract capital from that state”⁴⁶.

It varies between BITs what standard of treatment the foreign investor is granted. However, there are some common features. BITs often state that foreign investors are to be treated after the standards of fair and equitable treatment, full protection and security, non-discrimination, national treatment and most-favoured nation treatment⁴⁷.

The construction of international investment law has led to numerous of cases before international investment tribunals, and human rights can become a topic in such arbitrations. The foreign investor for instance, claims it has had its human rights violated by the host state, because it has been subject of expropriation without compensation⁴⁸. Human rights can further become a topic of these arbitrations because third parties, for instance non-governmental organisations, calls for human rights concerns to be made through written *amicus* briefs (so called third party *amicus curiae*)⁴⁹. States can also be the party calling for tribunals to consider human rights. Argentina for instance, in the *Argentina v. Suez* case, claimed that its violation of the foreign investor’s right to fair and equitable treatment was necessary, and therefore had to be precluded, based on the states obligation to fulfil the human right to water⁵⁰. A state can further, when it is sued for a violation of a foreign

⁴⁴Gerhard Loibl, “International Economic Law”, in *International law*, 2010 pp. 742-748 (p. 742).

⁴⁵ *Ibid.*, p. 743.

⁴⁶ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 2010 p. 177.

⁴⁷ Loibl, 2010 p. 744.

⁴⁸ See, for instance, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 19 May 2003 para. 41.

⁴⁹ Third part *amicus curiae* was for instance allowed in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007 para. 55.

⁵⁰ *Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 para. 229.

investors rights granted in a BIT, raise a counter claim against the foreign investor based on the investors human rights violation.

International investment law has traditionally provided a limited amount of contribution to the question of investor responsibility for human rights violations. Human rights arguments have, for instance, been dismissed on the ground that the tribunal is only authorised to consider commercial merits⁵¹, and states counter claims are rarely accepted⁵². Some recent developments, however, change this picture.

In 2016, the tribunal in the *Urbaser v. Argentina* case found it had jurisdiction over Argentina's human rights based counter claim⁵³. As the tribunal found that it had jurisdiction; the case represents a rare example of a state being able to bring a (human rights based) counter claim against a foreign investor before an international investment tribunal⁵⁴. The merits of this counter claim allows for the world to see how an international investment tribunal view the international human rights responsibility of a foreign investor, and the case is thereby of interest for this thesis.

The Morocco-Nigeria BIT, also from 2016, entails another development within the field of international investment law: the foreign investor shall according to the BIT respect human rights⁵⁵. This BIT will, together with the *Urbaser* case and the sources of human rights law, be examined in chapter 5 to give an answer to the question of whether or not the institutional financial investors bear human rights obligations.

3 The State and International Human Rights Law

Questions of business responsibility for human rights impacts arise in a greater context, and should not be examined in isolation. The state's position in international law (3.1) and its human rights obligations (3.2) is important to bear in mind when the human rights responsibility of institutional financial investors' is analysed, because it explains the

⁵¹ See, for instance, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996 p. 193-194

⁵² *Urbaser v. Argentina*, para. 1143.

⁵³ *Ibid.*, para. 1155

⁵⁴ *Ibid.*, para. 1143.

⁵⁵ Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016) art. 18.

challenges of human rights law when it comes to holding such private actors accountable for violations. Further, the states human rights obligations can, as stated in section 2.2, influence the human rights responsibility of an institutional financial.

3.1 States are the Primary Bearer of Human Rights Obligations

States were traditionally the only actor in international law. This means, “only states were subjects ... possessing the capacity to bear international rights and obligations”⁵⁶.

This narrow understanding of who holds the capacity to be an international person was partially abandoned by the recognition of international human rights in declarations and treaties submitted after the Second World War. Individuals became right holders in international law, and some international human rights instruments even allowed for individuals to submit human rights claims, making them actors at the international arena⁵⁷. The expansion of potential right holders in international human rights law, was not accompanied by an immediate similar expansion of potential duty bearers: most human rights treaties are drafted almost entirely in terms of state obligations⁵⁸ and states must be viewed to be the primary bearer of human rights obligation in international law⁵⁹. Human rights law did not come into existence in a vacuum; it is developed within international law, and the limits of international law have influenced the construction of human rights law.

Developments regarding who holds the capacity to bear international duties have, however, occurred. The International Court of Justice (ICJ) stated, in the *Reparations for Injuries* case, that the UN was “a subject of international law ... capable of possessing international rights and duties”⁶⁰. The scope of potential subjects of international law was thereby expanded to include international organisations. The topic of this thesis is whether or not the subjects of international law today is extended to also include institutional financial investors.

⁵⁶ Manfred Nowak and Karolina M. Januszewski, “Non-State Actors and Human Rights”, in *Non-State Actors in International Law*, 2015 pp. 113-162 (p. 114).

⁵⁷ See, for instance, the European Convention on Human Rights (1950) art. 34.

⁵⁸ Shelton, 2005 p. 155.

⁵⁹ Kamminga and Zia-Zarifi, 2000 p. 75.

⁶⁰ *Reparations of injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ reports 1949 p. 174 (p. 179).

3.2 The State's Human Rights Obligations: Protect, Respect and Fulfil

Generally, states must agree to be bound by norms of international law – herein international human rights law⁶¹. A state can give its consent to be bound by norms of international law through international agreements, such as treaties. States are further bound by rules of customary international law as far as they have not objected to it – no explicit consent is needed⁶². An exception from the demand of some sort of state consent for obligations to arise, are norms of *jus cogens* that per definition cannot be derogated from.

Where a state is a bearer of international human rights obligations, it is required by international law to “respect, protect and fulfil the human rights of individuals within [its] territory and/or jurisdiction”.⁶³ This tripartite typology of how human rights shall be secured by the state is generally recognized⁶⁴ and adopted by UN treaty bodies⁶⁵.

The state's duty to *respect* human rights entails “a negative obligation not to take any measures that result in a violation of a given right”⁶⁶. Accordingly, the state is obligated not to violate human rights.

The duty of states to *protect* human rights requires that it “proactively ensure that persons within its jurisdiction do not suffer from human rights violations at the hands of third parties”⁶⁷, including businesses. The state's fulfilment of its obligation to protect human rights from businesses violations will, according to the UNGPs, require “taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”⁶⁸. The state's obligation to give legal legislation that enables fulfillment of human rights has grounds directly in many human rights instruments⁶⁹.

⁶¹ Johan D. van der Vyver, “Sovereignty”, in *The Oxford Handbook of International Human Rights Law*, 2013 pp. 379-400 (p. 396).

⁶² Brownlie, 2008 p. 7.

⁶³ UNGPs (2011) Principle 1, Commentary.

⁶⁴ Kamminga and Zia-Zarifi, 2000 p. 77.

⁶⁵ Frederic Mégret, “Nature of Obligations”, in *International Human Rights Law*, 2014 pp. 105-113 (p. 101).

⁶⁶ *Ibid.*, p. 102.

⁶⁷ *Ibid.*, 2014 p. 102.

⁶⁸ UNGPs (2011) Principle 1.

If a state fail to prevent business' human rights violations, it will not automatically result in a breach of the states obligation to protect such rights; “[t]he State duty to protect is a standard of conduct”; and states are therefore “not per se responsible for human rights abuse by private actors”⁷⁰. It is the states' own actions, and how it handles a human rights violation caused by a business, that will determine whether or not the state is viewed to have breached its obligation to protect human rights.

The state is obligated to provide remedy to the victim of a human rights violation both where the state itself has caused a violation (breach of the states obligation to respect)⁷¹ and where another actor has caused the violation (and this entail a breach of the states obligation to protect)⁷². The states obligation to provide remedy in these situations is a part of the states obligation to *fulfil* human rights; which requires states to “take positive steps that have as consequence the greater enjoyment of rights”, including “provision of a remedy”⁷³. However, the next chapter – which examines the concept of remedy – will in section 4.2 show that the states obligation to provide remedy in these cases also have a more general foundation in international law.

4 The Obligation to Provide Remedies

4.1 The Purpose of Remedy

Remedies “aim to place an aggrieved party in the same position as he or she would have been had no injury occurred” and thereby “correct injustice”⁷⁴. The main purpose of remediation – to correct injustice – must be viewed in connection with the fundamental fact that remediation is a subsequent legal measure to address an already occurred violation of a human right. Remediation is a legal response to a wrongful act, and it serve as a mean to restore the balance between the wrongdoer and the victim by sanctioning unwanted behaviour and

⁶⁹ See, for instance, CESCR (1966) art. 2(2).

⁷⁰ UNGPs (2011) Principle 1, Commentary.

⁷¹ See, for instance, *Case of Storck v. Germany*, ECHR 2005/10 Case No. 61603/00 (third section), Judgement, 16 June 2005 para. 168.

⁷² See, for instance, *SERAP v. the Federal Republic of Nigeria*, ECOWAS, Judgement, No. ECW/CCJ/JUD/18/12, 14 December 2012 para. 112.

⁷³ Mégret, 2014 p. 103.

⁷⁴ Shelton, 2005 p.10. See also, Fiona McKay, “What Outcomes for Victims?”, in *The Oxford Handbook of International Human Rights Law*, 2013 pp. 921-954 (p. 925).

vindicating the victim⁷⁵. The legal concept of remedy creates an arena to express a disgrace of the wrongdoers' actions and hold him responsible for injury caused⁷⁶. In this way, remedies serve as a mean to “affirm, reinforce and reify the fundamental values of society”⁷⁷, and thereby restore the balance not only between the victim and the wrongdoer, but also between the society and the wrongdoer.

Deterrence is further a purpose of remediation, as remedies aims to “influence the behaviour of all potential actors, not just the future conduct of a particular defendant”⁷⁸. In this way, remediation may be viewed as a tool for the society to detain the potential of the legal frameworks to regulate and prevent further unwanted behaviour.

4.2 Right Holders and Duty Bearers

The Right to Remedy

The right to remedy is a crucial component of international human rights law; “[f]or rights to have meaning, effective remedies must be available to redress violations”⁷⁹. Based on this acknowledgement, the majority of today's global and regional human rights instruments constitute the right to remedy as a human right in itself⁸⁰. The consequence is the same for the victim, regardless of whether the right to remedy is viewed as a human right itself, or it is viewed as an integrated part of every human right: if a human right is violated, a new right comes into existence on the right holder's hand – a right to remedy⁸¹.

Because both individuals and groups can be holders of human rights and have their rights violated, both individuals and groups can hold the right to remedy. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* case is an example of a case where a group; an indigenous community, was the holder of a right to reparation⁸². Nicaragua was in this case

⁷⁵ *Ibid.*, p. 12.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p.13.

⁷⁹ UN Committee on the Rights of the Child, CRC/GC/2003/5, 27 November 2003 para. 24.

⁸⁰ Shelton, 2005 p 114. See, for instance, CCPR (1966) art. 2 (3); and UDHR (1948) art. 8.

⁸¹ *Ibid.*, p. 239.

⁸² *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., (Ser.C) No. 79, Judgement, 31 August 2001 part XII para. 7.

viewed to, among others, have violated the community's right to judicial protection according to the American Convention on Human Rights (1969) art 25⁸³.

In sum, there is a right to remedy when a human right is violated; but is the victims' right to remedy always complimented by a corresponding obligation on the wrongdoers' hand?

The activation of the obligation to provide remedies

In the *Factory Chorzow* case from 1928, the Permanent Court of International Justice (PCIJ) stated that it is "a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"⁸⁴. This formulation is reproduced in newer case law, for instance in the ICJ case *Avena and Other Mexican Nationals* from 2004⁸⁵, and its content must therefore still be viewed as valid.

The principle that a breach of an international obligation triggers an obligation to make reparation is also stated by the International Law Commission in the Draft Articles on Responsibility of States for Internationally Wrongful Acts & Commentary (DASR) and the Draft Articles on the Responsibility of International Organizations & Commentary (DARIO)⁸⁶.

Both DASR and DARIO also formulate an additional condition for activation of the international remedy obligation; the conduct that constitutes a breach of an international obligation must be "attributable" to the state or international organisation⁸⁷. This condition reflects the fact that a legal person, that is not also a natural person, cannot act on its own; it will always act "by and through [its] agents and representatives"⁸⁸. Decisive for attribution to occur is that the one who has caused a breach of an international obligation is considered to act on behalf of the obligated party⁸⁹. The DASR and DARIO are not legally binding

⁸³ *Ibid.*, part XII para. 1.

⁸⁴ *The Factory at Chorzow* (Germany v. Poland), Claim for Indemnity, Merits, 1928 PCIJ (ser. A) No. 17 [hereinafter *Factory at Chorzow*], 13 September 1928 para. 55.

⁸⁵ *Avena and Other Mexican Nationals* (Mexico v. United States of America), ICJ Reports 2004 p. 12 (para. 119).

⁸⁶ DASR (2001) art. 2 (b) cf. art. 1 and art. 31; and DARIO (2011) art. 4 (b) cf. art. 3 and art. 31.

⁸⁷ *Ibid.*, art. 2 (a) cf. art. 1 and art. 31; and DARIO (2011) art. 4 (a) cf. art. 3 and art. 31.

⁸⁸ *Ibid.*, art. 2, Commentary No. 5.

⁸⁹ *Ibid.*, art. 2, Commentary No. 5.

instruments⁹⁰, but they must in in this regard be viewed to codify customary international law: attribution of conduct is a criterion for international responsibility to arise⁹¹.

These principles, when employed on human rights law, entail the following: the one who violates human rights is obligated to provide remedy if the conduct causing the violation can be attributed to the wrongdoer and it entails a breach of the wrongdoers' international obligations. The investor will thereby (only) be internationally obligated to provide remedies to the victim of its human rights violation if it is a bearer of an international obligation not to violate the human right in question, and the violating conduct can be attributed to the investor.

This thesis does not discuss who holds the capacity to act on the institutional investors behalf (the criterion of attribution). It is the question of whether or not institutional investors are bearers of international human rights obligations that is addressed herein.

It must be stressed that the institutional financial investor may be obligated to provide remedy to the victim of its human rights violation even if the current analysis should show that it does not bear international human rights obligations. However, for this to be the case, the investors' obligation must have grounds in domestic law. Domestic regulations making institutional investors liable to provide the victim of a human right violation remedy will be a way for the state to fulfil its own obligation to protect and fulfil human rights within its jurisdiction. However, to rely on states to domestically enforce human rights is problematic for many reasons. The state in which a foreign investor operates may be a less powerful actor than the business (at least in terms of incomes), and can face problems when it comes to holding business accountable for their violations. Further, the states interest in fulfilling its obligation to protect human rights is not always compatible with its interest in being an attractive destination for foreign investments. Where the host state is willing to compromise its human rights obligations to attract foreign investments, there is no safety valve at the victims' disposal.

⁹⁰ See, for instance, *Ibid.*, General Commentary, No. 1.

⁹¹ See, for instance, *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006 para. 89 cf. footnote 51; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, ICJ Reports 2007 p. 43 (para. 385).

Before moving on to the examination of the question of whether or not an institutional financial investor bear international human rights obligations and thereby can be subjects of the international remedy obligation, one more aspect of the concept of remedies remains to be examined. What does a duty to provide remedy entail according to international law?

4.3 The Content of the Obligation to Provide Remedy

Most human rights instruments acknowledge that the victim of a human rights violation holds a right to an “effective remedy”⁹², but it is rarely stated what is required for a remedy to be “effective”⁹³. It is, however, undisputed that the concept of remedies has both a procedural and a substantive side in international human rights law⁹⁴. This terminology shows that one must look at both the process that leads to remediation, and at the outcome of this process, when the concept of remedy is examined. The victim of a human rights violation is entitled to both an effective process, and an appropriate outcome⁹⁵.

The following examination of the content of the obligation to provide remedy aim to clarify what international law requires of a remedy duty bearer; both in terms of process and outcome. The examination also addresses the question of what “effective remedy” entails according to the UNGPs, and to what extent this corresponds with the general principles of redress according to international law.

The Procedural Side – Access to Remedy

The procedural side of remedy regards “the processes by which arguable claims of human rights violations are heard and decided”⁹⁶.

Ensuring enforcement of the victims right to remedy for a human rights violation can be done through either judicial or non-judicial mechanisms, and states are by some human rights

⁹² A/72/162, 18 July 2017 para. 13. See, for instance, UDHR (1948) art. 8; and CCPR (1966) art. 8.

⁹³ Shelton, 2005 p.173.

⁹⁴ *Ibid.*, p. 7. See, for instance, the International Convention on the Elimination of All Forms of Racial Discrimination (1965) art. 6.

⁹⁵ Surya Deva, “Access to effective Remedy: taking Human Rights and Rights Holders Seriously”, in *Cambridge Core blog*, 14 November 2017 <<http://blog.journals.cambridge.org/2017/11/14/access-to-effective-remedy-taking-human-rights-and-rights-holders-seriously/>> accessed 11 December 2017.

⁹⁶ Shelton, 2005 p. 7.

instruments explicitly required to adopt remedial mechanisms⁹⁷. The UNGPs are in favour of states using both judicial and non-judicial grievance mechanisms in relation to business human rights abuse⁹⁸. This is based on the following recognition: “[e]ffective judicial mechanisms are at the core of ensuring access to remedy”⁹⁹, but “judicial remedy is not always required; nor is it always the favoured approach for all claimants”¹⁰⁰. Both judicial and non-judicial mechanism can potentially be a mean for the state to meet its obligation to protect human rights.

The judicial system is a part of a sovereign state’s domain¹⁰¹. This does not however, exclude establishment of non-judicial mechanisms by other units. It is, in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, acknowledged that non-judicial mechanisms, “when in accordance with international human rights law, play a positive role in dispute resolutions”¹⁰². The UNGPs is in line with the view of this Declaration, and encourage businesses to administer its own non-judicial mechanisms¹⁰³. Such mechanisms should however “not be used to ... preclude access to other judicial or non-judicial mechanisms”¹⁰⁴.

The fact that the obligation to provide remedy may be fulfilled through a variety of mechanisms, does not mean that these mechanisms are free to process human rights claims in any way they find suitable – the process shall be “effective”. The effectiveness criterion entails several elements, and to examine all of these in full would require its own thesis. It is however appropriate to give account of some fundamental features.

International law requires access to justice to be “accessible, affordable, adequate and timely”¹⁰⁵. The process shall further be “fair, transparent, effective [and] non-

⁹⁷ See, for instance, CCPR (1966) art. 2(3)(b).

⁹⁸ UNGPs (2011) Principle 26 and Principle 27.

⁹⁹ *Ibid.*, Principle 26, Commentary.

¹⁰⁰ *Ibid.*, Principle 27, Commentary.

¹⁰¹ Brownlie, 2008 p. 299.

¹⁰² General Assembly of the UN, resolution A/RES/67/1, 24 September 2012 para. 15.

¹⁰³ UNGPs (2011) Principles 28-30.

¹⁰⁴ *Ibid.*, Principle 29, Commentary.

¹⁰⁵ A/72/162, 18 July 2017 para. 32.

discriminatory”¹⁰⁶. Another requirement is that the decision on remedy shall be made by a competent authority¹⁰⁷. The elements incorporated in the effectiveness criteria in international human rights law are of relevance also for the understanding of what constitutes an “effective remedy” according to the UNGPs¹⁰⁸.

This brief examination of the effectiveness criteria shows that there are some general and quite formal requirements that must be met for the remedy process to meet the international standard. One last observation however remains to be highlighted: a single process may not be of equal effectiveness for all right holders. The rights holders’ “interests and rights are best advanced when their experiences, perspectives, interests, and opinions deeply inform how remedy mechanisms are created and implemented”¹⁰⁹. The UN Working Group has taken this knowledge into account in its report on the issue of remedy from July 2017, and emphasize that “rights holders should be central to the entire remedy process”¹¹⁰. This has several consequences for how the remedy process should be carried out according to the UNGPs. For instance, the individual right holder will influence whether or not the process is considered to be “affordable”; “what may be regarded as an affordable remedy from a purely objective perspective might not be considered affordable by the actual affected communities”¹¹¹.

This current examination of the procedural side of the concept of remedy is rounded off through the words of the UN Working Group: “an effective process may not always result in an effective outcome”¹¹². This gives proper ground to introduce the next question examined: what is an “effective outcome” for the right holder?

The Substantive Side – the Outcome of the Remedy Process

¹⁰⁶ *Ibid.*, para. 15.

¹⁰⁷ See, for instance, CCPR (1966) art. 2(3)(b).

¹⁰⁸ A/72/162, 18 July 2017 para. 18. See also, UNGPs (2011) Principle 31 regarding requirement set forth therein for non-judicial mechanisms.

¹⁰⁹ Colombia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold’s Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned*, 2015 p. 55.

¹¹⁰ A/72/162, 18 July 2017 para. 19.

¹¹¹ *Ibid.*, para. 32.

¹¹² *Ibid.*, para 3.

The *substantive* aspect of remedies regards the outcome of the remedy process; the relief the victim of a human right violation is provided with¹¹³. It was emphasized already in the first section of this chapter, that remedies aim to place the victim of a violation in the position he or she would have been in, had the violation not happened. This is expressed in the *Chorzow Factory* case referred to earlier; “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”¹¹⁴. How this aim is met will vary; remediation may take many forms.

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, reparation for a human rights violation may include, “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”¹¹⁵. The UNGPs operate with a broader catalogue of remedies as the concept can include “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition” according to the Framework¹¹⁶. This must be understood bearing in mind the special character of the UNGPs, as it aims to regulate the remedy responsibility of both states and businesses, and as remedies may be provided through both judicial and non-judicial mechanisms. The Framework thereby targets a range of situations, and its range of remedies reflects this.

The party obligated to provide remedy is not free to choose what form remediation shall take.

Chorzow Factory builds on a presumption of restitution as the preferred form of reparation; it is only where restitution is not appropriate that “the duty bearer [shall] provide compensation”¹¹⁷. Both the DASR and the DARIO build on the same view¹¹⁸. Compensation is, however, the main form of remedy for a violation of the human rights granted in the

¹¹³ Shelton, 2005 p. 7.

¹¹⁴ *Factory at Chorzow*, para. 125.

¹¹⁵ General Assembly of the UN, Resolution A/RES/60/147, 16 December 2006 annex, para. 18.

¹¹⁶ UNGPs (2011) Principle 25, Commentary.

¹¹⁷ *Factory at Chorzow*, para.125.

¹¹⁸ DASR (2001) art. 35 cf. art. 36 and art. 37; DARIO (2011) art. 35 cf. art. 36 and art. 37.

International Covenant on Civil and Political Rights (1966), according to the UN Human Rights Committee; but “where appropriate [,] reparation can involve restitution, rehabilitation and measures of satisfaction”¹¹⁹. The UNGPs do not expressly emphasize one preferred form of remedy. However, because the Framework shall be interpreted according to international law¹²⁰, it must be viewed to prefer restitution in line with the general norm.

It must in this latter regard be emphasised that the focus at the individual right holder in the UNGPs, mentioned in connection to access to remedy, is also reflected in the Frameworks requirements set out towards the outcome of the process. This do for instance have the consequences that “a range of remedies should be available for the right holders”¹²¹, and that the right holder shall have influence on the question of what constitutes effective remediation”¹²². It is thereby clear that restitution is not automatically the Frameworks preferred form of remedy in all cases; how remedy should be provided will depend on the individual right holders expectations and experiences¹²³.

A Concluding Remark: International Law and the UNGPs, and the Road Ahead

The examination of the content of the obligation to provide remedy show that international law sets forth high expectations to how the obligation shall be met by its duty bearer, both in terms of process and outcome. What the UNGPs require for a remedy to be “effective” is overall in line with what is generally required according to international law. The focus at the individual right holder in the UNGPs however, seem to be quite characteristic for this Framework, when it is compared to the general requirements in international law.

The next chapter examines whether or not the international obligation to provide remedy extends to institutional financial investors. It is in this regard also examined how the UNGPs remedy responsibility can be triggered.

¹¹⁹ UN Human Rights Committee, CCPR/C21/Rev.1/add.1326, 29 March 2004 para. 16.

¹²⁰ See, for instance, UNGPs (2011) Principle 31(1)(f).

¹²¹ A/72/162, 18 July 2017 para. 20.

¹²² *Ibid.*, para. 22.

¹²³ *Ibid.*, para. 20.

5 Does the International Obligation to Provide Remedies Extend to Institutional Financial Investors?

For an institutional financial investor to be legally obligated to provide remedy to the victim of its human rights impacts, the investor must be legally obligated not to violate the human right at stake, according to the examination in section 4.2. This chapter examines the legal sources that answer the question of whether or not there is such an international legal obligation. The legal sources of most relevance are, as mentioned in section 2.2, the UDHR, the UNGPs, the *Urbaser v. Argentina* case, and the Morocco-Nigeria BIT. These sources are examined in sections 5.1 to 5.4. The question of how a contribution can trigger international responsibility is discussed in relation to the UNGPs in section 5.2.

Section 5.5 analyses the investors' obligation. The legal sources examined in this chapter are therein viewed in connection to one another, and in light of the development that has occurred both within the fields of human rights law and international investment law, and within the broader field of international law. The aim is to give a clear answer to the question asked in this chapter: does the obligation to provide remedies extend to institutional financial investors?

5.1 The Universal Declaration of Human Rights (UDHR) (1948)

“Everyone” have certain rights according to the UDHR, such as the right to “life, liberty and security of person”¹²⁴, and to be free of slavery¹²⁵. These rights impose duties on potential wrongdoers according to art. 30: “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”. The UDHR do in other words grant everyone some fundamental rights, which shall be enjoyed without interference.

UDHR art. 8 grant everyone a right to an “effective remedy”. This right shall, according to the wording in the article, be fulfilled “for acts violating the fundamental rights granted him by the constitution or by law” The Declaration reference to a violation of “law” as a ground for a right to remedy to come into existence is generally understood to include violations of

¹²⁴ UDHR (1948) art. 3.

¹²⁵ *Ibid.*, art. 4.

international human rights law¹²⁶. The UDHR must thereby be viewed to grant a right to an effective remedy in case of a violation of the rights it guarantees.

For the Declaration to give grounds to state that the international remedy obligation extends to institutional financial investors, it is a condition, according to the examination in section 4.2, that the Declaration imposes a legally binding obligation on the institutional financial investor not to breach its provisions. Whether or not this condition is met, will be answered through the use of two sub-questions. Firstly, do institutional financial investors fall within the Declaration's scope of application? Secondly, do the UDHR impose legally binding obligations on institutional financial investors?

Does the UDHR Apply to Institutional Financial Investors?

The UDHR is, according to its preamble “a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive ... to promote respect for these rights and freedoms”.

It is uncertain whether the UDHR applies to institutional financial investors. The tribunal in the *Urbaser v. Argentina* case for instance stated that “[t]he Declaration may also address multinational companies”¹²⁷. The Court makes reference to Louis Henkin in this regard: “Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.”¹²⁸

The idea is thereby that the Declaration's scope of application is unlimited, and that its provisions bind all persons – both natural and legal. Henkin is not sole of this interpretation of the UDHR; other writers on the matter also argue that it may apply to businesses¹²⁹.

This thesis will not explicitly conclude on the question of the UDHR's scope of application. The reason for this is simply that there are not yet legal grounds to draw such a conclusion.

¹²⁶ See, for instance, A/RES/60/147, 16 December 2005 annex, preamble, para 2.

¹²⁷ *Urbaser v. Argentina*, para. 1196.

¹²⁸ *Ibid.*, para. 1196 cf. footnote 435 cf. Louis Henkin, “The Universal Declaration at 50 and the Challenge of Global Markets”, in *Brooklyn Journal of International Law*, Vol. 25, Issue 1, 1999 pp. 17-25 (p. 25).

¹²⁹ See, for instance, David Weissbrodt, “Business and Human Rights”, in *University of Cincinnati Law Review*, Vol. 74, Issue 1, 2005 pp. 55-74 (p. 60).

However, the examination herein show that "judicial decisions" and "teachings" – which is acknowledged as sources of international law in the Statute of the International Court of Justice (1945) art. 38 – view the UDHR to be an instrument that might apply to businesses. It is thereby not unlikely that the UDHRs scope of application can be drawn wide enough to include institutional financial investors.

The Declaration will, if institutional financial investors fall within its scope of application, at least impose a responsibility on the investor to respect human rights. The investor will in this case, because the Declaration in art. 8 grants a right to an effective remedy where its provisions is breached, have a responsibility to provide remedy to the victim of its violating conduct. The following sub-question examines whether or not the UDHR, assumed that investors fall within its scope of application, do not only impose a soft law responsibility – but a hard law obligation – on investors to respect the human rights granted in the instrument. If this is the case, the UDHR can potentially give grounds to state that the international remedy obligation extends to such investors.

Do the UDHR impose Legally Binding Obligations on Institutional Financial Investors?

In general, a declaration of the UN General Assembly is not legally binding¹³⁰. The UDHR however, has some legal standing, as it is referred to in the preamble of most international and regional human rights treaties, and as both national courts and the ICJ have referred to it¹³¹.

Some legal writers argue that the UDHR with time has become customary international law, or that at least parts of the Declaration hold this status¹³². Take for instance the UDHRs prohibition of torture in art. 5. This article is referred to in the ICJ case *Questions Relating to the Obligation to Extradite or Prosecute*, which states that the prohibition of torture is a norm of customary international law¹³³. The fact that the Court shows to the UDHR in this case

¹³⁰ Hilary Charlesworth, "Universal Declaration of Human Rights (1948)", in *Oxford Public International Law*, February 2008 para. 13 available at <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887>> accessed 13 December 2017.

¹³¹ *Ibid.*, para. 13-15. See, for instance, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgement, ICJ Reports 1980 p. 3 (para. 91).

¹³² *Ibid.*, para. 16.

¹³³ *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgement, ICJ Reports 2012 p. 422 (para. 99).

does, however, not automatically mean that the Court solely built on this instrument to justify the existence of the customary rule. On the contrary, in this case the Court stated that the customary nature of the prohibition is "grounded in a widespread international practice and on the *opinio juris* of States", and it merely showed to the UDHR as one of several instruments where the prohibition appear¹³⁴.

Regardless of whether parts of the Declaration is viewed to be reflected in customary international law, or if parts of the Declaration itself to some degree have become customary international law, there is not grounds to state how this will influence the responsibility of an institutional financial investor. The tribunal in the *Urbaser* case, referred to above, merely stated that the Declaration *may* apply to investors; it did not conclude on this, or discuss what it would entail if it addressed businesses.

Based on a lack of grounds to state something else, the conclusion in this thesis is that the UDHR does not impose legally binding obligations on institutional financial investors. It must be emphasised that this conclusion does not rule out the possibility that the instrument imposes legally binding obligations on States and other parties that are generally recognised as subjects of international law, or that it imposes soft law responsibilities on business enterprises. What it means is that there are not basis to state that the Declaration – even if parts of it have become part of customary international law – can impose binding obligations on private actors. The conclusion is drawn based on recognition of the special character an investor obligation will entail in international law. It builds on an understanding that this set off a need for some sort of explicit acknowledgement, for the legal obligation to extend to such actors. It is not ruled out that customary international law in the future can place an obligation on institutional financial investors to respect human rights. However, there are at date not solid grounds to state that international law has come this far.

The consequence for the question asked in this chapter of the thesis, is that the UDHR does not give grounds to state that the international remedy obligation extends to institutional financial investors.

¹³⁴ *Ibid.*

5.2 The UN Guiding Principles on Business and Human Rights (UNGPs) (2011)

Some Historic Background – Businesses’ Human Rights Abuse Become a Focus Area of the United Nations

Moves towards a form of international regulation of businesses’ human rights abuse first occurred in the 1970s¹³⁵, and increasingly became a more prominent concern of international human rights law in the 1990s¹³⁶.

In 1999, former UN Secretary-General Kofi Annan called for multinational companies to “uphold human rights and decent labour and environmental standards” at the Davos World Economic Forum¹³⁷. This statement was followed up by the announcement of the Ten Principles of the UN Global Compact in 2000. Businesses’ shall according to these principles “support and respect the protection of internationally proclaimed human rights within their sphere of influence” and “make sure they are not complicit in human rights abuse”¹³⁸. It is a voluntary initiative¹³⁹, which over 9.000 companies have expressed their intention of complying with¹⁴⁰. The Global Compact marks the beginning of an era: businesses’ human rights abuse was from then on an explicit and expressed focus area of regulation for the UN.

In 2003, a Sub-Commission under the UN Human Rights Commission completed The Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the UN Norms)¹⁴¹. The UN Norms, among others, called for business to “promote, secure the fulfilment of, respect, ensure respect of and protect human

¹³⁵ Kamminga and Zia-Zarifi, 2000 p. 83.

¹³⁶ John G. Ruggie, “Business and Human Rights”, in *Dovenschmidt Quarterly*, Vol. 2013, Issue 4, 2013 pp. 168-170 (p. 168).

¹³⁷ UN, Department of Public Information, Press release SG/SM/6881, 1 February 1999 para.1.

¹³⁸ The Ten Principles of the UN Global Compact (2000), Principle 1 and Principle 2.

¹³⁹ UN Global Compact, *About the UN Global Compact*, <<https://www.unglobalcompact.org/about>> accessed 13 December 2017.

¹⁴⁰ UN Global Compact, *Our Participants*, <https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=✓&search%5Bkeywords%5D=&search%5Bper_page%5D=10&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc> accessed 13 December 2017.

¹⁴¹ Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003

rights recognized in international as well as national law” and to “provide prompt, effective and adequate reparation to those ... that have been adversely affected by failures to comply with [the UN Norms]”¹⁴². The UN Human Rights Commission debated the UN Norms in 2004, and declared that they had “no legal standing” and that they could not be approved¹⁴³. The UN Norms have in retrospect been called “the train wreck of Geneva”¹⁴⁴.

The UN did not however abandon the idea of regulating businesses human rights abuse at the international level. Just one year later, in 2005, the UN Commission on Human Rights requested the Secretary-General to appoint a Special Representative “on the issue of human rights and ... business enterprises” which among others should be mandated to “identify and clarify standards of corporate responsibility ... with regard to human rights”¹⁴⁵. The appointed Special Representative, John G. Ruggie, completed his mandate in 2008 with the proposal of the Protect, Respect and Remedy Framework¹⁴⁶. This Framework was unanimously welcomed by the UN Human Rights Council, which decided to follow up its acknowledgement of the proposed Framework with granting Ruggie a new mandate: he was to operationalize it¹⁴⁷. The reception the Framework got, thereby stands “in stark contrast to the reception” the UN Norms got only four years earlier¹⁴⁸. Ruggie completed his new mandate in 2011, and recommended the UN Human Rights Council to adopt his proposal of the UNGPs¹⁴⁹, which it did¹⁵⁰.

Businesses have a Responsibility to Respect Human Rights, and to Provide Remedy when it fails to do so (UNGPs, principle 11)

¹⁴² E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003 para. 1 and 18.

¹⁴³ UN Commission on Human Rights, Resolution E/CN.4/2004/L.73/Rev.1, 16 April 2004 para. c.

¹⁴⁴ John G. Ruggie, Remark, *Delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network og Business Ethics Bamberg, Germany*, 14 June 2006.

¹⁴⁵ UN Commission on Human Rights, Resolution E/CN.4/RES/2005/69, 20 April 2005 para. 1 and 1(a).

¹⁴⁶ UNHRC, Report A/HRC/8/5, 7 April 2008.

¹⁴⁷ UNHRC, Resolution A/HRC/8/7, 18 June 2008.

¹⁴⁸ Karin Buhmann, “Navigation from ”train wreck” to being ”welcomed”: negotiation strategies and argumentative patterns in the development of the UN Framework”, in *Human Rights Obligations of Business*, 2015 pp. 29-57 (p. 29).

¹⁴⁹ UNHRC, Report A/HRC/17/31, 21 March 2011.

¹⁵⁰ A/HRC/RES/17/4, 6 July 2011 p. 2.

“Business enterprises should respect human rights” according to principle 11. This obligation does, according to the following wording in the principle, entail two elements. Firstly, business “should avoid infringing on the human rights of others”. Secondly, business “should address adverse human rights impacts with which they are involved”. It is in the commentary to principle 11 stated that business, as part of addressing adverse human rights impacts, should provide “remediation” where such impacts have occurred.

There will be an “adverse human rights impact” when an act or omission “removes or reduces the ability of an individual to enjoy his or her human rights”¹⁵¹.

The Business’ Duty to Provide Remedy is Activated when it has “Caused” or “Contributed” to an Adverse Human Rights Impact (UNGPs, principles 13 and 22)

Together, principles 13 and 22 decide when the business responsibility to provide remedies is triggered. Principle 13(a) states that the business obligation to respect human rights requires business to “avoid causing or contributing to adverse human rights impacts through their own activities”. Principle 13(b) further states that the obligation to respect demand business to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationship, even if they have not contributed to those impacts”.

Whether an investor is considered to either “cause” or “contribute” to adverse human rights impacts according to principle 13(a), or merely be “directly linked” to such impacts according to principle 13(b), is important for the investors’ duty to provide remedies to the victim of its violation. If an investor identifies its actions to fall within the scope of principle 13(a), the investor has a responsibility to provide remedy according to principle 22. On the other hand, where the investor’s relation to adverse human rights impacts merely trigger principle 13(b), the investor does not have to provide remedy, “though [it] may take a role in doing so”¹⁵².

Where the act of an institutional financial investor is “directly linked” to adverse human rights impacts, the commentary to principle 19 gives guidance for the investors’ decision on

¹⁵¹ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012 p. 5.

¹⁵² UNGPs (2011) Principle 22, Commentary.

whether to play a role in remediation¹⁵³. Factors an investor should take into consideration are thereby “the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences”¹⁵⁴.

According to John G. Ruggie, the author of the UNGPs, the relationship between “contribution” and “direct linkage” is a continuum, and there are several factors that can help put a certain situation on this scale¹⁵⁵. Such factors include “the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extend to which it could or should have known about such harm; and the quality of any mitigation steps it has taken to address it”¹⁵⁶.

This examination shows that the business’ remedy responsibility according to the UNGPs is triggered both where the business has caused an adverse human rights impact, and where it has contributed to this impact. The next sub-question examines one aspect of the concept of contribution.

Can an Institutional Financial Investor “Contribute” to an Adverse Human Rights Impact through a Third Party?

This question is of particular interest for the thesis, as it addresses the situation where a human rights impact is caused by a business the institutional financial investor have invested in. The question was, as mentioned in the introduction, the topic of the Thun Groups *Discussion Paper* from January 2017. In this paper, the Thun Group argues that a bank cannot be viewed to contribute to a human rights violation according to the UNGPs, though the act of its clients¹⁵⁷.

¹⁵³ UN Working Group, response letter to the Thun Groups Discussion Paper, 23 February 2017 p. 4 <http://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf> accessed 11 December 2017.

¹⁵⁴ UNGPs (2011) Principle 11, Commentary.

¹⁵⁵ John G. Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate Investment Banking Context*, 21 February 2017 p. 2 <<https://business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf>> accessed 11 December 2017.

¹⁵⁶ *Ibid.*, p. 2.

¹⁵⁷ Thun Group, 2017 p. 6.

Michael Addo, on behalf of the UN Working Group, gave a response to the *Discussion Paper*. He states that there are situations where a “bank through its own activities can contribute to human rights impact committed by a client”¹⁵⁸. For instance, “insufficient due diligence by a bank could potentially contribute to human rights impacts”¹⁵⁹. Addo further gives an example of such a situation: a bank can contribute to human rights impacts “where [it] provides a loan for an infrastructure project that leads to widespread displacement of local communities, but for which no safeguards or mitigations were in place”; “if a bank proceeds with financing, absent rigorous due diligence and safeguards, then its decision to lend may contribute to adverse human rights impacts, since it could have mitigated or prevented harm through its due diligence processes and the terms of its loans”¹⁶⁰.

Addo understands the UNGPs in a way that makes it possible for an institutional financial investor to “contribute” to adverse human rights impacts through a third party. This is in accordance with previous statements from UN bodies on the issue. *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* – which aims to further explain the UNGPs Pillar 1 (business responsibility to respect human rights) – is clear on the fact that an enterprise can be considered to contribute to human rights impacts through a third party¹⁶¹. The interpretive guide provides an example of such a situation: “an enterprise ... may contribute to an impact ... if it lends vehicles to security forces that use them to travel to local villages and commit atrocities”¹⁶². In *Banks and Human Rights: a Legal Analysis*, provided by the law firm Foley Hoag LLP and the UN Environment Programme Finance Initiative, it is stated that a “bank does not have to be the immediate cause of the impact to be considered to contribute to it” according to the UNGPs; it can contribute to a human rights impact by “assisting, facilitation, or incentivizing the conduct of another entity”¹⁶³.

¹⁵⁸ UN Working Group, response letter to the Thun Groups Discussion Paper, 23 February 2017 p. 3
<http://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf> accessed 11 December 2017.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012 p. 16 (picture two on the left side).

¹⁶² *Ibid.*, p. 41 (Q 39).

¹⁶³ Foley Hoag LLP and UN Environment Programme Finance Initiative, *Banks and Human Rights: A Legal Analysis*, 2015 p. 14.

Based on the elaboration above, it is clear that an institutional financial investor can contribute to adverse human rights violations through the act of the business it has invested in, and thereby be responsible to provide remedies to the victims of the violation according to the UNGPs.

This is not controversial: international law acknowledges that one party can assume responsibility for the wrongful act or omission of another party. This is for instance made evident in DASR. A state will, according to DASR art. 16 become responsible for the act of another state where it “aid or assists” the wrongful act of another state. This can for instance be the case where the state is “financing the activity in question”¹⁶⁴. A state can further assume responsibility for the act of another state where it “directs and controls” another state in the commission of an internationally wrongful act according to art. 17, and where it “coerces” another state to commit such an act according to art 18. DARIO contains corresponding provisions in its art. 14, 15 and 16.

Both DASR and DARIO do however require that the party that is to assume responsibility for the wrongful act of another had “knowledge” of the circumstances making the act internationally wrongful¹⁶⁵. The understanding of “contribution” is thereby broader in the UNGPs: the investor can for instance be viewed to “contribute” to human rights impacts on the base of a lack of human rights due diligence, according to Addo. It will in these cases be the investors’ lack of knowledge that triggers the investors’ responsibility for the act of the business. It is acknowledged in the commentary to the UNGPs principle 17 that the UNGPs use of the term “contribute” is not corresponding with the legal standard for complicity.

There is no legal basis to conclude on whether or not this broader understanding of “contribution” in the UNGP can be maintained as a rule of international law if there is a binding international obligation on investors. It is, however, noted that the more narrow understanding in international law seem to be well established. Despite this, it must be emphasised that the special character of the relationship between a business and an investor; the investor is an owner of the business, might lead to some adjustment of its application.

¹⁶⁴ DASR (2001) art. 16, Commentary No. 1.

¹⁶⁵ See, for instance, *Ibid.*, art. 16(a). ICJ have in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007 p. 43 para 420, confirmed that the article reflects customary international law.

Related International Initiatives of Importance for the Standing of the UNGPs

Organs of the UN have taken several initiatives to encourage and enable the states fulfilment of their responsibility according to the UNGPs Pillar 1 (state duty to protect) and Pillar 3 (access to remedy). In 2013, the UN Working Group called on states “[t]o consider elaborating a national plan of action [NAP] on implementation [of the UNGPs] to define responsibilities at the national level, identify resource requirements and mobilize relevant actors, building on lessons learned from such experiences in other countries”¹⁶⁶. It has further issued guidance on how states should develop, implement and update NAPs¹⁶⁷. At date (December 13th, 2017); 19 countries have produced NAPs and many more are in the process of doing so¹⁶⁸. States compliance with the UNGPs is further aimed achieved by the Accountability and Remedy Project (ARP); which shall provide guidance to states on how they should implement UNGPs Pillar 3 (access to remedy), through both judicial¹⁶⁹ and non-judicial¹⁷⁰ mechanisms.

The rights and responsibilities of businesses articulated in the UNGPs are given a broader scope of influence through the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (2011 Edition) (the OECD Guidelines). The OECD Guidelines chapter E on human rights “is consistent with the [UNGP]”¹⁷¹. The OECD Guidelines “provide non-binding principles ... for responsible business conduct”¹⁷² and thereby do not impose any legally binding obligations. They are “recommendations addressed by governments to multinational enterprises operating in or from adhering countries”, and constitute the only framework regarding “responsible business conduct that governments have committed to promoting”¹⁷³.

¹⁶⁶ UNHRC, Report A/HRC/23/32, 14 March 2013 para. 71(f).

¹⁶⁷ UN Working Group, *Guidance on National Action Plans on Business and Human Rights*, 2016.

¹⁶⁸ OHCHR, *State national action plans*,

<<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>> accessed 13 December 2017.

¹⁶⁹ Final report on the matter: UNHRC, Report A/HRC/32/19, 10 May 2016.

¹⁷⁰ Final report on the matter will be submitted in June 2018 according to; UNHRC Resolution A/HRC/RES/32/10, 15 July 2016 para. 13.

¹⁷¹ OECD Guidelines (2011) foreword, p. 3.

¹⁷² OECD Guidelines (2011) foreword p. 3.

¹⁷³ *Ibid.*

The OECD Guidelines reference to the UNGPs have one vital consequence, other than the fact that it reinforces the requirements set out therein: the mechanisms designed to ensure compliance with the OECD Guidelines, can also be used to ensure compliance with the responsibility articulated in the UNGPs.

The OECD Guidelines requires adhering states to set up National Contact Points (NCPs)¹⁷⁴. NCPs shall be “undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the [OECD Guidelines]”¹⁷⁵. The states is not bound to organise NCPs in a specific way, but it is required that NCPs are “visible, accessible, transparent, and accountable”¹⁷⁶. Where the NCPs contribute to resolution of issues in specific instances, it shall do this in a matter that is “impartial, predictable, equitable and compatible with the principles ... of the [OECD Guidelines]”¹⁷⁷. In sum, NCPs can provide an international arena where it is business’ non-compliance with the OECD Guidelines (and thereby the UNGPs) that is the topic at issue; and where the victim of a violation can get its case heard. The OECD Guidelines are in this way characteristic; it is “the only government-backed international instrument for responsible business conduct with a built-in non-judicial grievance mechanism”¹⁷⁸.

The UNGPs is further referred to in the International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Responsibility (2017 Edition) (ILO MNE Declaration). The Declaration states that the UNGPs “outline the ... duties and responsibilities of ... enterprises on human rights”¹⁷⁹. This mean that the mechanisms aiming to ensure compliance with the Declaration also can be used to ensure compliance with the UNGPs; in similar ways as the case is regarding the OECD Guidelines. However, the mechanisms in place to ensure business’ compliance with the Declaration is in

¹⁷⁴ *Ibid.*, part II, Amendment of the Decision of the Council of the OECD Guidelines for Multinational Enterprises (I)(1), (p. 68).

¹⁷⁵ *Ibid.*, part II, Amendment of the Decision of the Council of the OECD Guidelines for Multinational Enterprises (I)(1), (p. 68).

¹⁷⁶ *Ibid.*, part II, Commentary on the Implementation Procedures (I)(9), (p. 78).

¹⁷⁷ *Ibid.*, part II, Procedural Guidance (I)(C), (p. 72).

¹⁷⁸ OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015*, 2016 p. 2.

¹⁷⁹ ILO MNE Declaration (2017), General Policies, para 10(a)

large based on voluntarily initiatives; and they do not go further than the OECD mechanisms¹⁸⁰. Regardless, the ILO MNE Declaration does reinforce the content of the UNGPs: business should respect human rights.

5.3 Urbaser v. Argentina

Urbaser v. Argentina is an award by the International Centre for Settlement of Investment Disputes (ICSID). The dispute arose under the Spain-Argentina BIT¹⁸¹.

In 1999, Aguas Del Gran Buenos Aires S.A. (AGBA) was granted a concession to provide water and sewage services in a part of Buenos Aires, Argentina¹⁸². AGBA was a company established by foreign investors and shareholders, and Urbaser – a Spain registered company – held 27.4 % of the shares in AGBA¹⁸³. The concession was terminated by Buenos Aires in 2006, and Urbaser did in this relation claim that Argentina had breached several provisions protecting foreign investors under the BIT¹⁸⁴. Argentina denied all the claims, and raised a counterclaim based on Urbaser's "failure to provide the necessary investment into the Concession, thus [violating] its commitments and its obligations under international law based on the human right to water"¹⁸⁵. It is this counter claim, and how the Urbaser tribunal handled it, that makes the case interesting for the question of investor responsibility for human rights impacts.

The tribunal states that private parties have obligations in relation to human rights, and that the old principle of states as the only subject of international law has "lost its impact and relevance"¹⁸⁶. The tribunal adds that "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce", which includes "commitments to comply with human rights" in operations in foreign states¹⁸⁷. It referred to the UNGPs as the "basic document ... today" on the matter¹⁸⁸.

¹⁸⁰ *Ibid.*, annex II.

¹⁸¹ Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (1991).

¹⁸² *Urbaser v. Argentina*, para. 63.

¹⁸³ *Ibid.*, para. 34 and 62.

¹⁸⁴ *Ibid.*, para. 34 and 35 (a)(1) 2.

¹⁸⁵ *Ibid.*, para. 36.

¹⁸⁶ *Ibid.*, para. 1194.

¹⁸⁷ *Ibid.*, para. 1195.

On this basis, the tribunal conclude, “it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law”¹⁸⁹. Because the initiatives on the international level are not “on their own, sufficient to oblige corporations to put their policies in line with human rights law”, the tribunal found that it had to look at the “specific activities as they relate to the human rights at issue in order to determine whether any international law obligation attach to the non-State individual”¹⁹⁰.

After examining a several international treaties and declarations, including the UDHR and the ILO MNE Declaration, the tribunal concludes that “the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights”¹⁹¹.

The central question for the Court was thereby whether the human right to water imposed a corresponding obligation on the investor based on international law¹⁹². The tribunal found that there was an obligation on the investor to provide the population with water and sanitation services, but that this obligation was “not based on international law”; it rather had its origin in the legal conditions created by the BIT and the host state’s domestic law¹⁹³. The tribunal reasons this conclusion by drawing a distinction between obligations to “perform” human rights and obligations to “abstain” from interfering in the human rights of others.

Obligations to “perform” are according to the tribunal only imposed upon states, not private actors¹⁹⁴. In order for companies to have an obligation to “perform”, “a contract or similar legal relationship of civil and commercial law is required”¹⁹⁵. The tribunal is thereby of the opinion that obligations to “perform” must be imposed on the investor through other legal instruments than those of international human rights law. “The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would

¹⁸⁸ *Ibid.*, para. 1195 cf. footnote 434.

¹⁸⁹ *Ibid.*, para. 1195.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, para .1196, 1198 and 1199.

¹⁹² *Ibid.*, para. 1206.

¹⁹³ *Ibid.*, para. 1209.

¹⁹⁴ *Ibid.*, para 1210

¹⁹⁵ *Ibid.*

be at stake”; “[s]uch an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties”¹⁹⁶.

Because the “enforcement of the human right to water represents an obligation to perform”, this was not an obligation that could be imposed on private actors based on international law¹⁹⁷. The tribunal then moves on to review how the framework of the concession in question regulates human rights obligations. This is not relevant for this thesis; as such regulations do not have their origin in international law. The further review of this decision is therefore limited to give account for the tribunals’ conclusion: Argentina’s counter claim was not upheld¹⁹⁸.

5.4 The Morocco-Nigeria BIT

The BIT was signed in December 2016, and has not entered into force. International investment tribunals’ have naturally not ruled the BITs provisions yet, and its actual impact on questions of businesses human rights responsibility therefore remains unsettled.

Nevertheless, the BIT has already received some attention from the field of business and human rights. It is viewed to be a “great model” for “inclusion and protection of [international human rights law] through [international investment law]”¹⁹⁹, and it is thereby worth taking a closer look at.

States parties shall, according to art. 15(5) “ensure that its laws and regulations provide for high levels of labour and human rights protection”. Morocco and Nigeria are further obligated to “ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party” according to art. 15(6). The provision thereby “embeds UNGP Pillar 1 [state responsibility to protect]” in the BIT²⁰⁰.

Art 18 (2) requires “[i]nvestors and investments [to] uphold human rights in the host state”. Nigerian investors operating in Morocco shall thereby respect human rights in Morocco, and

¹⁹⁶ *Ibid.*.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, para. 1221.

¹⁹⁹ Tara Van Ho, “International Investment Law and the UNGPs”, in *Cambridge Core* blog, 23 November 2017 <<http://blog.journals.cambridge.org/2017/11/23/international-investment-law-and-the-ungp/>> accessed 11 December 2017.

²⁰⁰ *Ibid.*

Moroccan investors operating in Nigeria shall respect human rights in Nigeria. The investor's obligation to respect human rights is further expanded in art. 18(4), which states that [i]nvestors and investments shall not manage or operate the investments in a manner that circumvents ... human rights obligations to which the host state and/or home state are Parties". It is thereby clear that the Moroccan foreign investor operating in Nigeria is not only obligated to respect the human rights binding in Nigeria – but also those binding in Morocco (and vice versa). Art 18 (2) and (4) “ensures that UNGP Pillar 2 [business responsibility to respect] is ... reflected in the treaty”²⁰¹.

The BITs art.18 do in sum place an international obligation on investors to respect human rights. The strong regulation of investor responsibility in the BIT is however not followed up by provisions fully ensuring the implementation of access to remedy (UNGP pillar 3) for victims of businesses failure to respect human rights.

The foreign investor is in the BITs art. 27(1) granted a right to submit a claim against the host state. There is no similar provision granting the host state a right to submit a claim against the foreign investor; which must mean that the investor holds the exclusive right to initiate an investor-host state dispute. However, the provisions in the BIT do not comment on the host states right to submit a (human rights based) counter claim against the foreign investor in the case where the investor have submitted a claim against the state. It will thereby depend on an interpretation of the BIT to what extent an investment tribunal will have jurisdiction over such counter claims. Further, and even in a case where a tribunal rejects a host states counter claim, the tribunal will be both authorized and forced to take human rights into consideration in its dispute settlement when it is invoked, based on the BITs art. 18.

Art. 20 in the BIT states that “[i]nvestors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state”. The investors’ home state is thereby the state with the primary responsibility to enforce the investors obligation to respect human rights in its foreign operations; and this state is thereby imposed an extraterritorial responsibility. This is, for reasons that will be briefly mentioned in chapter 6, quite controversial. It is further problematic that the responsibility to ensure business’ compliance with human rights is primarily placed at the

²⁰¹ *Ibid.*

home state, and not directly at the host state, because it does not enable the host state to directly fulfil its obligation to protect the people within its jurisdiction itself – it must rely on another state in this matter. However, if the investor’s home state fails to meet its obligation to enforce the investors’ responsibility according to art. 18; art. 28 grants the host state a right to submit a claim against the home state for an arbitration tribunal.

The practical impact of the BITs lack of a provision that enables the host state to initiate an international legal process that can ensure the foreign investors fulfillment of its human rights obligations, is thereby modified by other legal measurements aiming to ensure such fulfillment.

5.5 Analysis of Investors’ Obligations

The examination of remedies in section 4.2 showed that it is a crucial condition for the international obligation to provide remedies to be triggered that the violating party is the bearer of an obligation not to violate the human right in question. It was in section 3.1 crystalized that states are the traditional subject of international law and also the traditional bearer of human rights obligations. Together, this mean that states are the main subject of a potential obligation to provide remedies to human rights victims. It was however emphasized, also in section 3.1, that there have been developments: international organizations may be subjects of international law. The *Urbaser* tribunal also confirm that the principle of states as the only subject of international law has “lost its impact and relevance”²⁰².

The traditional limitation of the subjects of international law can thereby only be used to explain why challenges appear when it comes to holding businesses internationally responsible for their human rights impacts. One can no longer merely refer to the construction of international law, and use this as a base to reject the possibility that institutional investors can be subjects of this field of law. Such a rejection will now require further reasoning. It is the relevant sources of international law, examined in 5.1-5.4, that will decide whether or not institutional investors are international human rights duty bearers, and thereby also obligated to provide remedy when they violate human rights.

Is an Institutional Investor Legally Obligated not to Violate Human Rights?

²⁰² *Urbaser v. Argentina*, para. 1194.

The sources of international human rights law examined; the UDHR, the UNGP, the OECD Guidelines, and the ILO MNE Declaration, are all non-binding instruments. They do thereby not impose a legal *obligation* on investors not to violate human rights. It is also the conclusion of the *Urbaser* tribunal that the current international initiatives are not “on their own, sufficient to oblige corporations to put their policies in line with human rights law”²⁰³.

The fact that there are several non-binding regulations does not make the rule they impose binding. It does however reinforce the signal they send: it is clear that institutional investors have a *responsibility* to respect human rights. The *Urbaser* tribunal confirms this; companies should as a part of their social responsibility “comply with human rights”²⁰⁴.

The broad follow-up of the UNGPs, through for instance, the OECD Guidelines and the ILO MNE Declaration makes it the leading document of today for mapping out what the institutional investors responsibility to respect human rights entails and how it should be carried out. The *Urbaser* tribunal confirms this²⁰⁵. The fact that states through NAPs have followed up their responsibility according to the UNGPs, gives the Framework quite explicit state recognition, which in turn enhances its international standing. The reference to the UNGPs in the OECD Guidance, which is a state initiative, has the same consequence. Further, the establishment of the UN Working Group and the ARP, and the fact that OECD Guidelines NCPs can be used to ensure business compliance with the UNGPs, contributes to the implementation and operationalization of this instrument. The UNGPs should for these reasons be decisive for how businesses manage their human rights responsibilities. An institutional investor that is observant to its soft law obligations will thereby provide “effective remedy” according to the UN Working Groups recommendations when it contributes to adverse human rights impacts through the act or omission of its client.

The regulation of businesses’ human rights responsibilities is under current development. The UN Human Rights Commissions rejection of the UN Norms, and its endorsement of the Protect, Respect, and Remedy Framework only five years later, show this. Further, all the legal sources of direct relevance for the question of investor responsibility for human rights that are examined herein if of a later date than 2011 (except the UDHR). It is in this regard

²⁰³ *Ibid.*, para. 1195.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, para. 1195 cf. footnote 434.

also worth mentioning that the UN – a highly regarded institution in international human rights law – has taken a leading role in the process of evolving regulations targeting businesses’ human rights abuse. This increased focus on businesses’ impacts on human rights, viewed in light of the recent developments in international law; states are no longer its only subject, makes it likely that businesses will become human rights duty bearers in the future. This also includes institutional financial investors. However, international law is not yet there.

The *Urbaser* tribunal’s distinction between obligations to “abstain” and “perform” in areas affecting human rights, also indicates that international law to some degree is heading towards imposing international obligations on institutional financial investors. The tribunal ruled out the possibility that the investor had an obligation to perform human rights. It did however state that the situation could be different where an investor has failed to “abstain” from human rights violating conduct²⁰⁶.

There are several additional indicators that this conclusion – that an institutional investor is not legally obligated to respect human rights – will not stand for long. Draft elements for a treaty on business and human rights were released in October 2017²⁰⁷. If it is followed up, it might drastically compromise the relevance of the conclusion drawn herein. Further, the conclusion will no longer be accurate when the Morocco-Nigeria BIT enters into force. Moroccan investors operating in Nigeria, and Nigerian investors operating in Morocco will, when the BIT becomes legally binding, be obligated to respect human rights in their operations within the party states. The future obligations of Moroccan and Nigerian investors’ according to the BIT is, because of its origin in a BIT, an obligation of international law. It is no basis to state that the breach of this international obligation will not have the same consequences as the breach of any other international obligation: an obligation to provide remedy is triggered. The procedural provisions in the BITs art. 20, 27(1) and 28 do not change the nature of this remedy obligation; the provisions only regulate the states’ responsibility to enforce it. When the BIT enter into force, one can thereby say that there are circumstances under which the international obligation to provide remedy extend to institutional investors.

²⁰⁶ *Ibid.*, para. 1210.

²⁰⁷ Chairmanship of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 29 September 2017.

6 Is there Anything Special about State-Run Investors?

The conclusion drawn in the previous chapter is that the international obligation to provide remedy to a victim of a human rights violation does not yet extend to institutional financial investors. This chapter asks if the conclusion will appear different if the institutional financial investor is state-run.

The question is herein answered by a three-step-approach. Section 6.1 maps out the criteria for an enterprise to be qualified as a “state-owned enterprise” (SOE). Section 6.2 examines to what extent a state can become obligated to provide reparation to the victim of a SOEs’ human rights violation. Section 6.3 analyses how the human rights responsibility of a state-run investor (that is qualified as a SOE) is influenced by the state’s human rights obligations, and aim to answer the question of whether or not state-run investors bear more comprehensive human rights responsibilities than other investors.

6.1 The Qualification of a State-Owned Enterprise (SOE)

It is no clear definition of what constitutes a state-owned enterprise (SOE) in international law²⁰⁸. There is however given definitions of the concept in a variety of instruments and documents. These definitions are not concurrent, and none of them has the international standing to be conclusive in all incidents. They can however together be used to map what international law in general seem to require for an entity to be qualified as state-owned.

The OECD Guidelines on Corporate Governance of State-Owned Enterprises defines an SOE as “any corporate entity recognised by national law as an enterprise ... that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control”²⁰⁹. An entity will thereby be considered at be an SOE according to the Guidelines if it is a corporate entity according to national law, which the state holds the dominating control over.

The UN Conference on Trade and Development (UNCTAD) World Investment Report from 2011 defines state-owned transnational corporations as “enterprises comprising parent

²⁰⁸ Charline Daelman, “State-owned enterprises and human rights: the Qualification & the Responsibility of the State”, in *Human Rights and Business: Direct Corporate Accountability for Human Rights*, 2015 pp. 407-427 (p 408).

²⁰⁹ OECD, Guidelines on Corporate Governance of State-Owned Enterprises (2015) p. 14.

enterprises and their foreign affiliates in which the government has a controlling interest (full, majority, or significant minority), whether or not listed on a stock exchange”²¹⁰. The report emphasises that what is considered to be a controlling interest can differ, but that “a stake of 10 per cent or more of the voting power, or where the government is the largest single shareholder” is decisive for the purpose of the report, and that state-ownership “refers to both national and sub-national governments”²¹¹.

The UNCTAD report’s definition’s reference to “parent enterprises and their foreign affiliates” must be understood bearing in mind the definition’s scope of application; it regards transnational corporations. This aside, the definition in the UNCTAD report is broad. It does not set out a criterion of a specific minimum shareholding position on the states hand, and it is not only the central governments ownership position that can qualify an entity as an SOE. However, state control is only defined in terms of ownership.

The last definition of an SOE examined herein, is the one given in the proposal for a free trade agreement (FTA) between the European Union (the EU) and the Socialist Republic of Vietnam (Vietnam)²¹². An enterprise can on three alternative grounds be qualified as an SOE according to the FTA section III, art 1 (a). The first ground is that the state “owns more than 50% of the enterprise’s subscribed capital or the votes attached to the shares issued by the enterprise”. The second ground is that the state “can appoint more than half of the members of the enterprise’s board of directors or an equivalent body”. The third and last ground for an entity to be an SOE is that the state “can exercise control over the strategic decisions of the enterprise”. The FTA thereby requires either a majority-ownership by the state, or dominating state-control over the entity’s decisions or governing body. The number of entities that will qualify as a SOE according to the agreement is drastically expanded by the fact that “any subsidiary” of the enterprise is included, and that the states ownership or control can be met either “directly or indirectly”, according to the preliminary wording in art 1 (a). State ownership or other forms of control of a parent entity can thereby lead to qualification of an affiliate as an SOE, and it is not only the central governments ownership or control that is relevant for the qualification.

²¹⁰ UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development*, 2011 p. 28.

²¹¹ *Ibid.*

²¹² FTA between the EU and Vietnam (agreed text as of January 2016).

This non-exhaustive examination of how a SOEs is qualified in international law, shows that state-control over the enterprise is required. State-control will not entail the same according to all definitions. Some definitions require state-ownership in the entity (the UNTCAD-definition), and other expands the scope of possible SOEs by defining the controlling interest in broader terms (EU-Vietnam FTA and OECD Guidelines). The EU-Vietnam FTA for instance, recognises qualification of a SOE based on a states control over the entities strategic decisions. However, the most obvious way for a state to gain such control will be through an owner position. The practical difference between the examined definitions thereby does not have to be as significant as it might seem.

In sum, international law seems to require state ownership or another form of controlling interest in the enterprise. Full ownership or control is probably not required; but a majority of such seem to be demanded. It further don't seem to matter whether it is the central government or another state organ that exercises the control or ownership, or whether or not the state holds such ownership or control directly in the company or through the SOEs position as a parent company.

6.2 How a SOEs' Violation of Human Rights can Trigger the Owner-States Obligation to Provide Remedy

The examination in section 4.2 shows that there are two conditions for the state's international obligation to provide reparation to be triggered. Firstly, the conduct must constitute a breach of the state's international obligations. Secondly, the conduct that constitutes a breach of an obligation must be attributed to the state.

States that bear human rights obligations are, as the examination in section 3.2 shows, internationally obligated to respect, protect and fulfil human rights. The examination further showed that a state can be viewed to have violated its human rights obligations both through its own acts (breach of the obligation to respect) and through the act of others (breach of the obligation to protect).

Where a SOEs conduct can be attributed to the state, the state is per definition viewed to have executed the conduct itself. Where the conduct entails a violation of a human right the state is obligated not to violate, it will entail a breach of the states obligation to *respect* human rights. Because both the criteria's for the obligation to provide reparation is triggered in this case;

attribution of conduct and a breach of international obligation; the state will automatically become a bearer of an obligation to provide reparation to the victim of the violation.

And the other way around: the human rights violating conduct of a SOE shall not be viewed as the conduct of the state where the conduct cannot be attributed to the state. This means that the state shall not be viewed to have breached its obligation to respect human rights based on the SOEs conduct. Because attribution is a condition for the obligation to provide reparation to be triggered, the state will in this case not be obligated to provide reparation to the victim of the SOEs violation. It is, however, necessary to examine to what extent it will influence the states obligation to *protect* human rights that the state is executing its obligation towards an enterprise that is under its own control²¹³. A breach of the obligation to protect, can as earlier mentioned, also trigger an obligation on the state's hand to provide reparation to the victim of a human rights violation. If this is the case, the obligation is triggered by the state's own conduct (lack of protection), and not the conduct of the SOE (failure to respect human rights).

The aim is in the following to clarify in which situations the conduct of a SOE can be attributed to the owner-state. How the states obligation to protect human rights is influenced by the fact that it is an SOE that violates human rights is a topic of subsequent examination.

Because the states' obligation to respect, protect and fulfil human rights applies within its territory (section 3.2), what is said herein is primarily directed at the situation where an SOE violates human rights within the territory of its owner-state. However, it is a prominent question in international law whether or not states bear extraterritorial human rights obligations. If states bear extraterritorial obligations to respect and protect human rights, the scope of what is said herein will be extended to apply also when an SOE violates human rights abroad. The debate about whether or not the state bear extraterritorial human rights obligation is not fully examined in this thesis, but it is briefly accounted for below.

Situations where Conduct of a SOE can be attributed to a State (and thereby have the Potential to Entail a Breach of the States Obligation to *Respect* Human Rights)

²¹³ Daelman, 2015 p. 413.

DASR art. 4, 5 and 8 give guidance for when the act of a SOE shall be viewed as an act of the state²¹⁴. Because the DASR do not only codify international law but also entails an element of legal development²¹⁵; international case law must be examined to map out to what extent the articles reflects customary international law.

DASR art. 4(1) states that “[t]he conduct of any State organ shall be considered an act of that state under international law”.

The term “State organ” in art. 4(1) shall be understood “in the most general sense”; [i]t extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level²¹⁶. However, art. 4(2) entails a limitation of the scope of subjects that can be considered to be a “State-organ”: the “person or entity [must have] that status in accordance with internal law”. It is highlighted that not only law, but also “practice” in the state will be decisive in this regard²¹⁷. A state can thereby not be free of responsibility for the act of a SOE on the ground that the entity does not hold a status in national law as a “State-organ”. If practise show that the entity exercises a state function; the conduct of the organ shall be attributed to the state.

DASR art. 4 reflects customary international law. This is explicitly stated by the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* advisory opinion²¹⁸, an by the investment tribunal in *Saipem SpA v. Bangladesh* case²¹⁹. The article is further referred to by the ICJ in several cases²²⁰.

²¹⁴ *Ibid.*, p. 412.

²¹⁵ DASR (2001), Introductory General Commentary No. 1.

²¹⁶ *Ibid.*, art. 4, Commentary No. 6.

²¹⁷ *Ibid.*, art. 4 Commentary No. 11.

²¹⁸ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999 p. 62 (para. 62).

²¹⁹ *SAIPEM S.p.A. v. The Peoples Republic of Bangladesh*, ICSID Casa No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 para. 148.

²²⁰ See, for instance, *Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, ICJ Reports 2005 p. 168 (para. 160); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, ICJ Reports 2007 p. 43 (para. 386).

The conduct of an entity that is not a state organ can, based on its execution of “elements of the governmental authority”, give grounds for state attribution according to DASR art. 5.

DASR art. 5 states, “[t]he conduct of a person or entity ... which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State”. The following wording in the article clarifies that it is a condition for such attribution to occur is that “the person or entity is [exercising governmental authority] in the particular instance”.

The term “entity” in art. 5 “may include public corporations, semi-public entities, public agencies ... and ... private companies”²²¹. It is thereby not an entities status as private or public that is decisive in regard to art. 5, “instead article 5 refers to the true common feature” of the entity²²². It is weather or not an entity is empowered to exercise governmental authority, and weather or not it does so in the specific case that is decisive for state-attribution of the entities conduct.

Together, the wording in art. 5 and the commentary to the article makes it clear that it is required that the entities power to exercise governmental authority has grounds in the national law of the state²²³. This requirement was not taken into account by the ICSID in the *Helnan International Hotels A/S v. Republic of Egypt*²²⁴ case, and it is thereby uncertain if this criterion for attribution based on execution of government authority can be upheld in international law. The tribunal did in an *obiter dictum* state that “[e]ven if EGOTH [the entity] has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation [of the tourist industry] are attributable to the Egyptian State”²²⁵. It was the fact that the entity had been “an active operator in the [process] on behalf of the Egyptian Government” that was decisive for the tribunals finding²²⁶.

²²¹ DASR (2001) art. 5, Commentary No. 2.

²²² *Ibid.*, art. 5, Commentary No. 3.

²²³ *Ibid.*, art. 5, Commentary No. 7.

²²⁴ *Helnan International Hotels A/S v. The Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, 17 October 2006

²²⁵ *Ibid.*, para. 93.

²²⁶ *Ibid.*

If it is further unclear what the content of the term “governmental authority” in art. 5 covers. The DASR do not clarify what it requires for conduct to entail an exercise of “governmental authority”. It merely states that “[b]eyond a certain limit”, it will “[depend] on the particular society, its history and traditions” what governmental authority entails²²⁷. It is not discussed what the “certain limit” covers, but the reference to it must be understood to mean that certain types of actions always will entail execution of “government authority”. A thinkable example of such an action is execution of the judicial power to sentence someone to prison. Beyond referring to a “certain limit” and to the distinctive character of the state, the DASR states that “not just the content of the powers, but the way they are conferred on an entity, the purpose for which they are to be exercised and the extent to which the entity is accountable to government for their exercise” will be of importance for the articles application.²²⁸ It will thereby in sum, above an unclear lower-limit, depend on the certain situation what constitutes “governmental authority” according to art. 5.

Art. 5 is referred to by the ICJ in the *Democratic Republic of the Congo v. Uganda* case²²⁹ and by the ICSID in the *Saipem SpA v. People’s Republic of Bangladesh* case²³⁰. It thereby seems clear that conduct of entities exercising governmental authority can be attributed to the state according to international law. It does however remain uncertain whether or not all the detailed provisions in the article reflect customary international law²³¹, which for instance can be illustrated by the tribunals’ decision in the *Helnan International Hotels A/S v. Republic of Egypt* case²³² referred to above.

DASR art. 8 recognises state-attribution based on a states direction or control over an entity that is not a state organ.

²²⁷ DASR (2001) art. 5, Commentary No. 6.

²²⁸ *Ibid.*, art. 5, Commentary No. 6.

²²⁹ *Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, ICJ Reports 2005 p. 168 (para. 160).

²³⁰ *SAIPEM S.p.A. v. The Peoples Republic of Bangladesh*, ICSID Casa No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 para. 148.

²³¹ Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*, 2015 p. 40.

²³² *Helnan International Hotels A/S v. The Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, 17 October 2006 para. 93.

More precise, art. 8 states that the conduct of private persons or entities can be attributed to a state if the person or entity “is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct”.

The commentary to art. 8 deal explicitly with the question of to what extent conduct of SOEs can be attributed to a state. State-attribution of conduct of SOEs cannot, according to art. 8, solely be based on a states establishment of the entity; it will rely on whether or not the SOE exercises elements of governmental control²³³. DASR art. 5 will thereby be the relevant provision. There is however an exception from this outset: where a state “[uses] its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question [shall] be attributed to the State”²³⁴. Art. 8 can thereby give grounds for attribution of conduct to a state where the state specifically have used its ownership or control to make an entity commit an act for the purpose of the achievement of a particular result wished for by the state.

The rules expressed in art. 8 and art. 5 seem to have quite the same standing in international law. Art. 8 is also referred to in case law²³⁵, but it is uncertain whether or not all the elements of the article reflect international customary law²³⁶. However, the commentary to art. 8 that consider attribution of conduct of SOEs is built on extensive reference to case law²³⁷. It thereby seem clear that this part of the DASR does not entail an element of legal development, but merely is restricted to codify already existing customary international law.

On the basis of this examination, the state can become internationally responsible for the conduct of an SOE on three grounds. Firstly, direct attribution of the SOEs conduct to the state will occur where the SOE is a “state organ”. Secondly, where an SOE is not a state organ, attribution can occur based on the entities’ execution of elements of governmental authority. Thirdly, where an SEE is not a state organ, the state can assume responsibility for

²³³ DASR (2001) art. 8 Commentary No. 6.

²³⁴ *Ibid.*, art. 8 Commentary No. 6

²³⁵ See, for instance, *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgement, ICJ Reports 2006 p. 6 (para. 168); and *Consortium Groupement L.E.S.I.-DEPENTA v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005 part (II), para. 19(ii).

²³⁶ Cook, 2015 p. 40.

²³⁷ DASR (2001) art.8, Commentary No. 6 cf. footnotes 163-166.

the conduct of a SOE because the entity is under the direction or control of the state. It must lastly be emphasised that “additional factual circumstances” can be important in the specific case²³⁸. In other words; each case must be examined individually, but the present of reasons for state attribution according to DASR art 4, 5 and 8 will often lead to the state assuming responsibility for the conduct of a SOE.

How the States Obligation to *Protect Human Rights* is Influenced by the fact that it is an SOE that Violates Human Rights

The state will bear an obligation to protect human rights also in the cases where conduct of an SOE cannot be directly attributed to the state and thereby does not trigger the state’s responsibility to respect human rights²³⁹.

The state’s breach of its obligation to protect human rights within its jurisdiction will, as stated in chapter 3, trigger a duty to provide remedy to the victims of a business’ human rights violation. It is, which is also mentioned in chapter 3, the states own actions in relation to the business’ human rights abuse that will be decisive for the decision on whether or not the states obligation to protect is breached, and thereby also if the remedy obligation is activated.

The *SERAP v. Nigeria*²⁴⁰ case can serve to illustrate this latter point. Nigeria became responsible for pollution committed by oil companies operating in the Niger Delta Region, which had violated the population’s “right to a general satisfactory environment favourable to their development” granted in the African Charter on Human and Peoples’ Rights (1981) art. 24²⁴¹. This was based on Nigeria’s’ insufficient regulation of the oil companies, and of its lack of enforcement of the regulations in place²⁴². The Court acknowledged Nigeria’s obligations to provide remedies to the victims of the companies’ human rights abuse²⁴³.

In this case, Nigeria was held responsible for the human rights violations of private companies. Where the state owns or in another way controls the entity that violates human

²³⁸ Daelman, 2015 p. 412.

²³⁹ *Ibid.*, p. 413.

²⁴⁰ *SERAP v. the Federal Republic of Nigeria*, ECOWAS, Judgement, No. ECW/CCJ/JUD/18/12, 2012

²⁴¹ *Ibid.*, para. 95 and 112.

²⁴² *Ibid.*, para. 107 and 108 cf. para. 110.

²⁴³ *Ibid.*, para. 118.

rights, the state will be in a better position to protect the people within its jurisdiction from human rights violations by the entity²⁴⁴. This leads to an increased duty to protect against human rights violations of an SOE²⁴⁵.

The state's obligation to protect human rights will thereby more easily be breached where a human rights violation is committed by an SOE than by another private entity. Accordingly: the state will be more exposed to bear a remedy obligation where it is an SOE that has violated human rights.

Are the States Human Rights Obligations of an Extraterritorial Nature?

In general, the state sovereignty of the host state is viewed to obstruct the possibility of extraterritorial obligations²⁴⁶. However, the last word might not be said in this regard.

The UN Human Rights Committee in its sixth periodic report on Canada's compliance with the International Covenant on Civil and Political Rights (1966) stated that Canada should "(a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations ... respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad"²⁴⁷. The committee do in other words encourage Canada to take an extraterritorial responsibility for the human rights impact the operations of Canadian registered companies have abroad.

The Committee on Economic, Social and Cultural Rights gave a similar recommendation to Norway in its fifth periodic report of the state's compliance with the International Covenant on Economic, Social, and Cultural Rights (1966)²⁴⁸.

²⁴⁴ Daelman, 2015 p. 414.

²⁴⁵ *Ibid.*

²⁴⁶ Surya Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights violations: Who Should 'Bell the Cat'?", in *Melbourne Journal of International Law*, Vol. 5, 2004 pp. 37-65 (pp. 46-47).

²⁴⁷ UN Human Rights Committee, CCPR/C/CAN/CO/6, 13 august 2016 para. 6.

²⁴⁸ UN Committee on Economic, Social and Cultural Rights, E/C.12(NOR/CO/5, 13 December 2013 section C, third Recommendation.

It is thereby clear indications that states, to act in compliance with its human rights obligations according to (at least) these two treaties, must take an extraterritorial approach to meet its obligations.

6.3 Analysis of State-Run Investors' Obligations

The examination in section 6.2 shows that the state's obligation to provide remedy to a victim of a human rights violation can be influenced by the fact that the violation is caused by its SOE. The examination does however not directly address the issue that is of the most prominent interest of this thesis: will the influence also go the other way around, in the way that the human rights responsibility of a state-run investor is influenced by its close connection to a state?

A State-run investor is, according to the definition of the term made in the Introduction, understood to be an institutional financial investor that is qualified as an SOE according to the criteria set out in section 6.1. To answer the question asked herein, it must be made a distinction between two categories of SOEs.

The state-run institutional financial investor that is a state organ, that exercises elements of governmental control, or which is under the direction or control of a state, is one category of state-run investors (in the following referred to as *type 1 state-run investors*). The term *type 2 state-run investor* does on the other hand refer to all other state-owned institutional financial investors.

Where a *type 1 state-run investor* violates human rights, its conduct can be attributed to the state. The state will automatically become obligated to provide remedy to the victim of the SOEs abusive conduct. This does not in itself make the state-run investor obligated according to international law to meet the responsibility to provide remedy. However, the fact that the state can become directly responsible for the SOEs human rights violation will impose on this type of state-run investor a comprehensive responsibility to respect human rights, and provide remedy when it fails to do so. If it fails to meet its responsibility, the state will automatically have to step in to redress the harm caused. In this way, an indirect human rights obligation with direct consequences in case of a violation is imposed on such state-run investors.

Where a *type 2 state-run investor* violates human rights, its conduct cannot be attributed to the state. The state can thereby not directly based to the conduct of the investor become internationally responsible for the investors' human rights violation. The *type 2 state-run*

investor can on this ground not be viewed to bear an indirect obligation to the same degree as a *type 1 state-run investor*. This is based on the fact that the conduct of such investors does not have the capacity to directly breach an international (human rights) obligation, and in turn trigger the states obligation to provide reparation to the victim of the violation. However, the investor will also in this case bear more comprehensive human rights responsibilities than other investors. This statement is reasoned on the fact that the conduct of such an investor to a greater extent than the conduct of other financial investors, can lead a states breach of its obligation to protect human rights.

7 Conclusion

The conclusion of this thesis is that an institutional financial investor does not (yet) have an *obligation* according to international law to provide remedy to the victim of a human rights violation caused by a business it has invested in. This conclusion can however be modified and clarified by a brief reproduction of the findings in this examination.

International law clearly imposes a soft law responsibility on institutional financial investors to respect human rights, and provide remedy when it fails to do so. This responsibility is even more comprehensive for state-run investors, because its failure to meet its soft law responsibility in certain cases directly can trigger the states obligation to provide remedy. To what degree this will be the case, depends on whether or not the conduct of the state-run investor can be directly attributed to the state. Where an institutional financial investor that is observant to its soft law obligations bear a responsibility to provide remedy for its human rights impact, it will do this in accordance with the requirements set out in the UNGPs, as this is the most important document of today on the matter.

In regard to the question of whether or not an institutional financial investor can be viewed to have contributed to a human rights violation through the act or omission of a business it has invested in; the question must be answered affirmative both according to the UNGPs and according to more general norms of international law. It is however not clear if investor-contribution shall be assessed according to the general rules of complicity in international law, or if the understanding expressed in the UNGPs should be decisive. This does not change the fact that a contribution *can* trigger the remedy responsibility; it will only have influence on the scope of acts and omissions with potential to trigger responsibility.

In sum; if the question asked in this paper were if institutional financial investor have a *responsibility* according to international law to provide remedy to the victim of a human rights violation caused by a business it has invested in; the answer would be yes.

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