Human rights obligations of states with regard to the conduct of business in conflict-affected areas through Export Credit Agencies

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2010

Master of Law

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ABSTRACT

HUMAN RIGHTS OBLIGATIONS OF STATES WITH REGARD TO THE CONDUCT OF BUSINESS IN CONFLICT-AFFECTED AREAS THROUGH EXPORT CREDIT AGENCIES

States have the primary duty to protect against human rights abuses, including those by businesses.

Many industrialized states engage in corporate activities abroad to support national exporters' competition for overseas sales, by providing export credits through Export Credit Agencies (ECAs). ECAs are one of the largest sources of financial support for projects that are commonly referred to as "environmentally and socially risky", in conflict-affected areas, where most of human rights violations by the corporate sector takes place.

Given the close relationship between ECAs and states, the question remains how to deal with, and who should be held accountable for misconducts on behalf of ECAs. At present, states are not generally required to regulate the extraterritorial activities of businesses domiciled in their territory, although they are not prohibited from doing so. There are in fact sound policy rationales for states to ensure that such businesses respect human rights abroad, especially when the state is involved in the business venture, for instance through an ECA.

The state duty to protect against all human rights abuses, is laid out in the framework of the United Nations Special Representative of the Secretary-General, and furthermore grounded in the core United Nations human rights treaties, where states are required to take necessary steps to prevent, investigate, punish and provide remedy for victims of human rights abuses. States will however not be held accountable for all human rights violations. They will only be responsible for those violating activities of ECAs that can be attributed to the state´s failure to exercise due diligence in fulfilling their duty to respect and protect human rights. Many states have been failing to fulfill their duties and it is clear that a reform is needed for the practices of ECAs. This thesis will provide some suggestions for ECAs and their home states in that regard.

ÚTDRÁTTUR

MANNRÉTTINDASKULDBINDINGAR RÍKJA VEGNA ÞÁTTTÖKU Í VIÐSKIPTUM Á ÁTAKASVÆÐUM Í GEGNUM ÚTLÁNASTOFNANIR

Ríki gegna þeirri grundvallarskyldu að vernda íbúa gegn mannréttindabrotum, einnig þeim sem snúa að viðskiptum.

Mörg þróuð ríki taka þátt í viðskiptafjárfestingum í öðrum ríkjum í gegnum svokallaðar útlánastofnanir, með því að útvega útflutningslán í gegnum þessar stofnanir til þess að styðja við útflytjendur á samkeppnismarkaði erlendis. Þessar útlánastofnanir eru meðal stærstu lánveitenda til fjárfestingarverkefna á átakasvæðum þar sem flest mannréttindabrot tengd viðskiptum eiga sér stað. Þessi verkefni eru jafnframt oft talin “umhverfis- og félagslega áhættusöm“.

Á grundvelli þeirra nánu tengsla sem eru á milli viðkomandi útlánastofnunar og ríkis er álitamál hvernig meðhöndla beri verklag hennar og hver skuli gerður ábyrgur vegna misferla af hennar hálfu. Almennt eru ríki ekki krafin um að setja sér reglur um starfsemi innlendra fyrirtækja vegna viðskiptahátta þeirra erlendis en þó er ekkert sem bannar þeim það. Í raun eru sterk rök fyrir því að ríki setji reglur sem hnykki á að innlend fyrirtæki virði mannréttindi í öðrum ríkjum, sérstaklega þegar ríki er þátttakandi að einhverju leyti í fyrirtækjastarfsemi í gegnum útlánastofnun.

Skylda ríkja til að vernda gegn öllum mannréttindabrotum, er lögð fram í starfsramma sérstaks fulltrúa aðalritara Sameinuðu Þjóðanna. Einnig er skírskotað til þeirrar skyldu í helstu mannréttindasáttmálum Sameinuðu Þjóðanna, þar sem ríki eru krafin um að taka nauðsynleg skref til að koma í veg fyrir, rannsaka og refsa fyrir mannréttindabrot, sem og að veita úrræði fyrir fórnarlömb þeirra. Ríki verða þó ekki gerð ábyrg fyrir öllum mannréttindabrotum, heldur einungis þegar brotlegar aðgerðir útlánastofnana má rekja til mistaka ríkisins við að uppfylla skyldur sínar að virða og vernda mannréttindi. Mörgum ríkjum hefur mistekist að þessu leyti og augljóst er að úrbóta er þörf varðandi starfshætti og stefnu útlánastofnana. Þessi ritgerð setur fram nokkrar hugmyndir til bóta í þessum málaflokki fyrir útlánastofnanir og heimaríki þeirra.

ACKNOWLEDGEMENTS

First of all I would like to thank my thesis instructor, Ursula Wynhoven, a lawyer and a special assistant to the Executive Director of the United Nations Global Compact, for all of her excellent and constructive comments. They were very valuable input into my work.

I would also like to thank Sebastienne Conradie for all of his help and support. His English guidance during the period of the work of the thesis will never be forgotten.

Last but not least, I would like to thank my parents for their endless patience, support and encouragement throughout my whole studies.

TABLE OF CONTENTS

1.0. INTRODUCTION 3

2.0. CONFLICT-AFFECTED AREAS AND THE PRIVATE SECTOR 5

2.1. DEFINITION OF CONFLICT-AFFECTED AREAS 5

2.2. INCREASING INVOLVEMENT OF THE PRIVATE SECTOR IN CONFLICT-AFFECTED AREAS 6

3.0. EXPORT CREDIT AGENCIES 9

3.1. DEFINITION OF AN EXPORT CREDIT AGENCY: BRIEF OVERVIEW OF THE CONCEPT, MAIN FUNCTIONS AND ACTIVITIES 9

3.2. CRITICISM OF EXPORT CREDIT AGENCIES´ PROJECTS IN CONFLICT-AFFECTED AREAS WITHIN THE DEVELOPING WORLD 11

3.3.NEGATIVE INVOLVEMENTS OF EXPORT CREDIT AGENCIES: THE INFAMOUS CASE OF THE THREE GORGES DAM IN CHINA 13
3.3.1. CASE OVERVIEW 13
3.3.2. EXPORT CREDIT AGENCIES AND THE THREE GORGES DAM PROJECT 13

4.0. STATE SUPPORT TO EXPORT CREDIT AGENCIES WHEN ENGAGING IN BUSINESS ABROAD 17

5.0. HUMAN RIGHTS OBLIGATIONS OF STATES WITH REGARD TO EXPORT CREDIT AGENCIES 18

5.1. GENERAL OBLIGATIONS OF STATES TO PROTECT INDIVIDUALS UNDER THEIR JURISDICTION 19
5.1.1. OBLIGATIONS OF HOME STATES 21
5.1.2. OBLIGATIONS OF HOST STATES 25

5.2. THE "PROTECT, RESPECT, REMEDY" FRAMEWORK OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL 27
5.2.1. MANDATE OF THE SPECIAL REPRESENTATIVE 27
5.2.2. MEANING AND SCOPE OF THE STATE DUTY TO PROTECT 29

5.3. THE NOTION OF DUE DILIGENCE 32

5.4. EXPORT CREDIT AGENCIES AND STATE RESPONSIBILITY UNDER INTERNATIONAL LAW 35
5.4.1. THE ESSENTIAL ELEMENTS OF STATE RESPONSIBILITY 37
5.4.2. ATTRIBUTION OF CONDUCTS TO A STATE 38
5.4.2.1. WHEN CONDUCT OF AN ORGAN OF A STATE IS ATTRIBUTED TO THE STATE 38
5.4.2.2. WHERE INDIVIDUALS OR GROUPS EMPOWERED BY THE LAW OF THE HOME STATE EXERCISE ELEMENTS OF GOVERNMENTAL AUTHORITY 38
5.4.2.3. WHEN THE CONDUCT OF A STATE ORGAN OR OF A PERSON- OR ENTITY EMPOWERED TO EXERCISE ELEMENTS OF GOVERNMENTAL AUTHORITY WILL BE ATTRIBUTED TO THE STATE, DESPITE

EXCEEDING ITS AUTHORITY OR CONTRAVENING ITS INSTRUCTIONS. 39
5.4.2.4. WHERE ACTIONS OF NON-STATE ACTORS ARE IN FACT DIRECTED OR CONTROLLED BY THE STATE 40
5.4.2.5. WHEN PRIVATE CONDUCT CAN BE ATTRIBUTABLE TO THE STATE, IF, IN THE ABSENCE OF FAULT OF OFFICIAL AUTHORITIES, CIRCUMSTANCES CALL FOR THE PRIVATE ENTITY TO EXERCISE GOVERNMENTAL AUTHORITY 41
5.4.2.6. WHEN A STATE AIDS OR PROVIDES ASSISTANCE IN THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT 42

6.0. APPLICABLE HUMAN RIGHTS SOURCES STATES HAVE WITH REGARD TO EXPORT CREDIT AGENCIES 45

6.1. INTERNATIONAL HUMAN RIGHTS LAW 46
6.1.1. BRIEF OVERVIEW OF CUSTOMARY INTERNATIONAL LAW WITH RESPECT TO INTERNATIONAL HUMAN RIGHTS LAW 48
6.1.1.1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 48
6.1.2. BRIEF OVERVIEW OF TREATY LAW WITH RESPECT TO INTERNATIONAL HUMAN RIGHTS LAW 49

6.2. THE MAIN LEGAL INSTRUMENTS 51
6.2.1. THE UNITED NATIONS CHARTER 52
6.2.2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 53
6.2.3. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 56

6.3. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) 59
6.3.1. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 61
6.3.2. OECD COMMON APPROACHES 62

7.0. CONCLUSION 67

BIBLIOGRAPHY 71

TABLE OF ABBREVIATIONS 77

TABLE OF CASES 78

TABLE OF CONVENTIONS AND DECLARATIONS 79

TABLE OF DOCUMENTS FROM THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL 80

TABLE OF INTERNATIONAL ORGANS 80

TABLE OF NATIONAL LAW 81

TABLE OF OTHER DOCUMENTS 81

TABLE OF WEBSITES 82

1.0. INTRODUCTION

States are the primary duty bearers with regard to human rights and bear the "principal responsibility for the vindication of those rights".[1]

During the post World War II era the world economy was still state-centric, meaning that states were the sole international decision makers and enforcers. The human rights regime that was created at this time as a response to the atrocities committed during World War II, was thus made by states for states, where states were the only ones responsible for implementing and enforcing human rights standards and furthermore the only ones capable of violating these standards. Today however, with increased globalization, the world´s economy is becoming increasingly integrated with the entry and expansion of transnational corporations (TNCs)[2] in the global market.

Globalization is highly controversial. Its proponents point out its main benefits of increasing economic productivity and helping developing countries to access foreign investments funds, while its opponents illustrate the fact that doing business in diverse political and economic systems poses difficult challenges, including those to human rights.[3] The rights of TNCs and their abilities to operate and expand globally has created widely known concerns, especially regarding the activities of TNCs in conflict-affected areas, since many of these activities can contribute to human rights violations.

Areas of conflict, post-conflict or where there is a problem because of lack of governance capacity are where the most severe human rights abuses by the private sector occur.[4] It should however be noted that the private sector can also contribute positively in those areas. For instance, investments can contribute to quicker economic recovery, since these investments can create jobs, opportunities and even work aside local communities. Corporations are increasingly seen as valuable

[1] U.N. Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* (SRSG Interim Report) 62nd Session, U.N. Doc E/CN.4/2006/97, 2006.

[2] TNCs, are corporations that operate and control assets across national boundaries, and do in fact carry out most of its business far beyond the borders of their home country. Cited from: Lawrence, Anne T. and Weber, James, *Business and Society: Stakeholders, Ethics, Public Policy,* 12th Edition. New York, United States 2008, p. 140.

[3] Ibid, p. 144-148.

[4] See chapter 2.1.

partners for peace building, and the creation of social cultures in those areas.[5]
It is imperative to understand that it is not only the acts of TNCs, in broader terms, the private sector, that are of relevance in this context. Not many know the scale and importance of Export Credit Agencies (ECAs)[6] in the current global economy. ECAs are one of the largest sources for financial support of projects commonly referred to as "environmentally and socially risky", in conflict-affected areas within the developing world. The controversial nature of the funding of these projects has become an issue, and its resolve in terms of how to deal with it, and who should be held accountable for misconducts on behalf of those agencies, has become more challenging since not all ECAs are public-only entities, as they were historically, but more commonly mixed out of public and private organizations.[7] According to John Ruggie, the appointed United Nations (UN) Special Representative of the Secretary-General on Human Rights (SRSG),[8] the international community is still in the early stages of adapting the human rights regime to provide more effective protection against corporate-related human rights abuses, emphasizing that the governance gaps resulting from globalization can be identified as a root cause of the issue.
Where governments back up developments in conflict-affected areas, especially through ECAs, the question remains what the scope and content of the state´s duty is in relation to human rights impacts of the ECA, if any.

The main focus of this thesis will be on the first pillar of the SRSG framework[9] namely the state duty to protect. The crux will be on finding when or whether that duty applies when states are doing business through ECAs, especially in conflict-affected areas. More specifically, light will be shed on the possible obligations that states bear in terms of the main international human rights instruments. Furthermore, this thesis will explore the potential state responsibility, according to international law, for human rights violations by ECAs.

This thesis aims to thoroughly investigate the importance of the role that

[5] UN Global Compact, *Doing Business While Advancing Peace and Development,* New York 2010, p. 6.
[6] See chapter 3.1.
[7] Can, Özgur and Seck, Sara L, "The Legal Obligations with respect to Human Rights and Export Credit Agencies", Final Legal Discussion Paper, July 2006, p. 2. See further in chapter 3.1.
[8] Accessible on: http://www.business-humanrights.org/SpecialRepPortal/Home, 31 August 2010.
[9] Now widely referred to as "the United Nations framework" (UN framework).

governments have to play when supporting projects in conflict-affected areas through ECAs, given an argued nexus between states and their ECAs. An unequivocal case will be built on these grounds and emphasized by looking into a variety of documents, mainly from the SRSG, the International Law Commission (ILC),[10] the Organization for Economic Co-operation and Development (OECD)[11] and the main international human rights treaties. Furthermore, to illustrate the arguments made throughout the thesis, examples from the infamous case of the Three Gorges Dam in China,[12] along with a review of how a few ECAs demonstrate their policies and position on those arguments, will be explored.

2.0. CONFLICT-AFFECTED AREAS AND THE PRIVATE SECTOR

2.1. DEFINITION OF CONFLICT-AFFECTED AREAS

Conflict occurs when interests of two or more parties clash or are incompatible, resulting in hostile actions or attitudes towards each other due to a variety of reasons, such as human rights violations or environmental issues.[13] There exists no single definition for the concept of "conflict-affected" area, where, as stated before,[14] the most severe human rights abuses occur. However, "conflict-affected" generally refers to areas where high levels of armed conflict occur due to political and social instability and where there is a high risk of further outbreaks of violence. Secondly, it can apply to areas where the conflict itself has concluded, but concerns persist about conflict-related human rights abuses.[15]

From an obvious point, conflicts within a state affect the whole society at every possible level, and most importantly, for the matter of this topic, weaken a state's ability to govern fully and adequately. Armed conflict has major impacts on economic activities. It destroys lands, workplaces and hinders access to infrastructure and markets, leaving employment opportunities scarce. Furthermore, the political

[10] Accessible on: http://www.un.org/law/ilc/, 24 November 2010.
[11] Organization of Economic Co-operation and Development. Accessible on: http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html, 9 December 2010.
[12] See chapter 3.3.1.
[13] International Alert, "Conflict-Sensitive Business Practice: Guidance for Extractive Industries", March 2005, p. 3. Accessible on: http://www.international-alert.org/pdfs/conflict_sensitive_business_practice_all.pdf, 9 September 2010.
[14] See chapter 1.0.
[15] A joint Global Compact – PRI publication, "Guidance on responsible business in conflict-affected and high-risk areas: a resource for companies and investors", 2010, p. 7. Accessible on: http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf, 9 September 2010.

instability and the fragile state of security in the country usually associated with conflicts discourage domestic and foreign investments.

2.2. INCREASING INVOLVEMENT OF THE PRIVATE SECTOR IN CONFLICT-AFFECTED AREAS

The UN High Level Panel on Threats, Challenges and Change stated:

> *Today's threats to international peace and security are transnational, involving an increasing number of non-state actors operating beyond national borders and beyond the reach of the established peace and security architecture.*[16]

Violent conflict also affects the private sector and poses a number of different challenges. With globalization, the private sector is playing an ever increasing role in the world economy. There are growing expectations that companies should act in a responsible manner[5] including that corporate actors should uphold universal standards, even in areas and situations where there is a conflict occurring, in a post-conflict situation or where instability and lack of governance structure is a fact of life.[17] The challenge for the private sector is to find a way to "function normally in abnormal conditions, make a profit, contribute to prosperity, and help strengthen the prospects of peace and stability".[18]

The private sector does not always disappear during conflicts and can actually be a positive force during these times. Beside its importance as a source of investment, the private sector can help bring about a more prosperous society, with greater political stability and peace through its resources, economical influence and political contacts, along with its skilled labour.[19] The peace-building task contribution of business can consist of other things than financial contributions to development and sustainable employment opportunities. Local stakeholder engagement, where the non-state actor consults and communicates strategies in order to maintain a

[16] *A more secure world: Our shared responsibility,* Report of the High-Level Panel on Threats, Challenges and Change, U.N. Doc. A/59/565. Cited from secondary source: UN Global Compact, *Enabling Economies of Peace,* Public Policy for Conflict-Sensitive Business, New York 2nd Edition, 2009, p. 4.
[17] Clapham, Andrew and Jerbi, Scott, *Categories of Corporate Complicity in Human Rights Abuses,* based on a background paper for the Global Compact dialogue on the role of the private sector in zones of conflict, New York March 2001, p. 1.
[18] Smith, Dan, Secretary-General of the International Alert, *foreword* in "Conflict-Sensitive Business Practice".
[19] UN Global Compact, *Doing Business While Advancing Peace and Development,* p. 6.

relationship with the local community,[20] along with supporting the community with social investments,[21] are ways that business can contribute in a positive way towards peace and stability. Through such activities, the private sector can also help to build the capacity and legitimacy of the state.[22]

Yet, the private sector can also contribute negatively to conflicts, whether consciously or not. For instance, two third of the reported corporate abuses occur within the extractive sector, in oil, gas and mining. Given the unique nature of the industry, this sector also accounts for most of the allegations on some of the most severe abuses in conflict-affected areas.[23] The exploitation of natural resources, such as oil, gas and diamonds, has fuelled conflicts and triggered corruption that left authorities weak, caused loss of human life and the exclusion of people living in the exploited area. This sometimes leads to resentment of authorities and even the outbreak of violence.

More specifically, the private sector can negatively impact human lives and security in multiple ways. A common issue in that regard is that they hire or consult with one group of local stakeholders while ignoring the rest. This can lead to resentment and perceptions of unfairness between communities. Badly trained and selected security forces can also lead to violations of basic human rights.[24] Even legitimate businesses can affect already existing conflict by supporting and strengthening governmental authority that may be involved in human rights abuses, corruption, environmental degradation or just lacking the governance capacity. The result being that they can implicate themselves in the conflict. Consequently, TNCs and other parts of the private sector need to be aware of their legal, moral and social obligations when working in difficult areas, in order for them to not involve themselves in human rights violations perpetrated by governments, rebel groups, individual or other business entities.

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[20] UN Global Compact, "Guidance on responsible business in conflict-affected and high-risk areas", p. 20.

[21] Ibid, p. 24.

[22] Organization for Economic Co-operation and Development, "Concepts and Dilemmas of State Building in Fragile Situations: From Fragility to Resilience", Off-print of the Journal on Development 2008, Volume 9, No. 3 2008, p. 39. Accessible on: http://www.oecd.org/dataoecd/59/51/41100930.pdf, 9 September 2010.

[23] SRSG Interim Report, par. 25.

[24] UN Global Compact, "Guidance on responsible business in conflict-affected and high-risk areas", p. 6.

The Universal Declaration of Human Rights (UDHR) is one of the fundamental foundations of international human rights law and serves as guidance for good practices, for states, individuals and business. The declaration states in its preamble that,

> …every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[25]

According to this, businesses, as an organ of society, have at least moral and social obligations to promote respect for the rights enshrined in the Declaration.[26]

Nevertheless, despite the increased participation of non-state actors in the world's economy, the primary responsibility for protecting citizens and human rights more generally still lies with governments. The main obligation is of course for businesses to observe and obey the national law of the host government and make sure that their operations there are in line with the main international law and human rights instruments. Yet, given the sensitive governance structure in weak and conflict-prone states, it becomes harder or impossible to promote conflict-sensitive business practices.[27] Accordingly, when the government is weak or broken, businesses or other private sector entities need to adopt and follow heightened human rights due diligence processes.[28] In that regard, businesses operating in conflict-affected countries need to evaluate whether the possible profit from investment outweighs the risks involved, both to themselves and to human rights. Businesses can find themselves in no-win situations, where they have already invested in a vulnerable area where human rights violations occur regularly. Informed self-interest in the reputation of the business should steer their decisions and functions towards more transparent and accountable management when exploiting and selling natural resources. Businesses can enhance communication and relations with the community in which they operate, and in that way decrease the possibility of violence

[25] Universal Declaration of Human Rights (UDHR), adopted by General Assembly Resolution 217 A (III), December 1948. Accessible on: http://www.un.org/en/documents/udhr/index.shtml, 9 September 2010.
[26] Clapham, Andrew, *Human Rights Obligations of Non-State Actors.* New York, United States 2006, p. 265-266.
[27] UN Global Compact, *Enabling Economies of Peace,* p. 5.
[28] Ruggie, John, "International Institute for Conflict Prevention & Resolution", New York 2 October 2008, p. 4. Accessible on: http://www.reports-and-materials.org/Ruggie-speech-to-CPR-2-Oct-2008.pdf, 7 October 2010.

breaking out.[29] In addition, by promoting transparency in their relationships with governments, being sensitive to the conflict and human rights context, adopting responsible corporate behavior and principles of do-no-harm, companies can contribute to peace in high-risk areas.[30]

3.0. EXPORT CREDIT AGENCIES

3.1. DEFINITION OF AN EXPORT CREDIT AGENCY: BRIEF OVERVIEW OF THE CONCEPT, MAIN FUNCTIONS AND ACTIVITIES

Export credit agencies or ECAs are "public agencies that provide government-backed loans, guarantees, credits and insurance to private corporations from their home country to do business abroad, particularly in the financially and politically risky developing world."[31]

In a nutshell, governments provide official export credits through ECAs to support national exporters competing for overseas sales. Most official export credit support involves insurance or guarantee cover for credits provided by private financial institutions. In order to fund export credits, ECAs obtain most of its capital from either domestic or international financial sources, then provide a loan to their nation's exporter, either directly or through a mediator bank.[32]

ECAs can be government institutions or private companies operating on behalf of the government. Historically, ECAs were always public-only organizations, but now they are either a wholly-owned and structured business entity of the state, or a public or quasi-public entity, which is then set up as agents or as a department of the state.[33] Most industrialized nations carry at least one official or quasi-official ECA within their government.[34] For the purpose of this thesis, the central focus will be on ECAs as official public entities.

Because of how the structure and operations of ECAs vary, the legal nexus between ECAs and their home states can be exemplified by a twofold test, initially the

[29] Annan, Kofi, former UN Secretary-General, *foreword* in "Conflict-Sensitive Business Practice".
[30] Tripathi, Salil and Gündüz, Canan, "Exploring Options for Better Business Conduct and Investment Decisions in Conflict-Zones", *Compact Quarterly*, March 2007, p. 2-3.
[31] Accessible on: http://www.eca-watch.org/eca/ecas_explained.html, 30 August 2010.
[32] Gianturco, Delio E, *Export Credit Agencies: the unsung giants of international trade and finance,* United States 2001, p. 2.
[33] Stephens, Malcolm, *The changing role of export credit agencies,* International Monetary Fund, Washington D.C, 1999, p.xi. Cited from secondary source: Can and Seck, "The Legal Obligations with respect to Human Rights and Export Credit Agencies",p. 2.
[34] Mirela, Cristea, Raluca, Dracea and Sorin, Domnisoru, "Export Credit Agencies and their Role on the credit insurance market", 2007, p. 249. Accessible on: http://steconomice.uoradea.ro/anale/volume/2007/v2-finances-accounting-and-banks/52.pdf, 4 September 2010.

structural test and then functional test.[35]

Firstly there is the so-called structural test, which focuses on the ownership of ECAs and control. Those ECAs are either established as public authorities, such as state agencies or departments, or established as wholly-owned state corporations and ultimately controlled by the state even though some of them are managed independently.[36] ECAs operating and functioning under an independent management, yet overseen by ministries or other departments of a government, are examples of ECAs structured as wholly-owned corporations. The Canadian ECA, the Export Development Canada (EDC),[37] is an example of that type of ECA. Both the United Kingdom´s (UK) official ECA, the Export Credit Guarantee Department (ECGD),[38] and the United States´ (US) ECA, The Export-Import Bank,[39] are examples of public ECAs set up as agencies or departments of the states.

Secondly, a functional test scrutinizes the mandate of ECAs and distinguishes it from the mandate of non-state entities in order to determine whether there is a link between the state and ECAs, or an explicit commercial purpose with an activity similar to those of private providers of export and investment supports.[40] These ECAs are referred to as quasi-public ECAs and can either be private or have mixed control and ownership. They can be structured as a conglomeration of private sector companies, and/or private and public companies. An example of such an ECA is the Austrian ECA, Oesterreichische Kontrollbank Aktiengesellschaft (OeKB),[41] which is owned by a handful of major commercial banks, yet a private entity that receives its authorizations through a contract with the Austrian minister of finance. Another example is the German ECA, HERMES,[42] which is a private company that has a duty to have its costs reviewed and approved by an inter-ministerial committee composed of representatives from few of the German government ministries, such as the Ministry of Finance, the Ministry of Foreign Affairs and the Ministry of the

[35] Can and Seck, "The Legal Obligations with respect to human rights and export credit agencies", p. 4.
[36] Keenan, Karyn, "Export Credit Agencies and the International Law of Human Rights", Paper prepared to inform the mandate of the SRSG, January 2008, p. 2.
[37] Accessible on: http://www.edc.ca, 4 September 2010.
[38] Accessible on: http://www.ecgd.gov.uk, 22 September 2010.
[39] Accessible on: http://www.exim.gov, 20 September 2010.
[40] Keenan, "Export Credit Agencies", p. 2.
[41] Accessible on: http://www.oekb.at/en/Pages/default.aspx, 11 October 2010.
[42] Accessible on: http://www.hermes-kredit.com, 20 September 2010.

Economic Cooperation and Development.[43]

Despite the fact that all of the above-mentioned types of ECAs vary in structure, all of them are considered under a state control.[44] Hence, whether as wholly-owned public entities or as quasi-public, ECAs are officially supported and can be distinguished from private institutions, as long as they are regulated under national laws or charters giving the ECAs the authority to perform their functions, all in accordance with a trade and investment mandate of the home state.[45]

Based on this argued nexus between ECAs and states, this thesis will further demonstrate that the states have a significant international obligation to some of the extraterritorial violations of human rights by their corporate nationals and their ECAs, since they are the ones backing up corporate activities.

3.2. CRITICISM OF EXPORT CREDIT AGENCIES´ PROJECTS IN CONFLICT-AFFECTED AREAS WITHIN THE DEVELOPING WORLD

ECAs are quoted as being "…one of the key players in the global economy, annually pouring twice as much money into the poor nations than the total of all development aid worldwide, both bilateral and multilateral, including U.N. agencies and the World Bank".[46] Beside the fact that one out of every eight dollars are financed by ECAs, the remaining seven dollars are also influenced by their activities and functions.[47] It is estimated that ECAs account for about USD$50 – 70 billion annually in support to projects in conflict-affected areas within the developing world.[48] It logically follows that ECAs play a critical role in international trade and finance in developing countries and other conflict-affected areas, which implies that they have a significant impact on sustainable development.[49] It is necessary though to bear in mind that ECAs do not entirely serve as foreign assistance, but rather as an instrument with the sole aim of increasing their home country's TNCs sales abroad.[50]

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[43] Can and Seck, "The Legal Obligations with respect to human rights and export credit agencies", p. 5.
[44] Ibid p. 4.
[45] Ibid p. 5.
[46] Rich, Bruce, "Exporting Destruction", *The Environmental Forum*, September/October 2000, p. 32.
[47] Gianturco, *Export Credit Agencies: the unsung giants of international trade and finance,* p. 1.
[48] Norlen, Doug, Cox, Rory, Kim, Miho and Glazebrook, Catriona, with contributions from member of ECA Watch, "Unusual Suspects, Unearthing the Shadowy World of Export Credit Agencies", 2002, p. 1. Accessible on: http://www.eca-watch.org/eca/unusualsuspects.pdf, 9 September 2010.
[49] A center for International Environmental Law, "Export Credit Agencies and Sustainable Development", 26 August – 4 September 2002. Accessible on: http://ciel.org, 4 September 2010.
[50] Rich, Bruce, "Exporting Destruction", p. 32.

ECAs are controversial for a number of reasons, consequently prone to criticism. One of these reasons is the lack of transparency of information regarding their projects. Not only do ECAs keep most of the information from the public whom indirectly support them through taxes, but also from their own legislatures.[51] Another critique ECAs have had to face is for allegedly undermining democracy in conflict-affected or developing countries, by contributing to bribery to the weakened and corrupted governments of those countries. ECAs have also been criticized for being responsible for the increasing amount of debt that is leading to a financial dependency, limiting the progress of many less developed countries.[52] In fact the projects that ECAs support abroad are typically projects that major TNCs, private banks and other financial institutions would not support due to the high human rights violations, social and political risk.[53] The crux of this is that the major industrialized countries´ governments have not shown sufficient political will to help govern their ECAs, scrutinize their actions and take responsibility for their wrongdoings.[54] State ECAs should embrace better communication with their home countries operating in conflict-zones, and could in that way play a more active role both individually, and in conjunction with official developmental agencies.[55]

As has been emphasized, ECAs are one of the largest sources of public financial support to national exporters competing for overseas sales. Due to the competitiveness of ECAs, these agencies frequently support development projects that major institutions such as the World Bank and the International Monetary Fund (IMF) have refused to support because of environmental, social or economic reasons. One of the most infamous cases in that context is the Three Gorges Dam in China.[56]

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[51] Ibid.

[52] Berne Declaration, Bioforum, Center for International Environmental Law, Environmental Defense Fund, Eurodad, Friends of the Earth, Pacific Environment & Resources Center and Urgewald, "A Race to the Bottom: Creating Risk, Generating Debt and Guaranteeing Environmental destruction", A Compilation of Export Credit *&* Investment Insurance Agency Case Studies*,* March 1999, p. 1. Accessible on: http://www.eca-watch.org/eca/race_bottom.pdf, 4 September 2010.

[53] Rich, Bruce, "Exporting Destruction"*,* p. 33.

[54] Ibid, p. 40.

[55] "The Universal Declaration of Human Rights – 60 years on", October 2008. Accessible on: http://www.article13.com/A13_ContentList.asp?strAction=GetPublication&PNID=1448, 4 September 2010.

[56] Heming, L., Waley, P. and Rees, P, "Reservoir resettlement in China: past experience and the Three Gorges Dam", *The Geographical Journal*, 2001, p. 167;195–212.

3.3.NEGATIVE INVOLVEMENTS OF EXPORT CREDIT AGENCIES: THE INFAMOUS CASE OF THE THREE GORGES DAM IN CHINA

3.3.1. CASE OVERVIEW

On completion in 2008, the Three Gorges Dam submerged 13 cities, 140 towns, more than 1600 villages and 300 factories. Today it is about a mile wide,[57] 600 feet high[58] and creates a reservoir 400 miles[59] long.[60] The project has been quoted as the symbol of China's development and "superior organizing".[61]

The Chinese authorities justified the project on three points of reason. Firstly, the dam would bring drinking water to the population in northern China. Secondly, the dam usage would be aimed to facilitate navigation.[62] Thirdly, and most importantly, the dam would generate electric power in mass scale, as a relatively close alternative to coal. The dam was estimated to be able to generate about 18,200 MW, hence making the dam the largest power project in the world.[63]

The project had its downsides as well, and was attacked by critics who claimed that the environmental and social costs and impacts would definitely outweigh the economic benefits of the dam. The project would displace about two million people in the area and had major environmental impacts, such as causing massive flooding, posing a threat to animal life and causing the destruction of rural areas and cultural treasures.[64] Consequently, consensus exists among many that the Three Gorges Dam is the world's most environmentally and socially destructive infrastructure project to date.[65]

3.3.2. EXPORT CREDIT AGENCIES AND THE THREE GORGES DAM PROJECT

"ECAs have been active in financing large-scale hydropower, most notably for the

[57] About 1,6 km.
[58] About 182,88 meters.
[59] About 640 km.
[60] Harrington, Spencer P.M, "Plundering the Three Gorges", 1998. Accessible on: http://www.archaeology.org/online/news/china.html, 9 September 2010. Cited from secondary source: Schaefer, Donald D.A, "The analysis of the Anticipated Effects on the Environment: Comparing Opinions Concerning the Central versus Local Government's Views on the Three Gorges Project in China as Well as U.S. Views on it from 1992-2006", *Loyola University Chicago International Law Review,* Volume 7 Issue 1 2009, p. 41-43.
[61] Accessible on: http://www.eca-watch.org/problems/asia_pacific/china/index.html#3gorges, 9 September 2010.
[62] Accessible on: http://www.explore.org/china, 19 September 2010.
[63] Shen, Doris, "Three Gorges Dam: New Round of Bidding Opens Amidst Controversy", June 2003. Accessible on: http://www.waternunc.com/gb/IRN_3g_02_2003.htm, 20 September 2010. Cited from a secondary source: Schaefer, "The analysis of the Anticipated Effects on the Environment", p. 42.
[64] Sims, Holly, "Moved, left no address: dam construction, displacement and issue salience", *Public Administration and Development*, Volume 21 Issue 3, New York 2001, p. 196.
[65] Accessible on: http://www.eca-watch.org/problems/asia_pacific/china/index.html#3gorges, 9 September 2010.

> controversial Three Gorges dam. In 1997, export credit agencies from Canada, France, Germany, and the United Kingdom alone provided $600 million in export credits for the first round of $1.1 billion in foreign contracts awarded for the $25 billion project."[66]

As stated above, the cost of the project is estimated around USD$25 billion,[67] although estimates range as high as USD$77 billion.[68] Funding of the project was not a big obstacle to some ECAs. In fact, there were many issues other than finding the means to fund the project that could have stopped it from being carried out completely. These issues included the time when the World Bank, the IMF and the US´ Export-Import Bank[69] denied supporting the project due to the high environmental and social cost. Instead, a few ECAs stepped in, extending support of over USD$1.4 billion in credits and guarantees for the construction,[70] encapsulating the essence of the phrase "*race to the bottom"*. In other words: When a handful of ECAs set up environmental standards, refusing to support a project due to a weak or no environmental or social safeguards, other ECAs rush in to fill the gap.[71]

Together with the Chinese government, banks and eight ECAs in December 1994, work began on the world's largest and most controversial hydroelectric facility – the Three Gorges Dam. The project raised many environmental and human rights issues, such as aforementioned forced displacement of about two million people without adequate compensation, loss of lands and livelihoods, state censorship because of project criticism and increased health risks and greenhouse gas emissions.[72]

Five Western OECD governments - Germany, Switzerland, Brazil, Sweden and

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[66] Evans, Peter C. and Oye Kenneth A., "International Competition: Conflict and Cooperation in Government Export financing", p. 137 in Hufbauer, Gary and Rodriguez, Rita (eds.), *US Ex-Im Bank in the 21st Century: A New Approach?* Washington DC, January 2001.

[67] Jun, Liao and Meng Rong, Zhou, "Multi-channel Fundraising ensures sufficient construction funding for the Three Gorges Project", *Economic Information Daily*, 17 June 2003. Cited from secondary source: Adams, Patricia (Probe International), Reilly-King, Fraser (NGO Working Group on EDV, a working group on the Halifax Initiative Coalitation), Ryder, Grainne (Probe International), Shen-Hoover, Doris (International Rivers Network) and the Three Gorges Probe, "Race to the Bottom, Take II", An Assessment of Sustainable Development Achievements of ECA-Supported Projects Two Years After OECD Common Approaches Rev 6, 2003, p. 24. Accessible on: http://www.eca-watch.org/eca/race_bottom_take2.pdf, 4 September 2010.

[68] Adams, Patricia and Grainne, Ryder, "China's great leap backward"*, International Journal,* Volume 53 Issue 4, Autumn, 1998. Cited from secondary source: Adams et al, "Race to the Bottom, Take II*",* p. 24.

[69] US´ Export-Import Bank (see note 39).

[70] International Rivers Network, "Human Rights Dammed off at Three Gorges", January 2003, p. 11. Accessible on: http://www.internationalrivers.org/files/3gcolor.pdf, 20 September 2010.

[71] Norlen et al, *Unusual Suspects,* p. 1.

[72] Adams et al, "Race to the Bottom, Take II", p. 23.

Canada - are very involved in the project. The German HERMES,[73] provided loan guarantees of up to USD$833 million to the German engineering giant Siemens AG and turbine manufacturer Voith Hydro. Switzerland's ECA, Exportrisikogarantie (ERG),[74] also provided loan guarantees to two Swiss companies, ABB and Sulzer Escher-Wyss for up to USD$300 millions. Swedish ECA, Exportkreditnämnden[75] (SEK) provided a USD$351 million loan for two converter stations. The Brazilian ECA, The Brazilian Developmental Bank (BNDES), supported the project by providing a loan for the amount of USD$202 million for eight turbine-generator sets.[76] Furthermore, Canada's EDC[77] was the first of all participating ECAs to give its financial support to the project, providing a total of CDN$189 million in loans and export credits with Canadian tax-payer's money,[78] and later on extended a further USD$153 million in support for a turbine contract to General Electric Canada.[79]
With regard to the environmental and social risks caused by the project, it is worth mentioning that the abovementioned countries are all adherents to the OECD Guidelines for Multinational Enterprises[80] and furthermore ratified the International Covenant on Civil and Political Rights (ICCPR),[81] which will be further emphasized and looked into in chapter 6.0 of this thesis.

A large majority of ECAs have only recently adopted policies to meet the criticism they have had for supporting risky projects such as the Three Gorges Dam. One of the main and largest official ECA, the Canadian EDC, has been one of the most, if not the single most, criticized official ECA, and has been pressured by both domestic and international non-governmental organizations (NGOs) for its participation in this specific project.[82] The financial support by EDC in the project is unfortunately not

[73] Germany´s HERMES (see note 42).
[74] Accessible on: http://www.swiss-erg.com, 4 September 2010.
[75] Accessible on: http://www.ekn.se, 4 September 2010.
[76] Accessible on: http://www.bndes.gov.br/SiteBNDES/bndes/bndes_en/, 4 September 2010.
[77] Canada´s EDC (see note 37).
[78] Adams et al, "Race to the Bottom, Take II", p. 24.
[79] Udall, Lori, "Export Credit Agencies", Contributing Paper prepared for thematic review V.4: Regulation, Compliance and Implementation Options, United States, 1999, p. 2.
[80] OECD Guidelines for Multinational Enterprises, the most recent revision completed in June 2000. Accessible on: http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html, 4 November 2010. See further in chapter 6.3.1.
[81] International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. Accessible on: http://www2.ohchr.org/english/law/ccpr.htm, 27 October 2010.
[82] Udall, "Export Credit Agencies", p. 9.

the only allegedly risky project that the agency has provided financial contributions to. EDC has even been quoted as being the most reckless of all the G7 countries´ ECAs, furthermore, for standing out among other international ECAs regarding its low environmental and human rights standards when choosing projects, as well as lack of transparency and persistent willingness to support projects that the World Bank, IMF and other ECAs deny supporting.[83]

Ironically enough, despite the US´ political attitude towards international environmental issues,[84] the US has been taking the lead in the attempt to push other industrialized countries into agreeing on some common environmental- and social standards and guidelines, in order for their ECAs to work their mandate more ethically and efficiently. US, the largest official ECA to back out of the Three Gorges project, has the most developed set of guidelines and procedures,[85] and is currently the only ECA that "requires a comprehensive environmental assessment process" that meets most international best practices,[86] To date, the UK ECGD,[87] has the weakest requirements for the environmental assessment process of ECAs work[88], and has to date not yet turned down any major project on environmental grounds.[89]

To summarize, from the increasing financial support by ECAs of large-scale infrastructure projects in conflict-affected areas within the developing world, to the fact that ECAs generally lack policies on environmental and social issues of their projects, there is a clear need for these agencies to look deeper into their work and examine the heavy impacts they have both on the environment and human lives.[90] Given the major involvement in the project of the Three Gorges Dam, the ECAs

[83] Wilson, Jeff, *EDC needs reform: Canada´s export-development lender has a poor record when it comes to considering projects´environmental and human rights impacts,* The Gazette, Montreal, Quebec 2001, p. 1.

[84] For example, global warming typically ranks lower by the US public when compared to other environmental concerns. President George W. Bush called the 1997 Kyoto Protocol "fatally flawed in fundamental ways", in his June 11th speech in 2001 and pulled the US out of the agreement. The US has been against effective action on climate change due to its reliance upon fossil fuel for its economy. Cited from: Brechin, S.R, "Comparative public opinion and knowledge on global climate change and the Kyoto Protocol: The US versus the world?" *International Journal of sociology and social policy*, Vol. 23, No. 10, 2003, p. 122. See also: http://www.globalissues.org, 18 November 2010.

[85] Udall, "Export Credit Agencies", p. 5.

[86] Ibid, p. 11.

[87] UK´s ECGD (see note 38).

[88] Udall, "Export Credit Agencies", p. 11.

[89] Ibid, p. 8.

[90] Sims, "Moved, left no address" p. 198.

along with their supporting governments, must, in all fairness, bear a responsibility to the environmental impacts and to any human rights violations that occur.

4.0. STATE SUPPORT TO EXPORT CREDIT AGENCIES WHEN ENGAGING IN BUSINESS ABROAD

With the incredible expansion of globalization, states are more frequently engaging in businesses on territories other than their own. Not only do they engage in business activities through state-owned entities or TNCs, but also by supporting their ECAs when participating in business activities abroad. As was mentioned in chapter 3.1, most official export credit support involves either insurance, or guarantee cover for credits provided by private financial institutions.[91] Also mentioned was that most industrialized countries have at least one ECA within their government function.[92] In fact, according to the strategic International Priorities of the United Kingdom Foreign and Commonwealth Office,[93] most of those governments have explicitly or implicitly acknowledged that one of their most valued priorities regarding foreign relations is to help their own corporations operate abroad.[94] That does not mean that states plan to allow a particular business to act recklessly, or in a way that can violate people's human rights, in another state. This is in line with international law, which lays out that states should always act in such a way so as not to make harm on the territory of another state,[95] due to the sovereignty of states. A sovereign state denotes a full and unchallenged power over its territory and all the people therein. Thus, state's sovereignty over its territory is absolute and complete, and should be respected by other states.[96]

Many of the projects ECAs participate in are operated in conflict-affected areas, or in areas within the developing world. Since many of these projects are claimed to be

[91] Gianturco, *Export Credit Agencies: the unsung giants of international trade and finance,* p. 2.
[92] Mirela et al, "Export Credit Agencies and their Role on the Credit Insurance Market", p. 249.
[93] Similar statements have been made by other governments in this regard: Australian government, "Advancing the National Interest White Paper", 2005. Accessible on: http://www.dfat.gov.au/ani/foreword.html; Canadian government "Opening the Doors to the World: Canada's Market Access Priorities*",* 2006. Accessible on: http://www.international.gc.ca/tna-nac/cimap-en.asp; United States, "Strategic Plan for Fiscal Years 2004-2009". Accessible on: http://www.state.gove/s/d/rm/rls/dosstrat. All last accessed on 27 November 2010. Cited from secondary source: McCorquodale, Robert and Simons, Penelope, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law,* United States 2007, p. 598-599.
[94] Ibid, p. 598.
[95] Dixon, Martin, *Textbook on International Law,* Oxford 6th Edition, Cambridge 2007, p. 154.
[96] There are few exceptions, such as guaranteeing human rights, which can limit that sovereignty.

highly environmentally and socially risky,[97] one ought to ask who should bear the ultimate responsibility when something goes wrong. International human rights law has always aimed at protecting individuals from states´ actions, rather than the other way around. This has changed with regard to individuals, which can now for instance be brought to trial in international criminal tribunals[98] and before the International Criminal Court (ICC).[99] Corporations, however, cannot. To date there is no international human rights law[100] that places the responsibility on the business entities.

The following chapters will try to demonstrate the international obligations and the sources thereof with regard to human rights violations that ECAs have contributed to in some ways. Additionally the situations in which the conducts of ECAs can be attributed to their home states, thus possibly making the state internationally responsible, will be evaluated. In this regard, it has to be kept in mind that states are not automatically responsible for all violations by non-state actors. A state will rather be held responsible where the act or omission can be attributed to the state´s failure of exercising due diligence in fulfilling the duty to protect.[101] Hence it becomes imperative that the notion of due diligence and state responsibility according to international law is clarified. The subsequent chapters will aid in this clarification.

5.0. HUMAN RIGHTS OBLIGATIONS OF STATES WITH REGARD TO EXPORT CREDIT AGENCIES

The following sub-chapters aim to illustrate the possible human rights obligations

[97] As was explained in chapter 3.1. See: Rich,"Export Destruction", p. 32.
[98] For example see: The UN Security Council, acting under Chapter VII of the UN Charter, created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994. The ICTR has jurisdiction over individuals under article 5 and 6 of the Statute. Accessible on: http://www.unictr.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx, 27 November 2010. Also see: International Criminal Tribunal for the former Yugoslavia (ICTY) was established with a resolution 827 of 25 May 1993 of the UN Security Council. Accessible on: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, 27 November 2010.
[99] The International Criminal Court (ICC), governed by the Rome Statute entered into force on 1 July 2002. Accessible on: http://untreaty.un.org/cod/icc/statute, 27 November 2010. Article 5 of the Statute list out the crimes within the jurisdiction of the ICC, where the Court has jurisdiction over individuals accused of these crimes
[100] Though exists many documents, scholar articles and other literature in this context, e.g: "The Norms" (see note 155); The OECD Guidelines for Multinational Enterprises (80): *OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, 2000 (see note 363); Clapham, *Human Rights Obligations of Non-State Actors* (see note 26).
[101] SRSG Report 2009, par. 14.

that states have with regard to ECAs. In that context, as the SRSG has stated, the root cause of the issue of human rights and businesses can be found in governance gaps created by globalization.[102] According to the SRSG, these gaps allow unintentional business-related human rights abuses to occur due to a lack of comprehensive international guidance on how to deal with the issue. A UN framework proposed by the SRSG attempts to address these governance gaps. Sub-chapter 5.2 will explain the mandate of the SRSG and furthermore detail the duty of states to protect against all human rights abuses within their jurisdiction, according to the UN framework´s first pillar. In addition, according to what was stated in chapter 4.0, the notion of due diligence and state responsibility will be demonstrated in sub-chapters 5.3 and 5.4.

5.1. GENERAL OBLIGATIONS OF STATES TO PROTECT INDIVIDUALS UNDER THEIR JURISDICTION

There are four main types of obligations towards implementing human rights standards for states, constituting of: the obligation to respect, protect, promote and fulfill rights.[103] In the context of states, *to respect* rights means to ensure that the state itself does not harm human rights – either through actions or omissions – and address the violations if and when they occur. Furthermore, it is up to the state to ensure that its organs or agents do not violate people´s human rights. *Promoting* rights requires awareness raising to inform the society about the importance of human rights. *Fulfilling* rights signifies the duty of states to provide resources to assist the society to realize the rights and their importance. The *duty to protect* is then understood as the obligation to protect individuals under the state´s jurisdiction from human rights violations, including abuse from non-state actors.[104]

International human rights law primarily imposes a duty on states to protect

[102] See chapter 1.0.

[103] Business Leaders Initiative on Human Rights, *Session on Partnerships between Business and Government,* Background Note on the State Duty to Protect, Stockholm, 18 June 2008, p. 1. Accessible on: http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Governmentpoliciespractices, 27 November 2010.

[104]The U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General in the issue of human rights and transnational corporations and other business enterprises,* (SRSG Report 2008) U.N Doc. A/HRC/8/5, 2008, chapter II. Cited from secondary source: Letnar Cernic, Jernej, "A Short Comment on the Report of the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises", Libertas Working Paper 02/2009, October 2009, p. 2. Accessible on: SSRN: http://ssrn.com/abstract=1491548, 16 October 2010.

individuals from human rights violations. In exceptional cases, it can hold individuals directly responsible for their violations,[105] while the liability of corporate actors seem to depend on procedures set up by states, which they have not chosen to proceed with. Thus, still today, there are no direct obligations placed upon corporate actors with regard to human rights. The term of "responsibility" to respect in the second pillar of the UN framework,[106] corporate responsibility to respect, is separated from the term of "duty", in order to indicate that by respecting rights is not an obligation imposed on companies under current international human rights law, but rather demonstrates a standard of expected acknowledged conduct in nearly all voluntary and soft-law instruments dealing with corporate responsibility.[107] Even though the second pillar is not a subject of this thesis, this is important to clarify, because when corporate actors are required to respect human rights, it occurs *indirectly* through the mediation of the international responsibility of the state.[108]

It is therefore clear that international law aims to rely mostly on states for the protection, to change laws and regulate activities and operations of their corporate nationals.[109] So when states take on responsibilities in this regard, by for instance becoming parties to international treaties,[110] it is then up to the states themselves to ratify, place the duties into their national law and enforce the rules according to these treaties.[111] Also in that perspective, where corporations and other business entities abuse human rights of people, and no remedies or enforcement mechanisms are available to punish those perpetrators, it can be looked at as a failure of the states´ national systems.[112] The importance of national law can thus not be emphasized enough, since without action on the national level, those international rules would be

[105] For example before the ICTR, ICTY and ICC (see notes 98 and 99 under chapter 4.0).
[106] See chapter 5.2.
[107] The U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General in the issue of human rights and transnational corporations and other business enterprises – Business & Human Rights: Further steps towards the operationalization of the "protect, respect and remedy" framework,* (SRSG Report 2010) U.N. Doc A/HRC/14/27, 2010, par. 55.
[108] De Schutter, Oliver, "The Accountability of Multinationals for Human Rights Violations in European Law", Center for Human Rights and Global Justice Working Paper No.1, NYU School of Law, New York, 2004, p. 6.
[109] "The State is the basic unit of international law and most international law puts obligations on states - rather than individuals – even though it is increasingly attributing responsibilities to private actors". Cited from: The International Council on Human Rights Policy (ICHRP), "Beyond Voluntarism: Human Rights and the developing international legal obligations of companies", February 2002, p. 45. Accessible on: http://www.ichrp.org/files/reports/7/107_report_en.pdf, 12 October 2010.
[110] See chapter 6.
[111] The International Council on Human Rights Policy,"Beyond Voluntarism", p. 45.
[112] Ibid, p. 46.

rather hard to enforce.

The obligations states have undertaken to protect individuals under their jurisdiction against corporate human rights violations,[113] does not only apply to host states where the violations occur, but are also applicable to home states of the business entities or the ECAs that support them, to regulate their activities, within or outside its territory, given the "effective control"[114] they exercise over them.[115]

The obligations of home and host states will be further emphasized in the following sub-chapters.

5.1.1. OBLIGATIONS OF HOME STATES

Human rights are claimed to be universal and applicable to all humanity.[116] Yet, state responsibilities for violations of human rights are restricted by territorial issues, meaning that each state has obligations and bear responsibilities for violations occurring on their own territory.[117] The question of who should bear the responsibility with regard to individuals on the territories of other states remains vague and unclear, due to territorial and citizenship issues. The notion of territory and sovereignty plays a very powerful role when drawing the line for state responsibility across borders, or in other words for extraterritorial activities, including those of non-state actors.[118] As noted by few academics in this field:

> But the notion of state sovereignty continues to protect states from responsibility for human rights violations. In fact, state sovereignty is *the* commonly used shield when one state has committed or facilitated gross abuses in another country; what would have been a gross human rights violations had it occurred in its own territory is apparently beyond the reach of human rights law. As a result, states are seemingly able to do virtually everything in their power to facilitate mayhem in another country, yet avoid

[113] For example obligations according to international human rights law. See further in chapter 6.
[114] See about the notion of "effective control" in chapter 5.4.2.4.
[115] De Schutter, "The Accountability of Multinationals for Human Rights Violations", p. 7.
[116] "The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting consent of States which creates legal obligations for them and giving concrete expression to universality. Some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilizations." Website of the Office of the High Commissioner for Human Rights. Accessible on: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx, 19 October 2010.
[117] Gibney, Mark, Tomasevski, Katarina, Vedsted-Hansen, Jens, "Transnational State Responsibility for Violations of Human Rights", *Harvard Human Rights Journal,* Vol. 12, Spring 1999, p. 268-9.
[118] Ibid. While citizens, and sometimes non-citizens of a particular country, enjoy some protection under international law against human rights abuses committed from that state for instance, then the protection for those living in other countries still remains uneven and uncertain. Non-citizens can then only claim and enfore rights against other states through their own state, under strict conditions.

> responsibility under international law for these actions on the basis that they themselves do not actually pull the trigger, to use an apt metaphor.[119]

There have been improvements in the development of human rights law from the middle of the last century. States are no longer free to behave, as they want to domestically, and are now bound by international law provisions aimed at protecting individuals. Notwithstanding, human rights violations still occur too frequently all over the world. Thus, it is important to look into transnational responsibilities, laying emphasis on the extraterritorial activities of non-state actors and the role of the home states, for the purpose of this thesis.

Simultaneous or overlapped jurisdiction is when more than one state is regulating the same extraterritorial conduct according to established jurisdictional principles.[120] On the basis of jurisdictional issues regarding extraterritorial activities, a number of points need to be highlighted.

Firstly, the concept of "jurisdiction" is used to describe "the limits of the legal competence of a State … to make, apply, and enforce rules of conduct upon persons."[121] Secondly, the term of "extraterritorial jurisdiction" is frequently used when referring to the regulation of activities that are not wholly occurring within the home state. It is an issue of great controversy that will not be dealt with in detail in this thesis, but for the context of extraterritorial obligations of home states, it needs a brief introduction in the least.[122]

Corporate nationals do remain under the control of their home state of which they are nationals, even after entering another state, although they then fall under the host state´s jurisdiction as well.[123] Nevertheless, indirect extraterritorial jurisdiction may still raise some sovereign concerns.

States today are not obligated to regulate extraterritorial activities of their corporate nationals, but are neither prohibited from doing so.[124] In fact, when home states

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[119] Ibid, p. 293. Cited from: Jochnick, Christopher and Zinner, Josh, "The Day of the Dictator: Zaire´s Mobuto and United States Foreign Policy", 4 *Harvard Human Rights Journal,* 1991, p. 139; Gibney, Mark, "United States Responsibility for Gross Levels of Human Rights Violations in Guatemala From 1954-1996"*, 7 J. Transnat´l L. & Pol. 77*, 1997.

[120] Lowe, Vaughan, "Jurisdiction", p. 354 in Evans, Malcolm D. (ed.), *International Law,* 2nd ed, New York, 2006.

[121] Ibid, p.335.

[122] Seck, Sara, "Home State Responsibility and Local Communties: The Case of Global Mining", *Yale Human Rights and Development Law Journal, Volume 11, 2008,* p. 185-186.

[123] De Schutter, "The Accountability of Multinationals for Human Rights Violations, p. 7.

[124] SRSG Report 2008, par. 19.

stand before a human rights violation on their territory, committed by a foreign corporate actor, there is a great consensus that those states are not prohibited to help, with preventive actions, where a "recognized basis of jurisdiction"[125] exists. Furthermore, home states are gaining increased encouragement from the treaty bodies to take regulatory action, in order to prevent abuses by their corporate nationals abroad.[126] Regardless, an "overall reasonableness test" has to be met by home states that deal with, among other things, non-intervention in internal affairs of other states due to the sovereignty of states.[127]

Public international law contains a general justification for home states to regulate the extraterritorial activities of their corporate nationals, on the basis of nationality.[128] States can decide on their own terms, by their own laws and regulations, who their nationals are, including their corporate nationals.[129] Corporate nationality can become very complex, especially in the case of TNCs for instance. A state can apply its national laws directly on a corporate national which has a branch or office in another state, but the state cannot place its laws upon a foreign affiliate set up under the host state´s laws.[130] Whether the exercising of jurisdiction of home state conflicts with the exercise of jurisdiction of another state might be another issue at hand, but will however not be dealt with in this thesis.

Another way to justify home state regulation in jurisdictional terms is to focus on territorial points of control, by aiming to link the home state with the conduct being regulated, such as those of ECAs. These territorial links can be found within institutional structures of the home states, such as in financial institutions and stock

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[125] Recognized basis of jurisdiction include an actor or a victim, national of the state where the acts have substantial adverse effect on the State, or where specific international crimes are involved. The U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops,* (SRSG Addendum 2) U.N. Doc A/HRC/4/35/Add.2, 2007.

[126] See chapter 6.0.

[127] SRSG Report 2008, par. 19.

[128] Zerk, Jennifer A., *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law,* Cambridge University Press, November 2006, p.106-109.

[129] Ibid. p.147-149 and Lowe,"Jurisdiction"*,* p. 345. Cited from secondary source: Seck, "Home State Resonsibility and Local Communities", p. 187.

[130] Blumberg, Phillip I, "Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems", *The American Journal of Comparative Law*, Volume 50 L. 493, 2002, p. 499; Blumberg, Phillip I., "The Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity"*, 24 Hastings Int'l & Comp. L. Rev.* 297, 2001, p. 299; Mann, F.A., *The Doctrine of International Jurisdiction Revisited After Twenty Years,* 186 Rec. Des Cours 9, 56, 1984;Also see: Zerk, *Multinationals and Corporate Social Responsibility",* p. 106 and 166. Cited from secondary source: Seck, "Home State Resonsibility and Local Communities", p. 188.

exchanges, as well as the services of ECAs.[131]

In this regard, a consideration should be given to the home state´s side regarding ECAs. Based on a nexus between the state and its ECA,[132] the ECA is mandated by the state and thus performs a public function. However, despite this link between the state and its ECA, it is still problematic to get ECAs to consider human rights when involved in big projects, especially in areas where it is needed the most.[133] As the SRSG stated in his report to the Human Rights Council (Council)[134] in 2008: "On policy grounds alone, a strong case can be made that ECAs, representing not only the commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts".[135] The ECAs are not the only ones hesitant in this regard, but also their home states that have been reluctant to regulate extraterritorial activities of their corporate nationals, based on the grounds that it conflicts with the sovereignty of other states where the activities or operations occur.[136] Yet, with regards to the universal character of human rights, it is important to try to justify means for home state regulations under nationality - and territoriality principles, as was mentioned above, which in fact provide that there is no conflict with the sovereignty of other states. The term of "universal jurisdiction" is of relevance in this context, applicable when crimes are regarded as very destructive to human rights and international order, and any state is therefore allowed to exercise jurisdiction of those crimes.[137] This type of jurisdiction is thus of relevance to situations where, no matter where the violating act in question occur, and regardless the perpetrator´s nationality,[138] the enforcement of

[131] Seck, "Home State Resonsibility and Local Communities", p. 189.
[132] See chapter 3.1.
[133] See chapter 2.1.
[134] Replaced the Commission on Human Rights (see note 157).
[135] SRSG Report 2008, par. 40.
[136] For example, Canada is not the only state that has shown reluctance to whether or not it should enact such laws, specially relating to the global mining activities of home state corporations. Australia had hearings in 2000/2001 for the possible enactment of a proposed Corporate Code of Conduct Bill (Bill 2000). The purpose of Bill 2000 was to make sure that Australian and Australian-related companies acted in compliance with fundamental international law principles of human rights and environmental protection. Bill 2000 was later rejected on the grounds that the legislation would be viewed as "arrogant, patronizing, paternalistic and racist". Cited from: Seck, "Home State Resonsibility and Local Communities", p. 181-184.
[137] "These include genocide, torture, war crimes, piracy, crimes against humanity and, less certainly, hostage-taking and hijacking". Cited from secondary source: Dixon, *Textbook on International Law,* p. 148. Furthermore, the existence of crimes considered to fall under universal jurisdiction, are inextricably linked with the existing international judicial bodies having jurisdiction over individuals. See article 5 of the Rome Statute of the ICC (see note 99).
[138] Dixon,*Textbook on International Law,* p. 147-148.

human rights by the home states should not be considered to amount to some kind of violations of another state´s sovereignty.[139] As was argued by De Schutter,[140] the extraterritorial home state regulation could be seen as a method to facilitate the territorial host state´s respect for the obligations that are imposed on it by international human rights law.[141] Thus, in the perspective of ECAs, whether conduct comes within state jurisdiction depends partly on what is understood to consist of the conduct itself or the activities in question.[142] The decisions of financing projects by ECAs, and the consequences thereof, could therefore fall within their home state´s territory.[143] Given that home states have a duty to make sure that the activities of their TNCs are conducted correctly in other states, arguments from host states of unwarranted intervention into their internal affairs are less compelling, especially if the alleged human rights violations are breaching universally respected rights. Thus, a possible reason for the host state to uphold its arguments of intervention, would be if the host state can prove that it is genuine willing and competent to investigate the violations, and accordingly provide adequate and effective remedies for the victims.[144]

5.1.2. OBLIGATIONS OF HOST STATES

Host states also have obligations to regulate the activities of TNCs within their national territory. Accordingly,

> …on the one hand, home States should guide and inform companies as they invest in places where policies may be less rigorous and engage with companies on the challenges of working in those areas. On the other hand, host States should have clear and comprehensive legal guidelines that are equitably applied and invest in labour inspection and judiciary systems to help ensure a level playing field.[145]

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[139] Wouters, Jan and Ryngaert, Cedric, "Transnational Corporate Responsibility for the 21st Century: Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction", *George Washington International Law Review*, 2009, chapter V (p. 955-959).

[140] De Schutter, Oliver, "The Total and Unocal Cases: Complicity and Extraterritoriality in the Imposition of Human Rights Obligations on Corporations", *French Yearbook of International Law,* 55, 95 (2006). Cited from secondary source: Wouters and Ryngaert, "Transnational Corporate Responsibility for the 21st Century", p. 940.

[141] Ibid.

[142] Lowe, "Jurisdiction", p. 353. Cited from secondary source: Seck, "Home State Responsibility and Local Communties", p. 190.

[143] Ibid, p. 190. According to this, the legislation mandating human rights and environmental standards on the decision to finance projects made by the EDC (see note 37 in chapter 3.3.2.), would fall within the Canadian territorial jurisdiction.

[144] Rome Statute, Article 17(1)(a) (see note 99). Cited from secondary source: Wouters et al, "Transnational Corporate Responsibility for the 21st Century", p. 959.

[145] Observation by Potter, Ed, par. 20. The U.N. Human Rights Council, *Report of the High Commissioner for Human Rights on her Office's consultation on operationalizing the framework for business and human rights,* Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General on its 14th

Yet, it does not suffice to merely adopt legislative measures, but it is also necessary for host states to invest adequate means to monitor and implement such regulations.[146] There are clear human rights legal obligations on states to effectively control activities, within their territory, that violate human rights.[147] To attract foreign investment, host states offer protection through bilateral investment treaties and host government agreements. With the expansion of investor protection and lesser regards given to the state´s duty to protect, host states can find it more difficult to strengthen their domestic, social and environmental standards due to a fear of foreign investor challenge, which can take place under binding international arbitration.[148] This can thus have the consequence of host states being unable or unwilling to effectively control the activities of the TNCs, or even be prevented from being done, due to other international treaty obligations such as bilateral investment agreements, as mentioned above. This will result in host states being in breach of their human rights obligations, given that they do not take up preventative measures that aim to stop the human rights violations.[149] However, even though it can be highly unpractical and costly for states individually, particularly for developing states, to take the necessary steps to acquire high standards for their TNCs operations, it would definitely benefit all these states to have globally accepted standards. To start with it would make these states less vulnerable to the threats of TNCs to leave the territory if the domestic regulations become any more demanding or costly to comply with.[150] This can be problematic in two ways. Firstly, depending on the host state, to ensure that human rights will be respected within its territory cannot always be counted on. One reason for this is that in many instances, especially within conflict-affected areas, the state itself is participating in the violations.[151] Secondly, even

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Session, U.N. Doc A/HRC/14/29, 2010.

[146] The U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General in the issue of human rights and transnational corporations and other business enterprises – Business & Human Rights: Further steps towards the operationalization of the "protect, respect and remedy" framework,* (SRSG Report 2009) U.N. Doc A/HRC/11/13, 2009, chapter III. Cited from secondary source: De Schutter, "The Accountability of Multinationals for Human Rights Violations", p. 9.

[147] For example article 2 of both the ICCPR (see note 81) and the International Covenant on Economic, Social and Cultural Rights from 1966 (ICESCR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27. Accessible on: http://www2.ohchr.org/english/law/cescr.htm, 27 October 2010. See further in chapter 6.2.2. and 6.2.3.

[148] SRSG Report 2008, par. 34.

[149] McCorquodale, and Simons, *Responsibility Beyond Borders*, p. 600.

[150] De Schutter, "The Accountability of Multinationals for Human Rights Violations", p. 10.

[151] Ibid, p. 9. Hence, the violations by TNCs could either be imposed by the host state or where the TNC may be said complicit in the governmental abuses.

when the host state is not deliberately participating in human rights violations, the state might lack the needed governance capacity to enforce and implement their national law with regard to human rights standards.[152] To exemplify, situations come about where ECAs support investors of large infrastructure projects that require the relocation of entire communities, as happened in the case of Three Gorges Dam in China.[153] Where human rights violations are committed during these processes and the host state failed to take reasonable measures to protect against the violations taking place, the host state would most likely be in breach of its human rights obligations, and could furthermore be deemed complicit.[154] This could however depend on the host state´s laws, policies, procedures and even the state´s track record of how it has implemented these instruments for the prevention of human rights violations.[155]

5.2. THE "PROTECT, RESPECT, REMEDY" FRAMEWORK OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL

5.2.1. MANDATE OF THE SPECIAL REPRESENTATIVE

The mandate was created in response to division caused by the draft Norms on Business and Human Rights (Norms),[156] which were put to the Commission on Human Rights (Commission)[157] in 2004 but failed to gather inter-governmental support. The Commission recommended that the Secretary-General appointed a Special Representative to advance the debate on business and human rights.[158] Professor John Ruggie was appointed as the SRSG on 28 July 2005. According to the Commission´s resolution 2005/69, the SRSG was requested to, among other

[152] Ibid, p. 10. For example in conflict-affected areas where governance capacity is lacking.
[153] See chapter 3.2.1.
[154] This would require the host state´s wrongful act to be found "reasonably foreseeable". See further about complicity in chapter 5.4.2.6. Cited from: Keenan, "Export Credit Agencies", p. 9.
[155] Ibid, p. 9.
[156] The UN Sub-Commission on the Promotion and Protection of Human Rights adopted the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" in 2003. U.N. Doc E/CN.4/Sub.2/2003/12/Rev.2, with Commentaries, U.N. Doc E/CN.4/Sub.2/2003/38/Rev.2. The UN Commission on Human Rights considered the Norms in 2004, and did not approve them on the grounds that they had "no legal standing". Cited from: http://www.business-humanrights.org/Categories/Principles/UNSub-CommissionNormsonbusinesshumanrights/UNSub-CommissionNormsGeneral?sort_on=effective&batch_size=10&batch_start=1, 16 October 2010.
[157] Replaced by the Human Rights Council. The Council was created and adopted with resolution 60/251 by the UN General Assembly on 15 March 2006. The Council´s main purpose is addressing situations of human rights violations and make recommendations on them. Accessible on: http://www2.ohchr.org, 16 October 2010.
[158] Ruggie, John, "Introduction by the Special Representative", July 2009. Accessible on: http://198.170.85.29/Ruggie-introduction-to-portal-Jul-2009.doc, 16 October 2010.

things, elaborate on the roles of states in regulating and adjudicating corporate activities.[159] There are two paragraphs of his mandate within the interim report by the SRSG from 2006 that are of special relevance to this thesis, since they shed light on the roles that state have with respect to business and human rights. These paragraphs are:

b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.[160]

The mandate in this regard evolved around strengthening the promotion and protection of human rights in relation to TNCs and other business enterprises, albeit with an emphasis on governments bearing the principal responsibility for the vindication of those rights. The SRSG report from 2006 furthermore stressed the primary role of states in relation to human rights as critical. In that context, a special mention was given to ECAs, with regards to situations when home states provide investment guarantees or export credits, possibly without assurance that the corporations receiving the benefits have any regard for human rights.[161]

Along with the interim report from 2006 to the Commission, the SRSG provided a report to the new Council in 2007.[162] In addition, the SRSG consulted extensively with businesses, governments and the civil society.[163] In his 2008 report to the Council, the SRSG presented the principle-based conceptual and policy framework, with the intention of helping the international community striving to adapt a more effective protection for individuals and communities in whole against corporate human rights abuses.[164] The proposed framework consists of three core principles,

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[159] Resolution 2005/69, E/CN.4/RES/2005/69. Accessible on: http://www.unhcr.org/refworld/docid/45377c80c.html, 27 November 2010.

[160] SRSG Interim Report.

[161] Ibid, par. 79.

[162] The U.N. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* (SRSG Report 2007) U.N. Doc. A/HRC/4/35, 2007.

[163] Including through 14 multi-stakeholders consultations on five continents. See: "The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations With Respect to Human Rights", Summary Report, Copenhagen, 8-9 November 2007. Accessible on: http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Governmentpoliciespractices, 27 November 2010.

[164] SRSG Report 2008.

namely: “the State duty to protect against human rights abuses by third parties, including business, the corporate responsibility to respect human rights; and the need for more effective access to remedies”.[165] The Council, with its resolution 8/7,[166] unanimously welcomed the “protect, respect and remedy” framework[167] proposed by the SRSG to better manage business and human rights challenges. The framework was further emphasized in the SRSG report to the Council in 2009[168] and elaborated in more detail in the SRSG’s 2010 report to the Council.[169]

The first pillar of the framework, namely the state duty to protect, will be further explored in the subsequent section of this thesis.

5.2.2. MEANING AND SCOPE OF THE STATE DUTY TO PROTECT

That states are the primary duty bearers with regard to human rights is not debatable.[170] Yet, as mentioned above, the duty to protect against human rights violations by non-state actors, including violations by business entities, is controversial and had received little attention in the debate surrounding the draft Norms.[171]

Business is the major source of investment and job creation. The business markets consist of powerful forces that are capable of generating economic growth, reduce poverty and increase demand for the rule of law. In this way, businesses can contribute to the realization of a broad spectrum of human rights. As the SRSG pointed out, history has taught us that markets pose the greatest risks to society and business itself when they exceed their scope and authorities, leaving the business environment open for wrongful acts by companies that don’t have adequate sanctioning or reparations. He furthermore stressed the root cause of this being the governance gap created by globalization and emphasized the need for effective responses that reduce these gaps.[172]

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[165] Ibid, par. 9.

[166] Resolution 8/7, adopted 18 June 2008 on the 28th meeting. The Human Rights Council was with this resolution “stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedom lie with the State, hence emphasizing that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies”.

[167] The UN framework (see note 9).

[168] SRSG Report 2009 (see note 146).

[169] SRSG Report 2010 (see note 107).

[170] See chapter 1.0.

[171] Ruggie, John, “Current Developments. Business & Human Rights: The Evolving International Agenda”, *The American Journal of International Law,* Vol. 1010:819, Issue 4, 2007, p. 828.

[172] Ruggie, John, (SRSG) and Kirkpatrick (Professor of International Affairs, Harvard Kennedy School of Governments, Affiliated Professor in International Legal Studies, Harvard Law School), “Human

The first pillar of the UN Framework is the state duty to protect against human rights abuses committed by third parties, including abuses by businesses. The state duty to protect, consisting of both legal and policy dimensions, is part of the international human rights regime's very foundation - requiring states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.[173]The treaty monitoring bodies recommend interpreting this duty as a duty for states to "take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress".[174] The treaty bodies furthermore suggest that this duty should apply to all activities of businesses, both at a national level and of those crossing borders.[175] Chapter 6.2 will look further into the main relevant treaties in this context.

With regards to the meaning of the state duty to protect, the SRSG stated in his 2008 report:

> The general nature of the duty to protect is well understood by human rights experts within governments and beyond. What seems less well internalized is the diverse array of policy domains through which States may fulfill this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad.[176]

The first pillar of the proposed framework should be looked at accordingly by states as a policy priority, in order to aim to reduce or eliminate the corporate-related abuses and situations where corporations are exposed to social risks, which, according to the SRSG "clearly cannot manage adequately on their own".[177] In that regard, the SRSG gives special consideration to situations when states support their corporate nationals operating abroad through their ECAs. The SRSG argues, that on policy grounds alone, ECAs - functioning as state entities – should require their clients to perform adequate due diligence on their human rights impacts, which would not only help ECAs to better see where serious human rights concerns are

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Rights and business: How can we move the agenda forward?" Accessible on:http://www.regjeringen.no/nb/dep/ud/kampanjer/refleks/innspill/menneskerettigheter/rights_ruggie.html?id=534744, 19 October 2010.

[173] SRSG Report 2008, par. 18.

[174] The U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties,* (SRSG Addendum 1) U.N. Doc A/HRC/4/35/Add.1, 2007. See also SRSG Report 2007, where stated that the duty is considered to fall under customary international law, as will be further explored in chapter 5.4. and 6.1.1.

[175] SRSG Report 2008, par. 18.

[176] Ibid, par. 27.

[177] Ibid.

worth looking into, but to also help these agencies pick projects to support on more ethical grounds. Moreover, the importance of a closer coalition between states and their ECAs is emphasized.[178] In his report from 2010, the SRSG stresses that the main cause of legal and policy incoherence, is the lack of simultaneous work by departments and agencies, ECAs included. Therefore, the SRSG identified in the same report, five priority areas through which states should strive to achieve greater policy coherence and effectiveness as part of their duty to protect, by:

a) Safeguarding their own ability to meet their human rights obligations;
b) Considering human rights when they do business with business;
c) Fostering corporate cultures respectful of rights at home and abroad;
d) Devising innovative policies to guide companies operating in conflict-affected areas; and
e) Examining the cross-cutting issue of extraterritorial jurisdiction.[179]

With regard to sub-paragraph (b), which is of special importance to this thesis, a relatively low number of ECAs consider the human rights impacts of the projects they support despite a state nexus,[180] even though these projects are compromised of well-known high risks. ECAs´ response to these facts have been in line with the fact that if they consider human rights for all the projects they consider supporting, it would put them and their clients at a competitive disadvantage. The SRSG considers that by, for instance, adopting the OECD "Common Approaches" as guidance to help states with their human rights due diligence requirements, could help level the playing field in this regard.[181] Concerning sub-paragraph (d), which is also of special relevance to this thesis, the SRSG has put together a group of states that will try to make ground-breaking and practical approaches to help achieve the aim of preventing or mitigating corporate abuses in conflict-affected areas. Among other things on the agenda of this group is to look thoroughly into the potential roles of home states´ embassies in those areas, state developmental agencies, as well as both foreign and trade ministries and export finance institutions. The extraterritorial jurisdictional issues in sub-paragraph (e) were dealt with briefly in chapter 5.1.1. According to the report from 2010, the SRSG will continue to consult on how to deal

[178] Ibid, par. 39-41.
[179] SRSG Report 2010, par. 19.
[180] See chapter 3.1.
[181] SRSG Report 2010, par. 30. The OECD Common Approaches will be looked into in chapter 6.3.2.

with the problematic measures that are permissible under international law, in favor of the parties concerned.[182]

5.3. THE NOTION OF DUE DILIGENCE

The obligation of states to protect the human rights of all individuals within its jurisdiction and under its authority is, in the least, very broad.[183] This raises the question of whether states should be held accountable for all human rights violations by private actors made on their territory. Irrespective of the relationship between state responsibility, as will be dealt with in chapter 5.4, and human rights law, it is not an absolute rule to use the latter to hold states responsible for every human rights violation committed by TNCs. Doing so would trivialize the notion of human rights, thus making it less significant.[184]

The standard of due diligence has been developed under international human rights law to determine when a state should be held responsible for the conduct of non-state actors, TNCs included, and what states must do to make these actors ensure respect for human rights.[185] Due diligence requires positive steps by states to prevent, control and regulate private actors, investigate, and where applicable prosecute and provide effective remedies to victims. The due diligence test was first formulated in the landmark case of the Inter-American Court,[186] *Velasquez Rodriquez v. Honduras.*[187] The case dealt with a student from Honduras who was detained without warrant, tortured by police and ultimately disappeared forcibly. The Court held that even if the attackers were private individuals, the total failure of the authorities to try to find the victim or perpetrators, or give any remedy to the victim´s

[182] All the concerned: host states which lack the capacity to deal with the problem; companies that may face operational disruptions or protracted and unpredictable law suits, and the home state itself, whose own reputation may be on the line. Cited from SRSG Report 2010, par. 49-50.

[183] See chapter 5.1.

[184] International Council on Human Rights Policy,"Beyond Voluntarism", p. 51.

[185] The SRSG has emphasized the importance of states exercising due diligence as part of their duty to protect. See: Human Rights Committee, *General Comment No. 31(80)* (General Comment 31), Nature of the General Legal Obligation Imposed on State Parties to the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add.13 (General Comments), 2004. General Comment 31 referred to the need of state parties to the ICCPR to act with due diligence when fulfilling their duty to protect. The practice of the CCPR has furthermore shown a cautious approach of making states responsible for activities of private actors and deal on a case-by-case basis. Moreover, all state parties to the ICESCR are under obligation to regulate, investigate, and even bring perpetrators before court where applicable, and a failure to do so can amount to a breach of international obligation to exercise due diligence.

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[187] *Velásquez-Rodríguez v. Honduras,* Inter-American Court of Human Rights. Merits. Judgment of July 29, 1988. Series C No. 4. Annual Report of the Inter-American Court of Human Rights, OAS/Ser.L/V/III.19, Doc 13, 1988. Accessible on: http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf, 29 November 2010.

family, was itself a violation.[188] Furthermore, the Court stressed that states have a duty to prevent human rights violations by non-state actors.[189]

On the basis of this case, it seems that due diligence relates to the question of whether the steps states are obliged to take are "reasonable" or "serious".[190] Hence, where states are considered to have taken reasonable measures to prevent violations of private actors, it will not be held responsible despite the outcome. In this case though, the Court gave its opinion on the methods used by the Honduras government, stating that they were inadequate and ineffective for their purpose to carry out the necessary investigation of the perpetrators, and to provide remedies to the victims. This decision has been further adopted and used by other human rights bodies, international and regional.[191]

In the case of ECAs, it is necessary to contemplate the state duty to protect under international human rights, and to consider whether a state will be in breach of its positive obligations to take steps to prevent, investigate, punish and provide remedies for violations by their corporate nations outside its territory. Due diligence obligations have an extraterritorial dimension, thus, a state can be held responsible according to an international human rights treaty for activities in violation outside of the state´s territory, or more specifically, where "acts of their authorities, whether performed within or outside national boundaries… produce effects outside their own territory".[192] The obligation to exercise due diligence is of great importance to states with regards to their corporate nationals, when acting outside of that state´s territory, especially when the state "knows of the likelihood of abuse and has sufficient influence to protect against the harm".[193] For instance, in large extractive and infrastructure projects, it is not uncommon to require the relocation of entire communities, and in many instances moving people against their will. By bringing

[188] Ibid, par. 172 and 177.
[189] Ibid, par. 166, 172, 174 and 175.
[190] Chirwa, Danwood Mzikenge, "Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights"*, Melbourne Journal of International Law*, Vol. 5, Issue 1, 2004, p. 14.
[191] For instance, both the Inter-American Court and the European Court of Human Rights have established that the notion of due diligence is essentially about whether the measures taken are reasonable or serious, thus possibly creating responsibility for the state if it fails to take such measures to prevent human rights violations or respond to them.
[192] *Loizidou v. Turkey,* European Court of Human Rights, Decision on Preliminary Objections delivered by a Chamber, Application No. 15318/89 (1995) 20 EHRR 99(62). Accessible on: http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Loizidou%20%7C%20v.%20%7C%20Turkey&sessionid=62827784&skin=hudoc-en, 29 November 2010. Cited from secondary source: McCorquodale and Simons, p. 618.
[193] Keenan,"Export Credit Agencies", p. 4-5.

this into context with the Three Gorges Dam case, where public officers moved the people in the affected areas without following international standards and hence violated their human rights, it is likely that China, as the party responsible for the activities of the officers, was in violation of its international human rights obligations. On these grounds, one could argue that the Chinese government had not taken "reasonable" or "serious" measures to prevent the violations as part of their due diligence, and that it should be held accountable. If the home state had knowledge of the violation, it could, through its ECA, be complicit in the wrongful act of the host state only if it did not take "reasonable" or "serious" measures to prevent the harm through their due diligence.[194]

Human Rights due diligence "is not a tool to judge the human rights performance of countries or regions. It is intended to help ECAs and their clients to better manage human rights risks and respect the spirit and principle of human rights within their context of operations".[195] A number of ECAs claim that they uphold due diligence in their activities by evaluating both the condition of human rights in the host state, and the potential impacts on human rights of the projects in question. The problem lies with the unclear way in which these assessments are undertaken, against which projects they are assessed, and the lack of effective mechanisms to adjudicate the human rights claims of many ECAs' home states. The Canadian EDC[196] is one of these ECAs which reports that it undertakes human rights assessments as part of its due diligence process.[197] EDC reports that it receives public policy guidance from the Government of Canada with respect to Canada's international obligations, such as those elaborated in the UDHR, and shares intelligence with the Government on the human rights situation for a wide range of countries.[198] Moreover, the subcommittee of the Parliamentary Standing Committee on Foreign Affairs and International Trade

[194] Ibid, p. 9.
[195] "To the Members of the OECD´s Export Credit Group", 29 September 2010. Accessible on: http://198.170.85.29/Ruggie-submission-to-OECD-Export-Credit-Group-29-Sep-2010.pdf, 4 November 2010.
[196] See chapter 3.2.2.
[197] See letter from 16 July 2007 from Rosemarie Boyle, Vice-President, Corporate Communications and External Relations, "Dirty Business, Dirty Practices", EDC to Karyn Keenan, Program Officers of the Halifax Initiative Coalition. Accessible on: http://halifaxinitiative.org/content/letter-edc-hi-re-dirty-business-dirty-practices-july-16-2007. See also the responding letter, dated September 17 2010, accessible on: http://halifaxinitiative.org/content/response-edc-september-17-2007, both accessed last on 3 November 2010.
[198] Based on a memorandum of understanding signed in 2002. Website of EDC, accessible on: http://www.edc.ca/english/social_15113.htm, 7 November 2010.

(SCFAIT) gave EDC recommendation in its hearing in 2005,[199] stressing the importance of strengthening the due diligence process and improving CSR performance of their clients.[200] Hence, EDC was recommended to apply Canadian CSR standards outlined from the UDHR, ICCPR, ICESCR and other instruments adopted by Canada into its policies, practices and project assessments.[201] Regardless, there is no reference to human rights in the statute or other regulations governing EDC´s activities.[202]

Similar aspects could be noted about the US Ex-Im Bank. Although the legislation that governs their activities mentions human rights, it does not instruct the ECA to establish policies and procedures to consistently protect against human rights abuses by private actors.[203]

To sum up, ECAs should, as part of their due diligence, ensure co-operation with other departments and agencies of their home state, and ensure that they have updated and accurate information about human rights regarding the status of the host state before deciding whether to take on a project. In addition, ECAs should keep an open dialogue with the other departments and agencies of the state regarding their activities.

5.4. EXPORT CREDIT AGENCIES AND STATE RESPONSIBILITY UNDER INTERNATIONAL LAW

States have international legal obligations to make sure that the activities and operations of their ECAs do not facilitate or contribute in any way to, nor ignore human rights abuses by the TNCs they support.[204] However, one might ask how states are to ensure that they will not violate their international law obligations through the operations of their ECAs, seeing that the reason why violations by

[199] Standing Committee on Foreign Affairs and International Trade, *Mining in developing countries – Corporate Social Responsibility*, 14th Report, 38th Parliament, 1st Session, 2005. Accessible on: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1901089&Language=E&Mode=1&Parl=38&Ses=1, 7 November 2010.

[200] National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, *Recommendation 3.4.2.1,* Advisory Group Report, March 29, 2007, p. 19.

[201] Ibid.

[202] Ibid. Cited from secondary source: Keenan, "Export Credit Agencies", p. 11. The Act has been under a legislative review, yet no mention is specifically given to human rights while this cited from the act current to October 20th, 2010.

[203] The Export Import Bank Act of 1945, as amended. Accessible on: http://www.exim.gov/about/charter/index.cfm, 7 November 2010.

[204] Keenan, "Export Credit Agencies", p. 6.

corporate actors of international human rights remain in most instances unpunished, is because that international law is mainly addressed to states. Hence, it seems that states are the only legal subjects to bear responsibility under international law,[205] and as stated before, only in exceptional cases are individuals held responsible for its violations.[206] Thus, the corporate liability and other non-state liability will continue to depend on legal procedures and regulations set up by states.

Of course, not all acts of the private sector will become the responsibility of the state according to international law. Under customary international law, a state will be held internationally responsible for a breach of an international legal obligation, where the relevant act or the omission can be attributed to the state. Furthermore, it is acknowledged that the articles on attribution are considered to reflect customary international law[207] that has been further codified in the ILC Draft Articles on responsibility of states for internationally wrongful acts, adopted by the International law commission in 2001 (ILC Draft Articles).[208] Nevertheless, it is important not to confuse the difference between the states´ primary and secondary obligations in relation to prevent corporate abuses. The ILC Draft Articles are for instance an example of secondary rules of state responsibility, which may be used to attribute responsibility to a state for internationally wrongful acts of corporations.[209] The state may then also be held responsible for corporate abuses due to a failure of fulfilling primary duties under the core human rights treaties and customary international law to protect individuals against violations by third parties.[210] The ILC Draft Articles are generally accepted to be applicable to international human rights law,[211] and have indeed been applied by the human rights treaty bodies to the human rights matters referred to them. For example, the regional courts of human rights have applied the rules of the ILC Draft Articles in their human rights cases, as, for instance stated by the Inter-American Court of Human Rights in its first case concerning the rights of an

[205] Most treaties, rules as well as the ILC Draft Articles, to name a few, only addresses states as the primary actors of international law.
[206] See chapter 4.0.
[207] As customary international law, the articles are also binding upon all states.
[208] The International Law Commission, *Draft articles on responsibility of states for internationally wrongful acts,* Report of the International Law Commission on the Work of its 53rd Session, A/56/10, 2001, UN GAOR.56th Session Supplement No.10, UN Doc A/56/10(SUPP) (2001) ("ILC Articles" and "Commentaries").
[209] See further in what situations this can be done under sub-chapters of 5.4.2.
[210] Business Leaders, *Session on Partnerships between Business and Government,* p. 1.
[211] Clapham, *Human Rights Obligations of Non-State Actors.* p. 318.

indigenous population, *Awas Tingni v. Nicaragua:*[212] "According to the rules of law pertaining to the international responsibility of the State and applicable under International Human Rights Law, actions or omissions by any public authority, whatever its hierarchic position, are chargeable to the State which is responsible under the terms set forth in the American Convention on Human Rights".[213]

5.4.1. THE ESSENTIAL ELEMENTS OF STATE RESPONSIBILITY

The elements of state responsibility are stated in article 2 of the ILC Draft Articles. According to this rule, there is an internationally wrongful act of a state when a conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state.[214]

Under these rules of state responsibility, the acts and omissions of ECAs are attributable to the state, even when such agencies are separate legal entities.[215] Thus, states have to guarantee that the operations of their ECAs do not violate the state's international obligations, more specifically indicating that the state duty to protect against human rights abuses by third parties[216] extends to the operations of ECAs. Yet, to conclude that the acts of ECAs, as agents or organs of the state, will be attributed to their home state, a link will have to be found between the two, hence making ECAs subject to the same international obligations of the state. To establish that link between ECAs and their home state,[217] it is essential to explore the attribution rules of state responsibility in detail, along with the responsibility of host states for violations of its international legal obligations.[218] Based on the fact that the ILC Draft Articles apply to international human rights law, an analysis of the relevant articles in this context are a good starting point to look into the responsibility matter, and to further explore under which circumstances acts by the private sector, for example TNCs supported by ECAs may be attributed to the state and lead to state

[212] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Judgment of 31 August 2001, Inter-American Court of Human Rights (Ser.C), No.79, 2001. Accessible on: http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf, 11 October 2010.
[213] Ibid.
[214] ILC Draft Articles, article 2,.
[215] See chapter 3.1. Cited from secondary source: Keenan, "Export Credit Agencies", p. 6.
[216] As noted in chapter 5.1.
[217] See chapter 3.1.
[218] Can and Seck, "The Legal Obligations with respect to human rights and export credit agencies", p. 6.

responsibility.[219]

5.4.2. ATTRIBUTION OF CONDUCTS TO A STATE

The following sections will detail in what kind of situations a conduct will be attributed to a state, hence making the state responsible for the wrongful act.

5.4.2.1. WHEN CONDUCT OF AN ORGAN OF A STATE IS ATTRIBUTED TO THE STATE

Article 4 lays out the core rule for determining what conduct is attributable to a state because of its organ.[220] According to this rule, which is considered to be the clearest and most common rule under the draft articles,[221] regarding state responsibility, "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whether its character as an organ of the central government or of a territorial unit of the State".[222] The article further states that, "an organ includes any person or entity which has that status in accordance with the internal law of the State".[223] As a result, a state is responsible if an act or omission of its state organs and officials is attributable to the state and there has been a breach of an international legal obligation. This is also applicable when these actions or omissions are committed outside those organs' official authority or mandate.[224] As noted in the Commentaries to the ILC Draft Articles (Commentaries), states generally divide the authorities into distinct legal entities, including ministries, department- and state accounts and separate liabilities.[225] Therefore, public ECAs will be considered as official organs of the state under article 4 of the ILC Draft Articles.

5.4.2.2. WHERE INDIVIDUALS OR GROUPS EMPOWERED BY THE LAW OF THE HOME STATE EXERCISE ELEMENTS OF GOVERNMENTAL AUTHORITY

Article 5 deals with the situation when an entity is separated from the state, but is still empowered by the law of that state, thus dealing with the attribution to the state from

[219] Articles 4-11 deals with which conducts of private actors can be attributed to the state. This thesis will only deal in specifics with the most relevant ones for its purposes.
[220] ILC Draft Articles, article 4.
[221] "The rule defines the core cases of attribution, and it is a starting point for other cases". Commentaries, article 4, par. 2, p. 40.
[222] Ibid, par. 1.
[223] Ibid, par. 2.
[224] See Commentaries, article 7, p. 45-47 and further on chapter 5.4.2.3.
[225] "The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions". Commentaries, article 5, par. 1, p. 42.

the conducts of bodies that are not state organs in the same sense that is laid out in article 4.[226]

Under article 5, "the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".[227] The general term for "entity" according to the rule in article 5 reflects the wide variety of bodies that can be empowered by the law of a particular state to exercise elements of governmental functions, even though they are not organs of the state in its clearest form.[228] So, for instance, when ECAs are quasi-public entities acting under governmental authority, it creates a functional nexus between them and the state, thus making the ECAs' actions, attributable to the state.[229]

5.4.2.3. WHEN THE CONDUCT OF A STATE ORGAN OR OF A PERSON- OR ENTITY EMPOWERED TO EXERCISE ELEMENTS OF GOVERNMENTAL AUTHORITY WILL BE ATTRIBUTED TO THE STATE, DESPITE EXCEEDING ITS AUTHORITY OR CONTRAVENING ITS INSTRUCTIONS.

Article 7 applies only to the cases of attribution covered in articles 4, 5 and 6 of the ILC Draft Articles. The conduct acted in the capacity of a state, of an organ of state or of a person or entity empowered to exercise elements of the governmental authority, shall be considered attributed to the state even if it exceeds its authority or contravenes instructions.[230]

Even in situations where ECAs operate as separate legal entities[231] from their industrialized government, yet remain officially-supported, hence being regulated under national laws, regulations and charters, they still have their duties to support and develop trade and extraterritorial investment opportunities for their national corporations operating abroad.[232] When pursuing their extraterritorial activities, they can be attributed to the state, even though the corporation would exceed its authority or if its activities would be contrary to instructions.[233] That is coherent with article 3, which affirms that states cannot rely on their own internal laws to avoid international

[226] Ibid.
[227] ILC Draft Articles, article 5.
[228] See article 4.
[229] Commentaries, article 5, par. 2, p. 43.
[230] Ibid, article 7, par. 1, p. 45.
[231] For example the Canadian EDC (see note 37).
[232] McCorquodale and Simons, *Responsibility Beyond Borders,* p. 608.
[233] ILC Draft Articles, article 7.

responsibility.[234]

5.4.2.4. WHERE ACTIONS OF NON-STATE ACTORS ARE IN FACT DIRECTED OR CONTROLLED BY THE STATE

The conduct of private persons or entities, in accordance with a general principle of international law, is generally not attributable to the state.[235] Nevertheless, due to a relationship between the state and that person or entity, the conduct can be attributed to the state.[236] Article 8 deals with two of these situations, more specifically when corporations are "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".[237] Thus, article 8 efficiently deals with whether the conducts of private actors, TNCs or private ECAs, for the purpose of this analysis, can be attributed to the home state, even though the private actor acts independently and without public state-support. Therefore, only when activities of corporations were directly part of the state's instruction or control, and not merely incidental to it, will they be attributable to the state. Also, when corporations act under the control of the home state and ignored or disobeyed an instruction, that conduct will be attributed to the state.[238] The notion of "effective control" is then of relevance in order to determine whether the conduct is attributable to the state. As happened in the case of the International Court of Justice (ICJ), *Nicaragua v. United States,*[239] the court required a high degree of effective control concerning responsibility for the US. In the case, the government of Nicaragua alleged that the US was responsible for violations of international law committed by the Contras, a revolutionary rebel force, against the Nicaraguan government. The Nicaraguan government held that, among other things, the US had funded the Contras and directed their strategies and tactics. The Court held that the planning, direction and support of the Contras´ activities were in fact carried out under the control of the US, but stated that there were no clear evidence of the US having exercised such a degree of control in all fields, so as to justify treating the Contras as acting on US´ behalf. The Court furthermore stated that it must be proved that the US had effective control of the military or paramilitary operations in the course of which the alleged

[234] Commentaries, article 7, par. 2, p. 45.
[235] Ibid, article 8, par. 1, p. 47.
[236] Ibid.
[237] ILC Draft Articles, article 8.
[238] Commentaries, article 8, par. 3, p. 47.
[239] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* **v.** *United States of America)* Merits. Judgment. I.C.J. Reports 1986, p**.** 14. Accessible on: http://www.icj-cij.org/docket/files/70/6503.pdf, 27 November 2010.

violations were committed.[240] This high threshold for the test of control gives rise to difficulty attributing acts or omissions of private actors under this article, to a state. In this context, the ICTY, in the case of *Prosecutor v. Tadic,*[241] pointed out a lesser standard for the test of control that could be applied - "overall control" - even though facts had to be looked at for each and every case. With regards to the "overall control" standard, it has to be looked at from other views, and it could be argued that many wrongful acts of private actors might be attributed to the state, under the proposed lesser standard of control by a state. For example, one might ask whether financial assistance to private actors by the state, with the knowledge that it might be used for, or contribute to, human rights violations, might not result in the liability of the state. Given the standard of the two above-mentioned requirements for control, it is debatable whether state would exercise such control over their corporate nationals, except possibly in very rare cases, where at the most it could be argued to hold the home state responsible for an explicit support to harmful corporate activities.[242]

5.4.2.5. WHEN PRIVATE CONDUCT CAN BE ATTRIBUTABLE TO THE STATE, IF, IN THE ABSENCE OF FAULT OF OFFICIAL AUTHORITIES, CIRCUMSTANCES CALL FOR THE PRIVATE ENTITY TO EXERCISE GOVERNMENTAL AUTHORITY

Under Article 9 of the ILC Draft Articles, a "conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities, and in circumstances such as to call for the exercise of those elements of authority".[243] This type of situation is commonly significant to war-torn countries where regulation of corporate activity is lacking or absent.[244] For a conduct to be attributable to the state, it has to meet three established conditions. Firstly, the person or group of people carrying out the conduct must be performing governmental functions, even though they might be

[240] Ibid.
[241] *Prosecutor v. Duško Tadic,* ICTY Case IT-94-1-A, 1999. Accessible on: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf, 11 October 2010.
[242] Jägers, N., *Corporate Human Rights Obligations: In Search of Accountability,* Antwerp, 2002, p. 171. Cited from secondary source: McCorquodale and Simons, *Responsibility Beyond Borders,* p. 609.
[243] ILC Draft Articles, article 9.
[244] For example see *Yeager vs. Islamic Republic of Iran,* where the Iran-United States Claims Tribunal concluded that the individuals, even though not explicitly authorized by the Government of Iran, was attributable to Iran. This conclusion was reached by relying on ILC Draft Articles, article 5, which is article 9 in the current form. Cited from secondary source: Dixon, *Textbook on International Law,* p. 249.

doing so on their own initiative. Here the nexus between the ECAs or corporate national must be stressed even further.[245] Secondly, the conduct must have been carried out when official authorities were absent or default, hence intended to cover both the situation when the state has completely collapsed and when the official authorities are not functioning normally, for example because of a partial collapse of the state.[246] The third condition has to do with the circumstances when the conduct was carried out, in other words, if it had been carried out in a way that urged the call for the exercise of those elements of official authority.[247]

However, it must be noted that where private actors are neither acting on behalf of the state nor acting as its organs, their activities are not attributable to the state and no international responsibility can be attributed. This is consistent with the rule that signifies that a state cannot be held internationally responsible for the acts of private citizens even if the acts take place within their territory. Yet, in that context, a situation can occur from the act of a private actor, which may give rise to a separate and independent cause of state responsibility, if the state subsequently fails to fulfill one of its own international obligations as the primary actors in international law.[248]

5.4.2.6. WHEN A STATE AIDS OR PROVIDES ASSISTANCE IN THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT

In exceptional cases it is appropriate for one state to assume the internationally wrongful acts of another state, and that even though the wrongful conduct in question lies primarily with the latter state.[249] Therefore, when a state voluntarily assists or aids another state in carrying out conducts which violates the international obligations of the latter state, that act could be attributed to the former state. Article 16 of the ILC Draft Articles explicitly states that, "a State which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so".[250] Two conditions have to be met in that regard. Firstly, the aiding or assisting state has to do so with knowledge of the circumstances of the internationally wrongful act, and secondly, the assisting state

[245] Commentaries, article 9, par. 4, p. 49.
[246] Ibid, par. 5, p. 49.
[247] Ibid, par. 6, p. 49.
[248] For example, if a private non-state actor commits a human rights violations towards a foreign national on their home territory, the state will not be held internationally responsible unless it fails to fulfill its own duties of protection. See "*The Hostage Case" (United States vs. Iran)*. Cited from secondary source: Dixon, *Textbook on International Law,* p. 252.
[249] Commentaries, article 16, par. 1, p. 66.
[250] ILC Draft Articles, article 16.

will only be held responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Otherwise stated, the article places a primarily responsibility on the acting state, where the assisting state has only a supporting role in that case.[251]

As emphasized in previous chapters, ECAs provide their support and services to their corporate nationals to advance the latter state's competitiveness in the global markets. The direct link between the support and services of the ECAs to assist their corporate nationals in foreign investment could be seen as state aiding and assisting internationally wrongful acts based on article 16 of the ILC Draft Articles.[252] An example of such a situation is when a home state or its ECA finance violating activities of its corporate nationals in another state. The fact that the host state allows the operations to occur even though they are in violation of its international human rights obligations - the same international human rights obligations the ECAs´ home state carry - implies that the home state could be found in violation for aiding or assisting an internationally wrongful acts.[253] As pointed out previously, there are exceptional cases where it is appropriate for one state to assume the internationally wrongful acts of another state even though the wrongdoing lies fully with the second state. The Commentaries specifically contemplate the fact that "the particular circumstances of each case must be carefully examined…"[254] which is controversial in the way that the "export of human rights violations" is done with "deliberative indifference" rather than with intent.[255] To illustrate what is meant by this, article 16 suggests that the home state of an ECA which, for instance, finances the exports of torture equipment to a state know to practice torture, would be held responsible for the wrongful act of torture itself, rather than being responsible for the wrongful act of financing torture. Thus, "the home state responsibility would be secondary to the host state responsibility, thus the extent of reparations owed by the home state would likely be less than that of the host state". [256]

[251] Commentaries, article 16, par. 1, p. 66.
[252] Commentaries, article 16, p. 66. Cited from secondary source: McCorquodale and Simons, *Responsibility Beyond Borders,* p. 612.
[253] Ibid.
[254] Commentaries, article 16, par. 9, p. 67.
[255] Can and Seck, "The Legal Obligations with respect to human rights and export credit agencies", p. 9.
[256] Ibid.

The ILC clarifies that a state assisting another state normally does not have to assume the risk that such aid is used to commit internationally wrongful acts, and that to be unlawful the aid must be given with a view to facilitate the commission of the violations, and must actually do so.[257] Hence, according to the Commentaries, there is a threefold limitation in the scope of responsibility under article 16. For the first, the state organ or agency in question needs to know that the relevant circumstance makes the conduct of the assisting state internationally wrongful. The reason for this limitation is because a state that provides material, financial assistance or aid to another state does not normally know or assume the possible risk of its assistance being used to carry out an internationally wrongful act.[258] The second limitation requires that the aid or assistance must be given with a view to actually facilitate the commission of the wrongful act. The intention of the relevant state organ or agency is of great importance here. It is therefore not enough that the aid or assistance was an indispensable part of the wrongful conduct, but it is of more significance that the contribution was made specifically to that act or omission.[259] The third requirement for limitation of article 16, affirms a limitation when in breach of obligations by which the aiding or assisting state is itself bound to. Thus, the aiding or assisting state may not deliberately procure the breach of an obligation by another state, which both of the states is bound to.[260]

Following from all of the above, state complicity in the extraterritorial activities of corporate nationals themselves is another example of how a state can be held internationally responsible. As an example, the states financially backing up the project of the Three Gorges Dam[261] and other similar controversial projects,[262] their ECAs and their corporate nationals involved, may be found complicit in a host state's internationally wrongful act with regard to their obligations to respect and protect the

[257] Commentaries, article 16, par. 4, p. 66.
[258] Ibid.
[259] Ibid, par. 5.
[260] Ibid, par. 6.
[261] See chapter 3.2.1.
[262] For example see *The Baku-Tbilisi-Ceyhan (BTC)* and *Chad-Cameroon pipelines,* both projects financed by ECAs and other banks, governed by investment agreements negotiated between the corporate investors and the host state trough "stabilization clauses". Those agreements significantly discourage the host states to fulfill their international human rights obligations. Keenan, "Export Credit Agencies", p. 8-9.

international human rights of people affected by the activities in question. This is in line with the recent development of the possibility of individuals being able to incur international responsibility for a growing number of international crimes,[263] along with the more commonly argued obligations of corporations and other business entities to cease committing international crimes, or else be deemed responsible accordingly.[264] Thus, for instance, where a home state aids or assists its corporate national through an ECA, and that corporate national commits human rights violations which constitute international crime, this specific home state will be held accountable to bear responsibility for that violation under international human rights law.[265] In this context, the first above-mentioned limitation of the rule stated in article 16, that the state to be held responsible for complicity must have known that it was aiding or assisting in the commission of the wrongful act, must be kept in mind. In that regard and to sum up, there is another side of this which has to be evaluated in this perspective: "where the assistance is provided by ECAs, constructive knowledge can be assumed where the agency maintains that it takes the human rights or social impact of a project into account in its decision-making or it is normally required to undertake assessments of, or investigations into, the human rights impacts of a particular project".[266] Accordingly, when ECAs carry out so-called social and environmental impact assessments of the activities their corporate nationals carry out, in cases where the result from these assessments are applied in the loan agreements, it can be held that those assessment's results stand for acknowledgement of ECAs´ due diligence obligations.[267]

6.0. APPLICABLE HUMAN RIGHTS SOURCES STATES HAVE WITH REGARD TO EXPORT CREDIT AGENCIES

This chapter aims to investigate the most relevant sources states have with regard to

[263] For example can individuals be brought to trial in international criminal tribunals and before the ICC (see notes 98 and 99).
[264] See two cases brought against French and Swiss banks for their activities during the Nazy Germany era: *Bodner v. Banque Paribas* and *In re Holocaust Victim Assets Litigation,* both from 2000. Cited from secondary source: McCorquodale and Simons, *Responsibility Beyond Borders*, p. 614.
[265] Clapham, Andrew, "State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations", p. 50-81 at 68 in Bomann-Larsen, L. and Wiggen, O. (eds), *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity,* United Nations University Press, Tokyo 2004.
[266] Can and Seck, "The Legal Obligations with respect to human rights and export credit agencies", p. 9. Cited from secondary source: McCorquodale and Simons, *Responsibility Beyond Borders*, p. 615.
[267] Ibid.

human rights and ECAs based on the their possible obligations laid out in chapter 5.0. Firstly the concept of international human rights law will be explained as well as the distinction between customary international law and treaty law in the context of human rights. Secondly, the main legal instruments that are applicable in this regard will be demonstrated. Lastly, two OECD mechanisms of relevance to this thesis will be dealt with.

6.1. INTERNATIONAL HUMAN RIGHTS LAW

Modern international human rights law, as we know it today, was developed after the 1940s as a response to the atrocities committed during the World War II era,[268] with the main aim of preventing immense violations of fundamental rights, placing emphasis on the obligations of states to respect human rights. Thus, if a state party failed to comply with those obligations, it would bear international responsibility.[269]

While the notion of business and human rights did not feature prominently in the early international human rights discourse, in the past decade it has been featuring more frequently on the international agenda, as is reflected in the activities of the UN in the appointment of the SRSG in 2005. The SRSG undertook research[270] to map states´ obligations under human rights treaties to assist him implementing paragraph (b) of his mandate explained in chapter 5.2.1, to "elaborate on the role of States in effectively regulating and adjudicating"[271] business enterprises with regard to human rights. When conducting the research, the SRSG noticed that it is less common for the treaty bodies to refer to corporations, yet more common to refer in general terms to state obligations to protect rights against interferences occurring with regards to corporate activities.[272] The SRSG furthermore suggested that governments need to pay more attention to the management of business and the human rights agenda, and in addition recommended that states need to push the boundaries beyond their

[268] See chapter 1.0.

[269] Piechowiak, M, "What are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification", p. 3 in Hanski, Raija and Suski, Markku (eds.) *An Introduction to the International Protection of Human Rights,* Åbo Akademi University, Institute for Human Rights, 2nd Edition 1999. Cited from secondary source: Wang, Cynthia Xinhong, "State Responsibility for Conduct by Private Actors under the ICCPR", Specialization Seminar in Human Rights by Professor Martin Scheinin: The ICCPR-Trends and Developments, Åbo Akademi Institute for Human Rights, 2006, p. 2.

[270] Ruggie, John, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* Prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, 2007.

[271] SRSG Interim Report, par. 1 (b).

[272] Ruggie, *State Responsibility to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* par. 2, 4 and 7.

currently narrow institutional confines with regards to businesses.[273]

As was explained in chapter 5.2.2, the duty to protect within the UN framework is distinct from the secondary rules of state attribution, as laid out in the ILC Draft Articles. The duty to protect has been interpreted by the treaty bodies to be a "substantive duty which will only be breached if the State fails to take steps to prevent and punish abuse".[274] This means that according to the treaty bodies, if a state does act to fulfill its positive obligations, but is despite this still unable to prevent interference, it is unlikely that it will be considered to have breached its treaty obligations and will not be held responsible for the corporate abuse per se.[275] States have both negative and positive obligations in this context. The obligation of a state to not violate human rights is a negative obligation. To protect and to take positive measures are positive obligations.[276]

International human rights law forms part of the general regime of public international law. Its sources accord with the provisions of article 38(1)(a-d) of the Statute of the ICJ. This article provides that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply;
>
> a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b) International custom, as evidence of a general practice accepted as law;
> c) The general principles of law recognized by civilized nations;
> d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[277]

Not all human rights norms have the same status in international law. Some are located in customary international law, but most are codified in human rights treaties. Of the above-mentioned sources, the most relevant for this thesis are the first two, namely, customary international law and treaty law.[278]

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[273] SRSG Report 2008, par. 19. See also: "Mandate Consultation Online", October 2010, p. 1-4. Accessible on: http://www.reports-and-materials.org/Ruggie-consultations-outline-Oct-2010.pdf, 1 November 2010.

[274] Ruggie, *State Responsibility to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* par. 8. See chapter 5.4. regarding secondary rules of state responsibility.

[275] Ibid, par. 8.

[276] Wang, "State Responsibility for Conduct by Private Actors under the ICCPR", p. 7.

[277] Statute of the ICJ, article 38(1) (a-d), which was annexed as an integral part of the UN Charter (see chapter XIV). Accessible on: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II, 30 October 2010.

[278] Skogly, Sigrun & Gibney, Mark, "Transnational Human Rights Obligations"*, Human Rights Quarterly*, Volume 24, 2002, p. 782.

6.1.1. BRIEF OVERVIEW OF CUSTOMARY INTERNATIONAL LAW WITH RESPECT TO INTERNATIONAL HUMAN RIGHTS LAW

Treaty law, as will be explained in the following sub-chapter, is based on the consent of states. Customary law differs in that it is binding upon all states, which results from "a general and consistent practice of states followed by them out of a sense of legal obligation".[279] Thus, customary international law binds all states without exception and irrespective of their consent, while treaty law only binds those states that have given their express consent to the treaty or agreement in question.[280] This distinction of whether a particular human rights norm derives from customary law, or a treaty, is important because customary law binds even those states that are not parties to a relevant treaty.

The scope and content of customary international law is a work in progress, due to their hard-to-define and difficult character. While it is widely accepted that some human rights norms are part of customary international law,[281] the status of many other human rights is much more vague. The UDHR is one of those norms debated about, whether it has a status of customary international law or not. The following sub-chapter will briefly demonstrate its main features with regard to businesses and the protection of human rights.

6.1.1.1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Some commentators claim that the UDHR has achieved the status of customary international law, while other commentators argue that only a select number of elements or rights of the UDHR have become customary law.[282]

On 10 December 1948, the UN General Assembly adopted and proclaimed the UDHR. The UDHR can be referred to as a "milestone document in the history of human rights". It was drafted by representatives with different legal and cultural backgrounds, from all regions of the world.[283]

Although not a treaty and therefore not binding, the UDHR is so widely accepted,

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[279] See Statute of the ICJ, article 38. See also *Restatement (third) of foreign relations law of the United States,* 102 (1986). Cited from secondary source: Howse, Robert and Mutua, Makau, "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization", January 2000. Website of Rights and Democracy (International Centre for Human Rights and Democratic Development), January 2000. Accessible on: https://www.dd-rd.ca/site/publications/index.php?id=1271&page=5&subsection=catalogue, 1 November 2010.

[280] Ibid.

[281] For instance the ILC Draft Articles as were discussed in chapter 5.4.

[282] The Universal Declaration of Human Rights (see note 25). Cited from secondary source: Skogly, and Gibney, "Transnational Human Rights Obligations", p. 787.

[283] The official website of the UDHR. Accessible on: http://www.ohchr.org/en/udhr/pages/introduction.aspx, 27 October 2010.

and respected by governments all over the world that they regularly invoke it. It is furthermore widely said that it meets the universal standard of *opinio juris sive necessitatis,*[284] a practice that state follows from a sense of legal obligation.[285] Despite the disagreement noted above, the better view seems to be that many UDHR provisions have entered customary international law, and are agreed to apply only to states. Most of the UDHR provisions have moreover been incorporated into the Covenants and other UN human rights treaties.[286]

As was stressed in chapter 2.2 of this thesis, businesses are fundamental and integral part of society and as such bear at least a moral responsibility for violations if the violent act in question can be attributed to it.[287] The phrase "every organ of society" used in the Preamble, is construed by many to include businesses, thus insisting non-state actors, such as TNCs, to promote and protect human rights. Because actions of private actors can have strong impacts on the enjoyment of human rights, these private actors cannot absolve themselves from the responsibility to respect international human rights standards. Furthermore, it has been argued by the advocates of those thinking of businesses as "organs of society" that, with the rise of non-state actors in the global economy, TNCs have a greater power than some states to have a possible effect on the realization of rights, and should thus also bear some responsibility for the rights they may have influence on.[288] Since "every organ of society" can be interpreted in many ways, it is controversial whether this phrase can have any legal effect. According to the SRSG the better view is that it does not.[289]

6.1.2. BRIEF OVERVIEW OF TREATY LAW WITH RESPECT TO INTERNATIONAL HUMAN RIGHTS LAW

It has often been stated that "international human rights treaties primarily create rights for people and duties for governments", where one of the obligations that governments take on is to respect human rights.[290]

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[284] Defines as "an essential element of custom, one of the four sources of international law as outlined in the Statute of the International Court of Justice. *Opinio juris* requires that custom should be regarded as state practice amounting to a legal obligation, which distinguishes it from mere usage". Accessible on: http://law.jrank.org/pages/16545/opinio-juris.html, 1 November 2010.

[285] Governments have referred to the UDHR, used it as guidance for their constitutional and other laws, as well as for formulating both domestic and foreign policies of their respective countries.

[286] Ruggie, "Business and Human Rights: The Evolving International Agenda", p. 833.

[287] See note 25 in chapter 2.2.

[288] Ruggie, "Business and Human Rights: The Evolving International Agenda", p. 824-5.

[289] SRSG Interim Report, par. 66.

[290] Green, M, "What We Talk About When We Talk About Indicators: Current Approaches to Human

The treaty sources of international human rights law include both international and regional treaties.[291] The so-called *International Bill of Rights*[292] constitutes of five international mechanisms, namely: UDHR,[293] ICESCR,[294] ICCPR,[295] Optional Protocol to the ICCPR (Optional Protocol)[296] and lastly the Second Optional Protocol to the ICCPR (Second Optional Protocol).[297] The UN core human rights treaties as interpreted by their respective treaty bodies, "require States to play a key role in effectively regulating and adjudicating corporate activities with regard to human rights. This role is generally considered as being part of the State duty to protect against abuse by third parties".[298] Furthermore, commentaries from the treaty bodies have shown an increased pressure on states to fulfill this duty, regardless of whether the relevant corporate entity is privately or publicly owned or controlled. Moreover, "while older treaties are more likely to speak generally about states´ duties to protect against interference with the enjoyment of rights, more recently adopted treaties explicitly mention private businesses in this respect".[299] This denotes that, as the state duty to protect against corporate human rights abuses is being more clearly articulated, it is more likely that states´ failure to prevent and punish corporate abuses will be seen as a violation of human rights.[300]

The extraterritorial application of human rights norms is one of the most controversial areas of international human rights law. As emphasized before, while the issue of extraterritorial jurisdiction will not be dealt with in detail in this thesis, this chapter will very briefly touches on how the issue arises under international human rights law. An assessment of the issue in the light of international human rights law has revealed

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Rights Measurement", *Human Rights Quarterly*, Vol. 23, 2001, p. 1071. Cited from secondary source: Can and Seck, "The Legal Obligations With Respect to Human Rights and Export Credit Agencies", p. 3.

[291] The regional treaties will however not be dealt with specifically in this thesis.

[292] Website of the Office of the United Nations High Commissioner for Human Rights: http://www2.ohchr.org/english/law/index.htm, 24 October 2010.

[293] The UDHR (see note 25).

[294] The ICESCR (see note 147).

[295] The ICCPR (see note 81).

[296] Optional Protocol to the ICCPR, adopted by General Assembly resolution 2200 (XXI) of 16 December 1966.

[297] Second Optional Protocol to the ICCPR, adopted by the General Assembly resolution 44/128 of 15 December 1989. This second protocol to the ICCPR aims at the abolition of the death penalty.

[298] Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* p. 1.

[299] Ibid.

[300] Ibid.

both inconsistency and underdevelopment of applicable principles.[301] Most of the treaty bodies have not dealt in detail with the question whether states are required to exercise extraterritorial jurisdiction over business conduct outside their territory. Despite the fact that none of the treaties or treaty bodies have so far suggested that exercising extraterritorial jurisdiction would be prohibited,[302] it is clear that states are supposed to act with respect to the sovereignty of states and within the limits of the non-intervention principle of international law.[303]

The most widely recognized treaties that are of the most relevance to this thesis are listed out in the following chapters.

6.2. THE MAIN LEGAL INSTRUMENTS

The following sub-chapters will seek to examine and assess the main human rights instruments that are of relevance to the purpose of this thesis. Based on the fact that business entities can virtually affect all internationally recognized human rights, broad periodic assessments of the issues that businesses may face is thus necessary to make sure that no issues will be missed. The following international treaties list out rights which businesses can hold on to while conducting such assessments. These instruments are state-based and there might hence be confusion of their relevance to business entities. Businesses might ask themselves why they should even be concerned with them at all, given the fact that they do not impose legal obligations on them directly. According to the SRSG the answer to that

[301] For instance, customary international law within the area of social and economic rights creates obligations for states to "refrain from actions in their international or transnational operations that will fail to respect human rights of people in other states". By looking at article 2(1) of the ICESCR, which will be dealt with in more detail in chapter 6.2.3, shows that the question is not whether parties to the ICESCR have extraterritorial obligations, rather what is the "precise nature and content" of those obligations. Furthermore, scholars have suggested that obligations under the ICESCR should be categorized into internal, external and international, where external obligations are of most relevance to ECAs, that is the obligations a state owes to victims outside its territory through its own national authorities. Cited from: Can and Seck, "The Legal Obligations With Respect to Human Rights and Export Credit Agencies", p. 13.

[302] The jurisprudence of the international human rights bodies have made clear that persons "can be ′within the jurisdiction′ of a state acting extraterritorially". Accordingly, a state can be in violation of its international obligations under a human rights treaty, for actions it takes extraterritorially with regard to anyone that is within the state´s power, effective control or authority. In this regard see two cases of the ICJ, *Advisory Opinion on the Wall* (2004, 43 ILM 2009 at 107-113), and *Democratic Republic of Congo v. Uganda* (Merits, 2006 45 ILM 271 at 217). Based on the conclusions reached by ICJ, it can be interpreted that ICJ is determining that states´ obligations under all international human rights instruments the state is a party to - and, all human rights that form a part of customary international law – are "applicable in relation to the acts of a state outside its territory". Cited from secondary source: McCorquodale and Simons, *State Responsibility Beyond Borders,* p. 605.

[303] Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* p. 3.

is easy to comprehend: “companies can and do infringe on the enjoyment of the rights that these instruments recognize…(and) companies should look to these instruments as authoritative lists of internationally recognized rights”.[304]

6.2.1. THE UNITED NATIONS CHARTER

When implementing or promoting human rights obligations beyond national borders, some legal foundations need to be established. The basis for these obligations are not only to be found in international treaties and covenants, but also in the Charter of the United Nations (UN Charter).[305]

Human rights are constitutionally based on the UN Charter, hence, the UN treaty instruments and bodies that address human rights issues are created pursuant to the UN Charter. As declared in article 1, paragraph 3 of the UN Charter, the member states have pledged themselves to “achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.[306] Article 55 and 56 of the charter furthermore state that UN members, shall promote “…higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.[307] Accordingly, all UN members shall “…pledge themselves to take joint and separate action in co-operation with the Organization for the achievement”[308] of “universal respect for, and observance of, human rights and fundamental freedoms”.[309] In conjunction with article 103, this implies that member states of the UN have an established obligation to operate and function with respect for human rights.[310]

Bear in mind that with globalization and the opening of markets, many governments´ abilities to control and govern over their nationals, corporate nationals included, have

[304] SRSG Report 2010, par. 60.
[305] Charter of the United Nations, signed on 26 June 1945, and came into force on 24 October 1945. Accessible on: http://www.un.org/en/documents/charter/index.shtml, 27 October 2010.
[306] UN Charter, article 1(3).
[307] Ibid, article 55.
[308] Ibid, article 56.
[309] Ibid, article 55.
[310] Ibid, article 103, which states that the obligations under the Charter will always prevail over obligations under other international agreements.

been reduced heavily.[311] Despite the great status of the UN charter, it alone may not be sufficient to place obligations upon states to ensure that their TNCs will not violate human rights while operating abroad. Therefore, in order to understand the complete scope of these state obligations, it is necessary to look at the UN Charter in the light of the developments in international human rights treaties during the last century.

6.2.2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR[312] is not only a part of the International Bill of Human Rights, but furthermore one of the most prominent instrument, along with the ICESCR,[313] that can establish transnational human rights obligations for its state parties. Together, both of the Covenants codify the basic norms laid out in the UDHR.[314] Even though the Covenant does not specifically address state duties regarding businesses, it imposes a general obligation on state parties to ensure the enjoyment of a range of civil and political rights enshrined therein and to prevent abuses by state agents, private persons or entities. This chapter will try to demonstrate the relevant articles in this context.

The ICCPR is a multilateral treaty adopted by the UN General Assembly on 16 December 1966, and came into force on 23 March 1976.[315] The Covenant established an expert body, the Human Rights Committee (CCPR),[316] with authority, firstly, to review reports from the state parties; secondly, to adopt General Comments on the meaning of the provisions of the Covenant; thirdly, to be able to under certain conditions deal with inter-State communications; and lastly, to receive individual communications under Optional Protocol.[317] In 1989, the General Assembly adopted the Second Optional Protocol to the ICCPR, which was aimed at the abolition of the death penalty.[318]

All the obligations laid out in the Covenant, article 2 in particular, are binding on all state parties. Article 2 defines the general legal obligations that state parties need to have towards individuals.[319] According to article 2, paragraph 1, state parties must respect and ensure that the rights in the Covenant apply to all individuals within their

[311] Clapham, *Human Rights Obligations of Non-State Actors,* p. 4.
[312] The ICCPR (see note 81).
[313] The ICESCR (see note 147).
[314] The UDHR, see further in chapter 6.1.1.1.
[315] The ICCPR (see note 81).
[316] Accessible on: http://www2.ohchr.org/english/bodies/hrc/, 3rd November 2010.
[317] Optional Protocol (296).
[318] Second Optional Protocol (see note 297).
[319] General Comment 31, par. 3-4.

territory and are subjected to their jurisdiction. These obligations imposed on state parties are both negative and positive in nature.[320] Thus, state parties must refrain from violation of rights enshrined in the Covenant, and furthermore avoid restricting any of these rights. If such restrictions are made, the state parties must demonstrate the necessity of such restrictions and thus only take such measures with proportionality in mind by applying or invoking them in a manner that will ensure continuous and effective protection of the rights enshrined in the Covenant.[321] The obligations laid out in paragraph 1 of article 2 are, as stated before, binding on state parties and thus do not have "direct horizontal effect"[322] as a matter of international law.[323] Nevertheless, the positive obligations state parties carry will not be "fully discharged" when individuals are not protected by the State "against acts committed by private persons or entities that would impair the enjoyment of Covenant rights" that "are amenable to application between private persons or entities".[324] General Comment 31 lays out situations which can give rise to violations by state parties of those rights, more specifically when "permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[325] Hence, it can be interpreted that a state can be held responsible for horizontal violations of certain rights under the ICCPR in two situations. Firstly, if a state party gives its permission or approval to someone to violate the rights of other individuals, and secondly, if a state party fails to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm.

According to the first situation if, for instance, a state party gives its permission to a private actor to deprive another´s life arbitrarily, it is permitting the violation. The private actor is then acting on behalf of the state, thus making the state accountable for the violation committed.[326] According to this broad interpretation of permissiveness from Amnesty International, it has to be kept in mind that under the

[320] Ibid, par. 6.
[321] Ibid.
[322] Horizontal direct effect is a legal doctrine developed by the European Court of Justice, whereby individuals can rely on the direct effect of treaty provisions, which confer individual rights in order to make claims against other private parties before national courts.
[323] Ibid, par. 8.
[324] Ibid.
[325] Ibid.
[326] Amnesty International, "Respect, protect, fulfill-Women´s human rights: State Responsibility for abuses by "non-state actors"", 2000. Accessible on: http://www.amnesty.org/en/library/info/IOR50/001/2000, 26 October 2010.

ICCPR, permission shall not be interpreted in such a broad sense, given the fact that the failure to investigate or punish can be included in the positive obligations of states to provide effective remedies, as laid out in paragraph 3 of article 2. States are required under the second paragraph of article 2 to "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".[327] It then follows that unless the rights enshrined in the Covenant are already protected by state parties´ domestic laws or practices, state parties are required at ratification of the Covenant to make changes to their domestic laws to ensure consistency.[328]

Regarding the second situation, the CCPR approaches the meaning of "taking appropriate measures" as taking steps to pass legislation, to investigate and "to bring perpetrators to justice".[329] Accordingly, where the state fails to take measures, it shall bear responsibility.

The third paragraph of article 2 entails the state obligations for violating rights laid out in the Covenant, stipulating that states have to ensure that any person whose rights or freedoms as recognized in the Covenant, shall have an effective remedy, determined and enforced by competent authorities.[330]

To place the ICCPR in context with the aforementioned violations on people´s rights in the Three Gorges Dam case, state parties are, according to paragraph three, required to make reparations to individuals whose Covenant rights have been violated. Without such reparation the obligation to provide an effective remedy laid out in paragraph two is not discharged. In this regard the CCPR considered that in addition to the explicit reparation required by article 9, paragraph 5[331] and article 14, paragraph 6,[332] "the Covenant generally entails appropriate compensation". The

[327] ICCPR, article 2(2).
[328] General Comment 31, par. 13, which demonstrates that article 2 allows such changes to state parties´ domestic law, to be pursued in accordance with their own domestic constitutional structure.
[329] Ibid, par. 18. Cited from secondary source: Wang, "State Responsibility for Conduct by Private Actors under the ICCPR", p. 15.
[330] ICCPR, article 2(3).
[331] Ibid, article 9(5), which states that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".
[332] Ibid, article 14(6), which states that "when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

CCPR furthermore notes that where appropriate, “reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations”.[333] Moreover, the covenant provides guarantees that forced migrants are entitled to freedom of movement, opinion and association. Meaning that those displaced in the area of the dam construction should be allowed to group together, fight for their rights and even form a NGO.[334] Yet, Chinese regulations forbid people to come together in associations outside of those controlled by the ruling Communist Party, leaving those who do so, despite these regulations, open for harsh treatment by the state. In addition, these regulations exclude any role for NGOs, informed consent and grievance mechanisms. The Chinese resettlement practices therefore not only violate international standards, such as the operational policies from the World Bank, but are also contrary to principles laid out in international treaties, which China is a party of. The ICCPR is one of those treaties, signed by China in 1998.[335]

6.2.3. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The ICESCR, like the ICCPR, does not address state duties with regard to businesses. The Covenant rather imposes generalized obligations on states to guarantee the enjoyment of a range of substantive economic, social and cultural rights and take steps to “prevent their own citizens and companies” from violating rights in other countries.[336] The main articles in this regard will be illustrated in this chapter.

The ICESCR was adopted by the UN General Assembly in 1966 and entered into force on 3 January in 1976.[337] The United Nations Economic and Social Council was the monitoring body of the Covenant, tasked to monitor compliance by state parties with their legal obligations under the Covenant. In 1987, this task was given to another body namely the Committee on Economic, Social and Cultural Rights

[333] General Comment 31, par. 16.
[334] See here especially following articles of the ICESCR: Article 12(1) – Article 17(1) – Article 19(1) and (2) – Article 21 – Article 22 and Article 25(1).
[335] International Rivers Network, “Human Rights Dammed off at Three Gorges”, p. 7.
[336] Committee on Economic, Social and Cultural Rights, *General Comment No. 15* on the Right to Water, UN Doc. E/C.12/2002/11, par. 33.
[337] ICESCR (see note 147).

(CESCR).[338]

International human rights imposes obligations on states to respect, protect and fulfill human rights,[339] including the obligation to take measures to regulate and adjudicate activities of non-state actors, which violate human rights of individuals within the state´s territory. This has been confirmed in the General Comments from the CESCR, that in order to fulfill the duty to protect, states must regulate and adjudicate the acts of businesses.[340] The emphasis on the duty to protect does not indicate that other state duties, such as those to respect, promote and fulfill are irrelevant to strengthening corporate responsibility and accountability. In fact, the CESCR has confirmed that state parties to the ICESCR are in breach of their duty to respect if they do not take into account the obligations "when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational entities".[341] Thus, states can also be found in breach of their duty to respect if state-owned or controlled entities or other corporate entities exercising public functions do not refrain from abuse, or if the state has laws or policies, which facilitate the abuse by the corporate entities.[342]

The Covenant establishes a reporting procedure on the measures that state parties have adopted and the progress made in achieving the observance of the rights contained in the Covenant.[343] Article 2 demonstrates the general obligation provisions, just as article 2 of the ICCPR does. With regards to the precise nature

[338] CESCR is consequently not strictly speaking, a treaty organ like the CCPR In response to the large number of communications submitted to the United Nations each year alleging the existence of gross and systematic violations of human rights, the CESCR adopted a procedure pursuant to the adoption of resolution 1503 of 27 May 1970, which deals with such communications. This procedure is known as the "1503 procedure", is based in individual petitions and comprehensive submissions by NGOs, and seeks to identify situations of grave violations of human rights affecting large number of people. Accessible on: http://www2.ohchr.org/english/bodies/chr/complaints.htm, 27 October 2010.

[339] CESCR, *General Comment No. 12 on the Right to Food,* E/C.12/1999/5.

[340] Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* par. 19.

[341] CESCR, *General Comment No. 18 on the Right to Work,* UN Doc. E/C.12/GC/18, adopted 24th November 2005, par. 33. Cited from secondary source: Ruggie, John, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* par. 10.

[342] See for example: Committee on the Elimination against Women (CEDAW), *General Recommendation 19, Violence against Women,* UN Human Rights Compilation at 246, 11th Session 1992, par. 9. Cited from secondary source: Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* par. 10.

[343] ICESCR, article 16, states that the state parties to the covenant undertake to submit in conformity with part IV of the ICESCR reports on the measures, which they have adopted and the progress made in achieving the observance of the rights recognized therein. All the reports shall be submitted to the Secretary-General of the United Nations, who transmits copies of the report to the Council and other specialized agencies.

and content of these obligations, the CESCR in its General Comment 15, provides guidance on this matter with respect to the right to water, stating:

> Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where State parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.[344]

With regards to extraterritorial issues, the term "companies" relates to both state-owned and privately owned corporate entities and "other third parties" to unrelated actors acting overseas.[345] However, despite the direct reference to companies above, it is certain that the obligation to take steps to "prevent" violation is obvious and that the exercise of extraterritorial jurisdiction is not prohibited as long as it is done in accordance with UN Charter and other applicable international law.[346] Furthermore, with regards to ECAs exercising public functions for instance, the obligation to protect requires states to prevent interference from third parties where "third parties include individuals, groups, corporations and other entities as well as agents acting under their authority".[347] Hence, state parties to the ICESCR must take action against abuse by a broad range of non-state actors, including business enterprises.

The CESCR emphasized in General Comment No. 3 that it also imposes various obligations that are of immediate effect, of which two are of more importance. Firstly, the undertaking according to the first paragraph of article 2 as stated above, and secondly the undertaking in the second paragraph of the same article, which lays out the importance of guaranteeing that the exercising of the rights in the Covenant will be without discrimination of any kind.[348] Hence, "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant´s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[349]

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[344] *General Comment 15,* par. 33.
[345] Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations´ core Human Rights Treaties,* par. 86.
[346] Ibid, par. 87.
[347] *General Comment 15,* par. 23
[348] ICESCR, article 2(1) and (2). Cited from: CESCR, *General Comment No. 3,* The Nature of State Parties obligations (Article 2, paragraph 1), UN Doc E/1991/23, 1990. Accessible on: http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument, 27 October 2010.
[349] Ibid, par. 2.

To consider the Three Gorges Dam case within the ICESCR, with about two million people in the area of the Dam being displaced, the biggest challenge for the dam-builders is the resettlement of those concerned. As the head of the Three Gorges Migration Office, Li Boning, stated in 1993: “Our goal is to ensure that those resettled will have better working and living conditions”,[350] and furthermore that “the compensation we are offering is much higher than their expected losses”. This is, in the least, far away from reality.[351] To exemplify, from the start of the project the Chinese government overestimated its ability to create new employment and to provide land to those displaced. All of those displaced have been forced to pay at least twice the amount of the compensation they have received for their new homes. Additionally, confusing policy changes, differing compensation rates and discriminatory practices had plagued the resettlement process. On top of all of this, there is widespread evidence indicating that the resettlement funds are corrupted, routinely embezzled and being diverted into the private pocket of local officials. Hence, the project´s resettlement, compensation, and rehabilitation measures fail to meet World Bank standards and deny citizens of their livelihoods. Furthermore, the ICESCR, ratified by China in 2001, must be considered violated, specially on the grounds of articles 11 and 15 of the Covenant, as article 11 lays out the right to adequate housing and the right to compensation for forced eviction,[352] and article 15 the right to take part in cultural life.[353]

6.3. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

As laid out in earlier chapters, most industrialized nations carry at least one official or quasi-official ECA within their government. The OECD consists of governments of countries that are committed to democracy and the market economy around the world. From its foundation in 1961, its mission has been to help its member countries to contribute to the development of the world economy, by providing a setting where these governments can seek answers to common issues and coordinate domestic

[350] International Rivers Network, “Human Rights Dammed off at Three Gorges”, p. 1.
[351] Ibid, p. 8-28. According to researchers´ eyewitness account based on a large number of interviews with affected people in five of the counties that are most affected by resettlement for the project.
[352] CESCR, General Comment No. 7 on *the right to adequate housing (Art.11.1): forced evictions,* 20 May 1997, UN Doc E/1998/22.
[353] Articles 11 and 15, ICESCR.

and international policies.[354] The OECD provides two mechanisms relevant to this thesis, the OECD Guidelines for Multinational Enterprises (Guidelines)[355]and the Common Approaches.[356]

In the context of the Guidelines, all the five participating ECAs[357] in the Three Gorges project have a state nexus to OECD governments that adhere to the Guidelines. This stipulates their responsibility to consider and respect human rights of those who are affected by their activities.[358] It is therefore necessary to lie out a brief synopsis of the Guidelines for the context of this thesis.

With regards to the Common Approaches, the membership of the "Working Party on Export Credits and Credit Guarantees"(ECG) has to be looked at. The ECG membership consists of all OECD countries.[359] The general objectives of the ECG is of relevance here, especially since one of those objectives concerns evaluating export credit policies.[360] In 1999 the members of ECG, with the input from the OECD´s Environment Directorate,[361] decided to strengthen the exchange of information on big projects located in sensitive sectors. An OECD Recommendation setting out the Common Approaches to review projects was negotiated, which was further adopted by the OECD Council in December 2003. The Recommendation requires governments that are members to the OECD and their ECAs to review potential environmental impacts of their projects and to benchmark them against international standards. The ECG precludes private financial institutions from its membership, and therefore, based on the fact that this thesis argues that ECAs are

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354 Organization for Economic Co-operation and Development. Accessible on: http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html, 10 December 2010.

355 OECD Guidelines (see note 80 in chapter 3.3.2).

356 OECD Working Party on Export Credits and Credit Guarantees, "Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits", June 2007. TAD/ECG (2007)9. Accessible on: http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=TAD/ECG(2007)9&doclanguage=en, 3 November 2010.

357 That is, ECAs from Germany, Switzerland, Sweden and Canada. Brazil is one of the many non-member economies with working relationship to the OECD. See chapter 3.3.2.

358 OECD Guidelines, General Policies, par. 2.

359 Excluding Iceland. Accessible on: http://www.oecd.org/document/24/0,3343,en_2649_34169_1844760_1_1_1_1,00.html, 11 December 2010.

360 Accessible on: http://www.oecd.org/document/24/0,3343,en_2649_34169_1844760_1_1_1_1,00.html, 10 December 2010.

361 "…provides governments with the analytical basis to develop policies that are effective and economically efficient, including through country performance reviews, data collection, policy analysis, projections and modeling, and the development of common approaches". Accessible on: http://www.oecd.org/department/0,3355,en_2649_33713_1_1_1_1_1,00.html, 5 November 2010.

state entities,[362] thus distinguishing them from private institutions, the membership of the ECG and the Common Approaches is of relevance.

6.3.1. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

In 1976, the OECD adopted the Declaration on International Investment and Multinational Enterprises (Declaration),[363] which was rewritten and annexed in 2000, resulting in the Guidelines. The Guidelines are voluntary for businesses. They are a set of recommendations by the governments that have adhered to them, to the businesses that are based in or operating in their countries. The Guidelines do not address corporate responsibility per se, although they include a range of important issues that could be used as guidance regarding operating in a country where the host country law, regulation and/or institutions are weak.[364] As stated in the Guidelines´ Preface: "The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises".[365] The first obligation of businesses is obeying domestic law.[366] Regardless, the promotion and upholding of human rights lies primarily with governments, and businesses are encouraged to co-operate with host governments[367] and to respect human rights in a manner consistent with the host government´s international obligations and commitments.[368] This can however leave a protection gap since not all countries in the world have adopted all human rights treaties, and even if they have, they might be unable or unwilling to enforce them.

The SRSG has commented on the Guidelines emphasizing that while the Guidelines serve as recommendations from governments to Multinational Corporations

[362] See chapter 3.1.
[363] Declaration on International Investment and Multinational Enterprises, adopted 27 June 2000. Accessible on: http://www.oecd.org/document/53/0,3343,en_2649_34887_1933109_1_1_1_1,00.html, 4 November 2010.
[364] International Alert "Promoting a Conflict Prevention Approach to OECD Companies and Partnering with Local Business", OECD DAC Conflict, Peace and Development Co-Operation Network Briefing Paper, March 2004, p. 2.
[365] OECD Guidelines, Preface, par. 1.
[366] Ibid, Commentary on General Principles, par. 2.
[367] Ibid, par. 3.
[368] Ibid, par. 4.

(MNCs)[369], "they should also affirm the need for states to fulfill their international obligations".[370] Based on the newest revision of the Guidelines which shows some progress in clarifying the business and human rights agenda, as laid out in the UN Framework, along with the strong support it enjoys, the SRSG proposed replacing the current Guideline 2 under General Policies, with a new chapter reflecting the "corporate responsibility to respect human rights" of the UN Framework.[371] Moreover, the SRSG mentions that given all the internationally recognized rights laid out in the International Bill of Rights and other conventions, businesses might need to think of other standards to take into account, for instance, the circumstances in conflict-affected areas, for instance.[372] By demonstrating that the Guidelines should clarify for businesses that exercising human rights due diligence can be a game-changer. The SRSG recommended the Guidelines should thus be updated, perhaps making due diligence one of the general operational principles of the General Policies.[373]

6.3.2. OECD COMMON APPROACHES

The Recommendation setting out the common approaches[374] is legally non-binding, but expresses the common position or will of the whole OECD membership, and can thus entail important political commitment for OECD governments. The 2003 Recommendation was replaced by a newer version in 2007,[375] which sets out stronger requirements with regard to the environment for export deals to qualify with for OECD export credits.[376] The OECD Council gives a recommendation that "members, before taking decisions on officially supported export credits, apply the following common approaches for addressing environmental issues relating to

[369] See note 2. This thesis will place an equal meaning into the two concepts of TNCs and MNCs.
[370] Ruggie, John, "Updating the Guidelines for Multinational Enterprises", Discussion Paper, 10th OECD Roundtable on Corporate Responsibility, Paris June 30, 2010, par. 3. Accessible on: http://www.oecd.org/dataoecd/17/35/45545887.pdf, 2 November 2010.
[371] Ibid.
[372] Ibid, par. 11. The SRSG makes a special mention to International Humanitarian Law in this context and other standards, which are specific to "at risk" or vulnerable groups in projects affecting them.
[373] Ibid, par. 12-15. The UN Framework lays out the basic factors of human rights due diligence. The SRSG is, at the request of the CCPR, developing guiding principles for the operationalization of the UN Framework and will continue to work closely with the OECD on the common elements between the Guidelines and the UN Framework.
[374] See above in chapter 6.3.
[375] OECD Working Party on Export Credits and Credit Guarantees, "Common Approaches" (see note 356).
[376] "About Environment and Export Credits". Accessible on: http://www.oecd.org/document/26/0,3343,en_2649_34181_39960154_1_1_1_1,00.html, 3 November 2010.

exports of capital goods and services and the locations to which these are destined".[377] To achieve the objectives of these Common Approaches, members should, among other things, but most relevant to ECAs supports in conflict-affected areas, foster transparency, predictability and responsibility in decision-making.[378]

At the time of the financing of the Three Gorges Dam project, only the US´ Ex-Im Bank had some environmental policies in place and, based on these, rejected to finance the project.[379] At the time when the financing of the project started, the Common Approaches from 2007 did not exist, only "Rev. 6", a Draft version from 2001. The other ECAs involved,[380] which did not consider environmental issues before deciding on supporting the project, have argued that they applied policies that prevailed at the time, such as Rev. 6.[381] The rather flexible and vague Rev. 6. did not require any consideration of broader socio-economic, human rights or cultural impacts. By basing their policies on the grounds of Rev. 6, the ECAs involved missed out on setting standards that could have prevented them to finance the project based on the displaced people in the area, the fact that a total of about 320 million people will be affected, the loss of agricultural land, the record of China´s human rights abuses and the loss of about 1300 cultural sites.[382]

Under the Common Approaches, ECAs are required to make information on environmental and social guidelines on the projects they are supporting available to the public, at least 30 days prior to making a cover decision.[383] Most ECAs from OECD countries have the information available and easily accessible on their websites. Examples of those are the US Ex-Im-Bank[384] and the Australian ECA,

[377] OECD Working Party on Export Credits and Credit Guarantees, "Common Approaches" (see note 356).
[378] Ibid, par. 3.
[379] McCully, Patrick, "A Crack In China´s Dam Plan", excerpt from *Silenced rivers: the ecology and politics of large dams,* London, 1996.
[380] That is ECAs from Germany, Switzerland, Brazil, Sweden and Canada. See further in chapter 3.3.2.
[381] See for example a letter from 17th of January 2003 to the Canadian EDC and a response from 5th of February the same year, regarding the involvement of that ECA in the projects. Accessible on: http://halifaxinitiative.org/content/sign-canadian-government-re-human-rights-violation-three-gorges-january-17-2003 and http://halifaxinitiative.org/content/edc-response-re-three-gorges-february-5-2003, both last accessed 3 November 2010. Cited from secondary source: Adams et al, "Race to the Bottom, Take II", p. 26.
[382] Ibid, p. 27.
[383] OECD, General Principles, par. 19.
[384] Accessible on: http://www.exim.gov/products/policies/environment/environment.cfmm, 4 November 2010.

Export Finance & Insurance Corporation (EFIC),[385] which also were the leading ECAs to provide information on application prior to the final approval of an application, along with the British ECGD. The Canadian EDC[386] and the British ECGD[387] did not publish their Environmental Impact Assessments (EIAs) on their websites due to legal reasons, but encouraged their exporters to make EIAs available on request. Only the Norwegian ECA, Garanti-instituttet for eksportkreditt (GIEK)[388] is an exception to that.[389] ECGD furthermore maintains a website for high potential impact cases, listing EIAs before decisions are taken regarding such projects. Other ECAs, such as the German HERMES and the Switzerland´s ERG[390] only published selected pieces of information. Most ECAs, including GIEK, HERMES and EFIC, addressed environmental and social impacts of supported projects in their annual reports, yet most of the information were only made available after an ECA had granted support for a particular project. Currently, HERMES provides information about pending cover decisions via the Internet, given the client´s consent for the publication.[391]

Based on all of the above, the latest revision of the Common Approaches has certainly moved transparency forward through better and earlier disclosure of information, even though it remains to be seen how the rest of ECAs not mentioned will respond to this innovation. The real test will clarify which parties to the Common Approaches will make use of the transparency clause. The clash there is based on the fact that ECAs´ job is to facilitate exports, and those businesses which could possibly benefit from their support may decide to take on risks themselves in order to attempt to escape from revealing a project´s information that their competitors might

[385] EFIC, facilitates a public consultation period of not less than 30 days in relation to the EIA conduct by the project sponsor. Accessible on the website of EFIC: http://www.efic.gov.au/corp-responsibility/envr-responsibility/environmentpolicy/Pages/categoryadisclosure.aspx, 4 November 2010.

[386] Accessible on: https://www.edc.ca/english/docs/Disclosure_Policy_e.pdf. See also: https://www.edc.ca/english/disclosure_accountability.htm, both visited 4 November 2010.

[387] Accessible on: http://www.ecgd.gov.uk/publications/reports/list-guar-policies-issued, 4 November 2010.

[388] Accessible on: http://www.giek.no/miljo_og_sosialt_ansvar/gieks_politikk_innen_samfunnsansvar/en, 4 November 2010.

[389] Görlach, Benjamin, Knigge, Markus and Schaper, Marcus, "Light at the end of the tunnel? Participation and Transparency in Export Credit Agencies´ Cover Decisions", Institut for International and European Environmental Policy, 2003, p. 5.

[390] Accessible on: http://www.serv-ch.com/en/sustainability/transparency/, 4 November.

[391] Accessible on: http://www.agaportal.de/en/aga/nachhaltigkeit/umwelt/projekte.html, 4 November 2010.

use against them.[392] In this context it is worth mentioning that ECA-Watch[393] has criticized the Common Approaches´ standards, referring to them as benchmarked and not mandatory, and that the monitoring and public reporting on the implementation of them remains incredible vague. The ECA-Watch believes that a truly transparent and thorough process that keeps public interest at heart, and further encourages public accountability must be "coupled with mandatory standards which permit international norms to be upheld in all material respects.[394]

The SRSG urged the members of the ECD to "explicitly recognize human rights in the Common Approaches as a critical element in the social sustainability of enterprises and markets, coupled with the role of ECAs in fostering the corporate responsibility to respect human rights".[395] Accordingly, this would be the first step for moving ECAs in line with international practices, laid out in the International Bill of Rights,[396] and coupled with the International Labour Organization´s (ILO) core conventions.[397] The SRSG emphasized that businesses can have effects on virtually all internationally recognized human rights, and should thus make sure that they have not missed any rights[398] when doing their due diligence. He furthermore stressed that ECAs cannot make informed decisions unless they carry out human rights due diligence on possible projects.[399] The SRSG also made a remark on obstacles ECAs face when considering human rights impacts on projects they support, and suggested ECG should consider reviewing the Common Approaches to

[392] Görlach et al, "Light at the end of the tunnel?" p. 11
[393] International NGO Campaign on Export Credit Agencies (ECA-Watch). Accessible on: http://www.eca-watch.org
[394] "Revised OECD Export Credit Standards are an Empty Basket for Environment and Development NGOs", 26 April 2007. Accessible on: http://www.eca-watch.org/problems/fora/oecd/CommonApproaches/ECAW_Common_Approaches_26apr07.htm, 5 November 2010. It is un-debatable that increased transparency can obviously lead to more honest implementation of agreements and furthermore provide NGOs monitoring ECAs with a valuable tool.
[395] "To the Members of the OECD´s Export Credit Group", 29 September 2010. Accessible on: http://198.170.85.29/Ruggie-submission-to-OECD-Export-Credit-Group-29-Sep-2010.pdf, 4 November 2010.
[396] See chapter 6.1.2.
[397] ILO was founded in 1919, and became the first specialized agency of the UN in 1946. ILO´s fundamental conventions, accessible on: http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Introduction/ConventionsandRecommendations/lang--en/index.htm, 4 November 2010.
[398] For example the rights enshrined in the International Bill of Rights and the core ILO Conventions, as indicated above.
[399] "To the Members of the OECD´s Export Credit Group" (see note 395).

help the international community as a whole.[400] This could be done by first making sure that the Common Approaches "clearly acknowledge that human rights are a critical element in the social sustainability of enterprises and markets",[401] and furthermore be aware of the role ECAs carry in fostering respect for human rights.[402] Building the capacity of ECAs with regards to human rights is the second suggestion made. On these grounds, it is suggested that OECD should perhaps create a human rights working group which could focus on making it easier for ECAs to carry out human rights due diligence, and help increase ECAs´ knowledge and competency.[403] Thirdly, by conducting and requiring due diligence of ECAs themselves, and where applicable, of the project sponsors. Lastly, the SRSG emphasizes the possibility that ECAs clients can be implicated in human rights abuses where projects are operated in, or near conflict-affected areas. This will call for a "heightened due diligence" which should include evaluations of the projects, whether it could contribute to, facilitate or encourage the conflict. The SRSG states that in such instances the Common Approaches should limit the exposure of ECAs.[404]

[400] Ruggie, John, "Engaging Export Credit Agencies in Respecting Human Rights", Remarks to the OECD Export Credit Group´s "Common Approaches" Meeting, Paris 23rd June 2010. Accessible on: http://198.170.85.29/Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010.pdf, 4 November 2010.
[401] Ibid, par. 1, p. 6.
[402] Ibid.
[403] Ibid, par. 2, p. 6.
[404] Ibid, par. 4, p. 7.

7.0. CONCLUSION

This thesis has established that officially supported ECAs are organs or agents of the State. Where such ECAs do not exercise due diligence in taking steps to mitigate impacts on human rights on their corporate nationals, they may be liable for both failing to protect against corporate-related human rights abuses, and for failing to respect human rights. According to attribution rules of international law, this can then give rise to international responsibility for the home state of the ECA. Hence, states should be motivated to establish some kind of framework in order to monitor and oversee corporate activities in other states. The same applies for host states, which are obligated to regulate the activities of TNCs within their national territory and adopt adequate means to monitor and implement such regulations. A host state that is unable or unwilling to effectively control the activities of TNCs on their territory, and take preventive measures to stop human rights violations in order to attract and protect foreign investment, can be in breach of its human rights obligations.

In the light of the transformation of the institutional features of the world economy, it is not surprising that the corporate sector that operates across borders has attracted increased attention with regards to human rights. One reason for this is that some corporations have made themselves, and in some cases their entire sector, a target known for making mistakes or malfeasance, which may have resulted in human rights violations. This clearly calls for increased corporate accountability, even though this does not mean that states, as primary duty bearers under international law, are exempt from certain duties in this regard. On the contrary, if all states would exercise their duty to protect, the challenge of engaging corporate responsibility would be significantly lessened.

The state duty to protect, according to the first pillar of the UN framework, has both legal and policy dimensions, and is grounded under the core UN human rights treaties that require states to "take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress".[405] The SRSG will present to the Human Rights Council in 2011 "Guiding

[405] SRSG, Addendum 1.

Principles" based on the UN Framework.[406] The Draft Guiding Principles are grounded in the fact that states have "the primary role in promoting and protecting all human rights and fundamental freedoms, including those with regard to the operations of business enterprises".[407] Moreover, as has been emphasized throughout this thesis, states are not responsible for all human rights violations by private actors, only for where they fail to take appropriate measures to prevent, investigate, punish and redress such abuses.[408] Exercising due diligence is thus of great importance. Making the link between the state duty to protect and the corporate responsibility to respect more explicit and requiring human rights due diligence by businesses as well, could reinforce the state duty to protect.

As the SRSG has stated, governance gaps caused by globalization may be the root cause of the business and human rights predicament.[409] In conflict-affected areas where the worst business-related human rights abuses occur and hence where these governance gaps must be at its worst, the human rights regime cannot be expected to function as intended. In these situations the cooperation between states to ensure policy coherence at both national and international level cannot be stressed enough in order to be able to close these governance gaps. In these areas the ability of states to govern and pursue their duties is crucial. In such difficult contexts it is important that both host and home states address issues early, and furthermore make sure that their policies, regulations and enforcement measures can effectively address the heightened risk in such areas.[410] Today, states are not generally required to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction according to international human rights law, but are also not prohibited from doing so, given a recognized jurisdictional basis and that the exercising of jurisdiction is reasonable. As was laid out in chapter 5.1.1, there are good reasons to justify means for home states to regulate corporate activities in other states. Not only to prevent the home state from being associated with alleged human rights violations overseas, but it can also provide a necessary support to host

[406] Ruggie, John, *Draft on Guiding Principles for the implementation of the United Nations "Protect, Respect and Remedy" framework,* General Assembly, posted for public review and comment until 31st January 2011.
[407] Ibid, Annex A: Guiding principles for the implementation of the "Protect, Respect and Remedy" Framework, p. 5.
[408] Ibid, Principle 1.
[409] See chapter 1.0.
[410] Ibid, Principle 10.

states, which in many cases lack the capacity to effectively comply with their duties in this regard, especially in conflict-affected areas.[411]

With regards to state obligations in the context of the Three Gorges Dam project, the Chinese host government, along with the governments who are funding project through their ECAs,[412]are all at high stakes. All of them have ratified both the ICCPR and ICESCR, which requires the state parties to first make reparations to individuals whose rights were violated, and second, the ICCPR specifically requires that states allow for people to group together and fight for their rights.

The Chinese host government breached its own domestic law that required the provision of independent grievance mechanisms, which is one of the requirements for host states.[413] Furthermore, the practices of punishing peaceful protestors and the widespread human rights violations, amounted to a breach of China´s obligations under international human rights law.[414]

The home states of the ECAs involved should have encouraged their corporate nationals involved in the project to respect human rights, especially since these governments were involved with their support through their ECAs.[415] Moreover, the home states are all parties to the OECD Guidelines that further reinforces their responsibility to consider and respect human rights of those who can be affected by the activities they support. The Common Approaches by the OECD did not exist at the time of the financing, only "Rev. 6", which was much more flexible and vague with regards to environmental issues. Hence, for the ECAs involved to base their policies on the grounds of Rev. 6, it can be said that they missed out on setting standards that could have prevented them for participating in the project.

Consequently, despite warnings and the fact that the World Bank backed out from the project, it can be argued that the ECAs´ home states should share the responsibility for the human rights impacts with the Chinese government.

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[411] Ruggie, John, *Guiding Principles for the implementation of the United Nations "Protect, Respect and Remedy" framework,* par. 7-8.

[412] See chapter 3.3.2

[413] Observation by Potter, Ed, par. 20 (see note 145); See further, SRSG Report 2008, par. 38: "States, companies, the institutions supporting investments, and those designing arbitration procedures should work towards developing better means to balance investor interests and the needs of host States to discharge their human rights obligations.**"**

[414] The ICESCR, which China has signed and ratified, and the ICCPR, which China has signed but not ratified.

[415] SRSG Report 2009, par. 16.

To conclude, given that many home states of ECAs have been failing to fulfill their duties, one might ask what these states can do to meet their international human rights obligations, and thus prevent violations in the provision of export credit and investment support to the private sector. According to the SRSG, a part of the solution to strengthen states´ fulfillment of their duties lies in preventive measures. In this sense, if governments build their capacity to protect human rights, promote respect for rights while doing business with business, encourage the development of corporate cultures respectful of rights at home and across borders, and furthermore work together to prevent and address the challenges they meet in conflict-affected areas, they are taking important steps in the right direction to meet that goal.[416] Adopting legislation mandating ECAs to protect against human rights abuse by third parties, and enforcing that legislation, is a necessary first step. Furthermore, they should establish robust procedures from investigation to adjudication, and ensure effective remedies for victims when cases of abuses occur. Transparent communication between ECAs and corporations are very important and can benefit both parties. Information about the possible negative impacts on human rights of projects can help ECAs to assess the risks of their operations. Also, in situations where the risk of negative human rights impacts are heightened, such as in conflict-affected areas, ECAs can guide corporations on the best way to proceed, or even redesign projects. Additionally, as part of ECAs´ due diligence processes, working with other departments or agencies of the state, and maintaining open dialogue can make a difference to ensure that decisions are based on updated and accurate information.

[416] SRSG, Report 2010, par. 51.

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TABLE OF ABBREVIATIONS

Canadian Dollar	CDN
Committee on Economic, Social and Cultural Rights	CESCR
Committee on the Elimination of Discrimination against Women	CEDAW
Corporate Social Responsibility	CSR
Environmental Impact Assessment	EIA
Export Credit Agency	ECA
Export Credit Guarantee Department	ECGD
Export Development Canada	EDC
Export Finance & Insurance Corporation	EFIC
Exportkreditnämnden	SEK
Exportrisikogarantie	ERG
Garanti-instituttet for eksportkreditt	GIEK
Hermes Kreditversicherungs - AG	HERMES
Human Rights Committee	CCPR
International Court of Justice	ICJ
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Criminal Court	ICC

International Criminal Tribunal for the former Yugoslavia	ICTY
International Criminal Tribunal for Rwanda	ICTR
International Labour Organization	ILO
International Law Commission	ILC
International Monetary Fund	IMF
Mega Watt	MW
Multinational Enterprise	MNC
Non-Governmental Organization	NGO
Oesterreichische Kontrollbank Aktiengesellschaft	OeKB
Organization for Economic Co-operation and Development	OECD
Special Representative of the Secretary-General	SRSG
Standing Committee on Foreign Affairs and International Trade	SCFAIT
The Brazilian Developmental Bank	BNDES
Transnational Corporation	TNC
United Kingdom	UK
United States Dollar	USD
United States	US
United Nations	UN
Universal Declaration of Human Rights	UDHR
Working Party on Export Credits and Credit Guarantees	ECG

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