UNIVERSITY OF LJUBLJANA

FACULTY OF SOCIAL SCIENCES

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International Accountability for Human Rights Abuses by Multinational Corporations

Mednarodna odgovornost multinacionalnih podjetij za kršitve človekovih pravic

Master's Thesis

Ljubljana, 2015

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Abstract

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The thesis deals with the corporate accountability for human rights abuses with accent on developing countries. It brings the definition of corporate social accountability and highlights its role in addressing the issue. Development of the international framework by specific international organizations such as United Nations, International Labour Organization and Organization for Economic Co–operation and Development is described as well as hard and soft law mechanisms. The thesis tests the effectiveness of these mechanisms on the case study 'Yadana pipeline project' in Myanmar and assesses the compliance with their standards in order to show the extent of corporate accountability. The presented case shows the impact of corporations on environment, living conditions and enjoyment of human rights in the area they operate suggests the necessity for effective mechanism for addressing corporate accountability.

Keywords: corporate social responsibility, corporate accountability, human rights, Myanmar, hard law, soft law.

Povzetek

Mednarodna odgovornost multinacionalnih podjetij za kršitve človekovih pravic

Magistrsko delo se ukvarja z odgovornostjo podjetij za kršitve človekovih pravic s poudarkom na primerih v državah v razvoju. V uvodnem delu podam opredelitev družbene odgovornosti podjetij in njihove vlogo pri reševanju vprašanja varovanja človekovih pravic. Delo obravnava oblikovanje in razvoj mednarodnega sistema s strani mednarodnih organizacij, kot so Združeni narodi, Mednarodna organizacija dela in Organizacija za gospodarsko sodelovanje in razvoj. Analiza se osredotoči na formalne pravne postopke, pa tudi na tako imenovano 'mehko' pravo, se pravi tista določila in rešitve, ki sicer niso del zakonodaje, a v sklopu mednarodnih implicitnih režimov naslavljajo vprašanja kršitve človekovih pravic in odgovornost multinacionalnih podjetij. Naloga preverja tudi učinkovitost teh mehanizmov na študiji primera 'projekt plinovoda Yadana' v Mjanmaru. Študija primera osvetli vpliv izbrane korporacije na spoštovanje človekovih pravic in sodne poti, izbrane za njihovo zaščito. Analiza poudari potrebo po učinkovitem mehanizmu za reševanje odgovornosti podjetij.

Ključne besede: družbena odgovornost podjetij, človekove pravice, Mjanmar, mednarodno pravo.

Contents

List of abbreviations:

Art. – Article

ASEAN – The Association of Southeast Asian Nations

ATCA – Alien Tort Claims Act

Cca. – Circa

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

CETIM – Europe–Third World Centre

Ch. – Chapter

COP – Communication on Progress

CRC – Convention on the Rights of the Child

CSR – Corporate social responsibility

Et al. – Et alia

Etc. – Etcetera

ECOSOC – United Nations Economic and Social Council

ERI – Earth Rights International

ESCR – Economic, social and cultural rights

GC – Global Compact

GDP – Gross domestic product

GNI – Gross national income

GP – Guiding Principles

HDI – Human development index

HR – Human rights

Ibid. – Ibidem

ICCPR – International Covenant on Civil and Political Rights

ICERD – International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR – International Covenant on Economic, Social and Cultural rights

IGO – Intergovernmental organization

IHRL – International Human Rights Law

ILO – International Labour Organization

MNC – Multinational corporations

NCP – National Contact Point

NGO – Non–governmental organization

OECD – Organization for Economic Co–Operation and Development

OFAC – Office of Foreign Assets Control

SLORC – State Law and Restoration Council

SPDC – State Peace and Development Council

SRSG – Special representative to the Secretary General

TD – Tripartite Declaration

TNC – Transnational corporations

TVPA – Torture Victims Protection Act

UDHR – Universal Declaration on Human Rights

UN – United Nations

UNC – United Nations Charter

UNHRC – United Nations Human Rights Council

UNICEF – United Nations Children's Fund

UNCTAD – United Nations Conference on Trade and Development

UNSG – United Nations Secretary General

UPR – Universal Periodic Review

USMT – United State Military Tribunal

v. – Versus

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1 Introduction

The issue of human rights (HR) abuses by business entities (corporations) plays an important role in international corporate regulation. Some research suggests that corporations often ignore the social aspect of corporate activity while concentrating on profit maximization, and therefore (in)directly violate human rights (HR) (Wallace 2014, 386). Such violations often relate to forced labour, child labour, the suppression of rights to freedom of association and speech, breaches of environmental rights, and the like (Dhnarajan and Metheven 2014, 14). These violations are even more evident in developing countries, which are often incapable of imposing legal sanctions for HR violations, especially for the violations committed implicitly by corporations. Also, the existing international human rights regime is state–centric, since according to international law states are the main duty–bearers of human rights, but often fail to protect them (Duruigbo 2008, 2; Weissbrodt and Vega 2007, 146).

Over the past years, corporate liability for HR abuses has received much attention from governments, HR organizations, nongovernmental organizations, business groups, the United Nations (UN), Organization for Economic Co–operation and Development (OECD), International Labour Organization (ILO), and other actors (Dhnarajan and Metheven 2014, 6–7). Intensifying efforts to regulate corporate behaviour started with the changes in rhetoric by international institutions, and with establishing the UN Centre for Transnational Corporations in 1974. This was followed by drafting the Code of Conduct on Transnational Corporations in 1977 (known as the 'Draft Code') (United Nations Commission on Transnational Corporations 1983) as the first attempt to regulate corporate activities, with the task of identifying the rights and responsibilities of corporations and host countries, but it was abandoned in 1992 (*ibid.*; Mujih 2012, 125–135). Another attempt at setting up a framework was made by the OECD in 1976 with the Guidelines for Multinational Enterprises (Organization for Economic Co–operation and Development 2008, 29), which were a part of the OECD Declaration on International Investment and Multinational Enterprises (Organisation for Economic Co–operation and Development 2008, 9–11). One year later, the ILO adopted the Tripartite Declaration of Principles concerning Multinational Enterprises (International Labour Organization 2006a, 19). Since all these initiatives were on a voluntary basis, in 2003 the UN tried to make a step forward by moving away from voluntarism with the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003). It set out the

responsibilities regarding HR and addressed directly all tension points of the previous 'voluntary CSR' codes of conduct: the substance of HR in the documents, enforcement and monitoring mechanisms, and the issue of stakeholder involvement (Ruggie 2007, 828). Another attempt by the UN is the Global Compact Initiative launched in 2000, which serves as a dialogue platform between businesses and civil society to share their business practices (Global Compact Network Belgium 2015). This voluntary initiative is engaged in promoting the UN principles "regarding human rights, labour standards, environmental protection, and anti–corruption" (Hillemans 2003, 1069). Even though these initiatives have lacked wider international recognition, they have contributed to the evolution of setting the standards for corporations by defining with greater clarity what should be done. As a result of this process, in 2011 the UN endorsed the Guiding principles for implementing the UN Protect, Respect and Remedy Framework, which serve as a "global standard for preventing and addressing the risk" of HR abuses linked to corporations (Idowu *et al.*, 559).

Although these initiatives have contributed to a greater awareness for multinational corporations (MNCs) regulation, they do not provide a legal framework for accountability, and neither does international law, which stipulates that States are the main bearers of responsibilities to protect, respect and ensure human rights, while corporations are not its direct subject (Karavias 2013, 82). The problem of a non–existent international framework in cases of human rights abuses is becoming essential in developing countries, as will be demonstrated in a case study, which will present the implicit corporate liability for HR abuses.

The case study illustrates the Yadana pipeline project, implemented by Unocal Corporation in a joint venture with Myanmar's government, as a case of HR abuses, which represented a step forward in corporate liability for HR abuses. The first part of the case study is dedicated to the Unocal Corporation and the Doe v. Unocal lawsuit, in which the violations of HR were connected with the standard of living, forced labour, right to earn a living through work, and right to health. Unocal Corporation not only violated the right to life, but also the dignity of the person, which is the basis for every human right. This case is significant for addressing the implicit corporate liability for human rights violations, first brought under the United States Alien Tort Claims Act (US ATCA), and resulted in extrajudicial compensation to the plaintiffs in 2005. This case study therefore marks a milestone moment towards implicit corporate accountability and corporate accountability for HR abuses in general, since Unocal paid the compensation.

This thesis is based on the following research questions:

What is the role of the international community in setting corporate social responsibility in the area of human rights?

To which extent can the international community/nation states hold corporations responsible for human rights abuses?

Human rights protection is considered the primary responsibility of the state as the main actor, according to international law, in the protection of human rights. When corporations operate in the developing world, domestic laws of these countries often fail to impose HR sanctions on multinational corporations (MNCs). This stresses the need for an international response and international regulation. That is why it is important to address the role of the international community in setting responsibilities for business entities, and the case study provides evidence as to which extent corporations are held accountable. Even though a framework for corporate regulation exists, my hypothesis in the thesis is that it is not directly enforceable against corporations, and does not provide grounds for their liability. To answer the research questions, this thesis provides an analysis of primary sources, such as conventions, declarations (the most important being those of the UN, ILO, OECD and provisions of international law) and secondary sources. I use various methodological instruments to provide the answers to the proposed questions. The thesis is divided into three parts.

In the first part, I provide a literature review while giving the definitions and role of multinational corporations (MNCs) and Corporate Social Responsibility (CSR). It also includes the development of the international framework in order to present the evolution of CSR initiatives and mechanisms by international organizations. This chapter therefore serves as a basis for the following chapters. To reach this objective, I use analytical methods to analyse the primary and secondary sources. I use the analysis of the concept of CSR, and relate it to corporate behaviour to address corporate responsibility for HR and their violations.

In the second part, I analyse international mechanisms for CSR. This includes hard law (international law/international HR law and the United States Alien Tort Claims Act, known as US ATCA) and soft law mechanisms of relevant actors–the UN, ILO and OECD. The goal of this chapter is to present the content of these mechanisms while addressing both positive sides and critiques in order to examine to which extent they can hold corporations liable for HR abuses. To reach the aim, I use primary sources while combining analytical and descriptive method. This

chapter serves as a basis for the implementation of these mechanisms contained in the following chapter. The first two chapters provide the answer to the first research question–'What is the role of the international community in setting corporate social responsibility in the area of human rights?'

The third part is essential since it will test international mechanisms on the case study–the Yadana pipeline project, Myanmar. This part tests the compliance of corporations with international mechanisms, and to which extent corporations can be held liable for HR violations. To reach the aim, I present Myanmar's profile, which includes its history, economy, and regulations regarding MNCs to show the environment in which MNCs operate. Next sub–chapter is dedicated to the Yadana pipeline project and human rights abuses by Unocal Corporation, and later Chevron Corporation, to clarify their role in the project and involvement in HR abuses. The last sub–chapter is dedicated to the implementation of international mechanisms, namely, the UN Guiding Principles for Multinational Enterprises ('Protect, Respect, Remedy' Framework) and OECD Guidelines. The UN Protect pillar examines the role of Myanmar in protecting HR, the Respect pillar analyses corporate compliance with the obligation to respect HR, and the Remedy pillar includes the Doe v. Unocal lawsuit, which examines the role of the US ATCA and presents the extent of Unocal's liability for implicit HR abuses. The other mechanisms included in this sub–chapter, the OECD Guidelines, examine the extent of compliance with obligations under this mechanism by both the corporation *per se* and the home country, the United States.

In the analysis I use reports, the final judgment of cases, and primary and secondary sources of international mechanisms. This chapter completes the entire research and helps provide the answer to the research question–'To which extent can the international community/nation states hold corporations responsible for human rights abuses?'

2 Multinational Enterprises and Corporate Social Responsibility

Corporations are important players on the international stage, as they serve as accelerators of economic development and globalization (Hunya 2012, 1). At the international level, there is still a discussion about corporate social responsibility and what rules should govern MNCs and transnational corporations (TNC). This chapter will explore the role of corporate social responsibility to understand the contemporary issues concerning the regulation of MNCs, and provide an answer to the proposed question 'What is the role of the international community in setting CSR?' Moreover, to understand why it is important to create a regulatory framework, this chapter will focus on the role of MNCs, especially in developing countries, and their engagement in HR violations. Also, it is important to see how the discussion on the international stage (from the early stages) contributed to the creation of the framework for MNC regulation in the field of HR as it is present nowadays.

2.1 The role of Multinational Corporations

According to Dunning and Lundan "a multinational or transnational enterprise is an enterprise that engages in foreign direct investment (FDI) and owns or, in some way, controls value–added activities in more than one country" (Dunning and Lundan 2008, 3).[1] Large MNCs began to develop in the second half of the 19th century, while modern MNCs began to rise in America (US) around the 1880s with the New Jersey legislature, which liberalized regulatory statutes in order to attract corporate licensing fees. This represented a major step in the history of US business (Kinley 2009, 31). Nowadays, they are the most important factor in the process of economic globalization.[2]

The characteristic of MNCs is that they have headquarters in one country, while they operate in another, or several others, through their subsidiaries, while using capital from developed countries in operating and developing (Boundless 2015). They can also engage in joint ventures, especially "with domestic firms located in countries where the TNCs wish to develop an interest, and licensing arrangements whereby a domestic firm produces a TNC's product locally" (Ragan

[1] It is a way to develop foreign operations by "controlling interest in foreign production facilities either by purchasing existing facilities or by building new ones" (Ragan 2005, 1).

[2] Economic globalization is an "increasing economic interdependence of national economies across the world through a rapid increase in cross–border movement of goods, services, technology and capital" (Boundless 2015).

2005, 1). MNCs are characterized by maximizing profits while not paying sufficient attention to the effects that they produce. Their leading motive is escaping the protectionist policies of the importing country and preventing competition. Their presence is significant for developing countries, where they influence the economy by "imposing monopolistic practices, and assert a political and economic agenda on a country" (West's Encyclopaedia of American Law 2005).

On the one hand they contribute to the world's development, while on the other their power and influence enable them to cause great harms. While inflows to developed economies for the past 3 years fell by 28 %, FDI flows to developing economies increased by 2 %–from $639 billion in 2012 to $671 billion in 2013, and $681 billion in 2014. The share in FDI flows that developing counties take in the world economy increased from 45.7 % in 2013 to 55.5 % in 2014 (World Investment Report 2015, 30).

MNCs have a great influence on developing countries, since they are the top investment destinations. For the year 2013,[3] the number one investment destination was developing Asia, with the total inflow of FDI of $426 billion (*ibid.*). The following year developing Asia remained the main destination with FDI inflows of $465 billion, which is a 9 % increase from 2012, and "accounted for nearly 30 per cent of the global total" (*ibid.* 2014, Ch. XIX) (See Figure 2.1). Among other regions, Asia was the only one which had a positive trend in FDI inflows–from $428 billion in 2013 to $465 billion in 2014 (See Figure 2.1).

Figure 2.1: FDI inflows, by region, 2012–2014 (Billions of dollars)

Source: World Investment Report (2015, 4).

[3] Also available in the World Investment Report (2014, Ch. IX).

Nowadays, according to the 2015 Forbes list of top 2000 companies, the most powerful MNCs come from the US and China, where the assets of just the top 10 amount to $17.264 billion. The total worth of the top 2000 was $162 trillion (the assets), combined revenues $39 trillion, profits more than $3 trillion, and market value $48 trillion (See Appendix A) (Forbes 2015). Chevron Corporation, which will be presented in the case study, takes the16th place on the list with the sales of $191.8 billion, profits $19.2 billion, assets $266 billion and market value $201 billion (*ibid.*). If we compare Chevron with Myanmar as a developing country whose GDP is estimated at $74 billion (2015) and GDP per capita at $1,420, we can see that Chevron is more powerful than the country *per se* (Global Finance 2015). A similar situation is often present in other developing countries.

According to the United Nations Conference on Trade and Development (UNCTAD) projections, the global FDI flows in this year should increase by 11.4 %. That applies to both, developed and developing economies. Therefore, developed countries should see the increase in FDI flows by more than 20 % and the FDI inflows to developing countries should rise by 3 %. UNCTAD reported that FDI inflows to developing countries will continue to grow in the following years–more specifically 3.9 % in the following year 2016 and 15.8 % for 2017 which just confirms the MNCs' growing power (See Figure 2.2) (World Investment Report 2015, 21–22). This data shows that MNCs do contribute to the world's development, yet at the same time their considerable economic and political power makes their activities difficult to regulate.

Figure 2.2: Projections of FDI flows, by group of economies (Billions of dollars and per cent)

	Averages				Projections		
	2005–2007	2009–2011	2013	2014	2015	2016	2017
Global FDI flows	**1 397**	**1 359**	**1 467**	**1 228**	**1 368**	**1 484**	**1 724**
Developed economies	917	718	697	499	634	722	843
Developing economies	421	561	671	681	707	734	850
Transition economies	60	81	100	48	45	47	53
	Average growth rates		*Growth rates*		*Growth rate projections*		
Memorandum	*2005–2007*	*2009–2011*	*2013*	*2014*	*2015*	*2016*	*2017*
Global FDI flows	***40.1***	***3.1***	***4.6***	***-16.3***	***11.4***	***8.4***	***16.2***
Developed economies	*48.2*	*3.0*	*2.7*	*-28.4*	*23.8*	*13.9*	*16.7*
Developing economies	*26.1*	*4.8*	*5.0*	*1.6*	*3.3*	*3.9*	*15.8*
Transition economies	*48.0*	*-1.1*	*17.0*	*-51.7*	*-2.3*	*5.3*	*12.3*

Source: UNCTAD.
Note: Excludes Caribbean offshore financial centres.

Source: World Investment Report (2015, 21).

2.2 Corporate Social Responsibility definition

The importance of the concept of 'CSR' is recognized by Emilio D'Orazio. He refers to Scherer and Palazzo, who recognize the importance of social responsibility of businesses (2007, 1096), by stating that CSR "has been used as an 'umbrella term' for all those debates that deal with the 'responsibilities of business and its role in society', including subfields like business and society, business ethics, corporate sustainability, or stakeholder theory" (D'Orazio 2015, 3), as it addresses and identifies the terms which have to be debated.

Early efforts to define CSR, such as the definitions by Davis and Frederick, were too vague and did not provide the basis for academic research. Davis defined CSR as "the firm's considerations of, and response to, issues beyond the narrow economic, technical, and legal requirements of the firm to accomplish social benefits along with the traditional economic gains which the firm seeks" (Davis 1973, 312–313), while Frederick provides a similar definition, in which he includes the "obligation to work with social benefits" (Frederick 1994, 150). The latest definitions provide more bases for academic research, but they are still challenged over the use of language, i.e. terminology, and covering key issues, such as the definition of stakeholders, explanation of the term 'ethical', etc. (Hopkins 2007, 16). For some authors, CSR means the idea of legal responsibility or liability, but for others it means ethical responsibility. Donna Wood provides an 'ethical' definition in terms of Corporate Social Performance, where she defines CSR, in accordance with Wartick and Cochran's definition (1985), "as a business organization's configuration of: principles of social responsibility, process of social responsiveness and observable outcomes as they relate to the firm's societal relationships" (Wood 1991, 693; Hopkins 2007, 16–17), while Goodpaster and Matthews provide a definition of both 'moral and responsible', as they include the 'invisible hand'–where corporations have a moral responsibility to pursue their own interest, the 'hand of the government'–where a government intervention is needed to regulate their behaviour, and the 'hand of management'–where corporations should manage social responsibility by themselves (Goodpaster and Matthews 20014, 132).

By using the definition of Goodpaster and Matthews as the starting point, I argue that the role of the international community, if the failure of this concept occurs, is needed. This issue will be further discussed through the analysis of international mechanisms such as the UN Norms, Global Compact, OECD Guidelines, ILO Tripartite Declaration, and UN 'Protect, respect, remedy', and their implementation. Since there are still different views present nowadays on the topic of CSR, I agree with Votaw's statement that "corporate social responsibility means

something but not always the same thing to everybody!" (Votaw 1972, 25; Garriga and Mele 2004, 51).

2.3 International Corporate Social Responsibility framework setting

After World War II, many developing countries had welcomed FDI, but they changed their attitude during the 1960s. The reason was the growth of MNCs–the increase in their power–and the observation that they are not operating in harmony or in accordance with economic and political objectives (Keller 2008, 5).[4] During the 1960s, the relationship UN–MNCs was relatively harmonious, but after the 1970s the reputation of MNCs came under attack because of the ITT affair.[5] However, "developing countries urged UN to take action to ensure that TNCs better met their needs" (UN Intellectual History Project 2009, 1). That event represented a shift in the UN's rhetoric and emphasized the need for establishing the Codes of Conduct. After recognizing the role of MNCs and the need for their regulation, the UN Economic and Social Council (ECOSOC) established a permanent Commission and the Centre on Transnational Corporations (TNCs) in 1974 to help governments in relation to MNCs and FDI (*ibid.*).

The first attempt of the UN to regulate MNCs' behaviour was made by the UN Centre for TNCs in 1977 by setting the 'Code of conduct', also known as the 'Draft code'. During the first report in 1990, two essential issues were addressed: "the non–interference in the internal affairs in host countries and the standard governing nationalization and compensation" (United Nations Department of Public Inforrmation 1992, 460). In order to reach the agreement on the matter, the General Assembly (GA) in its resolution in 1990 decided to intensify the consultations, but different ideas and standings led to the abandonment of the Code in 1992 (*ibid.*, 460–461). One of the reasons could be found in the fact that during the period of negotiations, developing countries were major recipients of FDI as a source of foreign capital.[6] Even though the Code was abandoned without any enforceable treaty, its power lay in the regulation of corporate responsibility in host countries, with the task to identify the rights and responsibilities of MNCs

[4] By 1990, the total number of MNCs "exceeded 35,000, with more than 150,000 foreign affiliates" (United Nations 1992, 11).

[5] The "operations of the International Telegraph and Telephone Corporation in Chile that led to the toppling and death of President Salvador Allende–and the bribery scandals around the world that were revealed by U.S. Congressional Committees" (UN Intellectual History Project 2009, 1).

[6] According to UNCTAD's World Investment Report in 1992, FDI increased from 30 % during 1981–1985 to 74 % for the period 1985–1990 (United Nations 1992, 1).

and countries in which they operate (United Nations Commission on Transnational Corporations 1983).

Another attempt to set up the framework was made by the Organization for Economic Co–operation and Development (OECD), whose focus was on the behaviour of foreign firms in developing countries with rich resources (Melo and Quinn 2015, 34). In 1976, the OECD presented the 'Guidelines for Multinational Enterprises' (the Guidelines), which were followed by the ILO adopting the 'Tripartite Declaration of Principles concerning Multinational Enterprises' (Tripartite Declaration) in 1977. Both documents, the Guidelines and ILO Tripartite Declaration, recognize the importance of the Universal Declaration of Human Rights (UDHR) as the starting point, and declare that their documents will be in compliance with the Declaration.[7] The ILO Tripartite Declaration was adopted in November 1997, with the aim to minimize/eliminate the difficulties that MNCs produce, and to connect governments and employer and worker organizations in order to make social progress (Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2001, Art. 2–3). Even though it was not legally binding, it served as a soft tool to regulate MNCs' activities. The main aim of the Tripartite Declaration, as Voiculescu and Yanacopulos address, was to encourage a dialog between MNCs and countries in which they operate, and to affect the governments, as well as the MNCs, to change their behaviour (Voiculescu and Yanacopulos 2011, 12–13).

In trying to move away from voluntarism, in 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work, which is based on the following ILO conventions: the Convention on the Freedom of Association and the Effective Recognition of the Right to Collective Bargaining, Elimination of all Forms of Forced or Compulsory Labour, Effective Abolition of Child Labour, and Elimination of Discrimination in Respect of Employment and Occupation (Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1998, Art. 9). The 1998 Declaration represented an important step in regulating corporate social responsibility (CSR), but it still remained a soft regulatory tool.

[7] The Commentary on General Policies in OECD Guidelines declares that the "Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard" (OECD Guidelines 1976, 40). Moreover, ILO Tripartite Declaration requires the concerned parties to "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress" (Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977, 3; *ibid*. 2006b, 3).

On the other hand, the OECD Guidelines (also not legally binding) include the rules of conduct for MNCs–regulation of their economic activities in host countries. Even though the major signatory powers agreed on these principles, the Guidelines have never been transformed into international legal norms. Prior to the revision, they gave absolute priority to States, as they included a statement that enterprises should "respect human rights of those affected by their activities consistent with the host government's international obligations and commitments" (OECD Guidelines for Multinational Enterprises 2008, Art. 2).[8] The revised guidelines in 2000 addressed the obligation of MNCs to comply with international standards (like the UDHR) and the core labour standards by the ILO (like the 1998 ILO Declaration) (OECD Guidelines for Multinational Enterprises 2008, 8).

In the year 2000, when both documents were revised (the ILO Tripartite Declaration and OECD Guidelines), the largest corporate social responsibility framework–the UN Global Compact, become operational on the initiative of United nations Secretary General (UNSG) Kofi Annan (Ruggie 2007, 2). This voluntary initiative was engaged in promoting the "UN principles regarding human rights, labour standards, environmental protection, and anti–corruption" (*ibid.*, 2). This mechanism is still an important tool and includes 10 principles "derived from the Universal Declaration of Human Rights /1948/, International Labour Organization's Declaration on Fundamental Principles and Rights at Work /1998/, Rio Declaration on Environment and Development /1992/ and United Nations Convention against Corruption /2004/" (United Nations Global Compact 2015). This action of creating the Global Compact was significant at the time because it invited MNCs to support and incorporate these "values in the areas of human rights, labour standards, the environment, and anti–corruption" into their work (United Nations Global Compact 2015). Unlike other initiatives, the Global Compact encouraged voluntarism and emphasized its role by serving as a major tool for addressing HR and global market issues and connecting the UN, private sector and Non–governmental organizations (NGOs). "By 2008, the Global Compact had over 5,100 corporate participants and stakeholders from over 130 countries" (UN Intellectual History Project 2009, 3).

After early attempts to set a framework for MNC regulation in the field of HR with the Draft Code and Global Compact, in 2003 the UN Sub–Commission made a step forward by 'moving away from voluntarism' and adopting the 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights' (in the following

[8] See OECD Guidelines (OECD Guidelines for Multinational Enterprises 2008, Ch. II.2).

text: 'the Norms'). As Černič described, the Norms set out responsibilities regarding HR and directly addressed all tension points of the previously 'voluntary CSR': the substance of HR in the document, enforcement and monitoring mechanism, and the issue of stakeholder involvement (Černič 2011, 24). Even though the Norms tried to move away from voluntarism, they included the word 'shall', which signifies only a moral obligation and therefore preserves the voluntary nature of participation. Contrary to previous efforts, the Norms acknowledged the role of the state as the main 'force' by stating that "States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises" (Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 2003, Art. 17). In this way they tried to move beyond voluntarism by imposing 'duties' indirectly on States. The Norms addressed the need for strengthening the legal ground for the implementation of the HR framework for corporations. Nevertheless, the Norms were a far–reaching attempt to set international standards at the time. Different interests prevailed within the Sub–Commission on the Promotion and Protection of Human Rights by business groups (like the International Chamber of Commerce, International Organization of Employers, and certain national governments) and led to rejection of this mechanism (Ruggie 2007, 4).

However, the mandate for producing a comprehensive map of international standards and practices related to MNCs' activities and HR was entrusted to John Ruggie, the UN Secretary–General's Special Representative on Business and Human Rights (SRSG).[9] Under his mandate, numerous documents and reports were produced in order to operationalize the framework (Voiculescu and Yanacopulos 2011, 19). In the final report, his goal was to set non–binding rules for MNCs, in which he succeeded by presenting 'The Guidelines for Multinational Corporations in regard to HR' (2011). They included guidelines for States, companies, and stakeholders, and

[9] The UN Secretary–General's Special Representative on Business and Human Rights has a role: "1. To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; 2. 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; 3. To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity' and 'sphere of influence'; 4. To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; 5. To compile a compendium of best practices of States and transnational corporations and other business enterprises" (Human Rights Resolution 2005/69, 1).

what steps should each of them take to respect HR and prevent risks. These guidelines were incorporated into the three–pillar 'Protect, Respect and Remedy' Framework, which became the first global standard for MNC regulation (United Nations, Office of the High Commissioner for Human Rights 2011, 1).

This chapter presented the nature of corporations and the role that MNCs take in the international community. Besides their strong impact on the world economy, they also make an important contribution to developing countries. The need for their regulation became essential for the international community, so international organizations started with the creation of international mechanisms. The role of the UN was put to the fore with the creation of a diverse regulatory framework for MNCs. Moreover, the Organization for Economic Co–operation and Development (OECD) Guidelines and ILO Declaration showed the extent of developed countries' flexibility in accepting obligations for their MNCs operating abroad. This overview of the evolution of the CSR framework has identified the efforts which contributed to the creation of the contemporary CSR framework on the international level. In the next chapter, I will elaborate the role of the international community by analysing contemporary mechanisms for MNC regulation.

3 Multinational Corporations: Human Rights liability

The current international framework in the field of HR has been challenged by MNCs, as will be demonstrated in the following sub–chapter. Since MNCs engage in numerous bilateral treaties and agreements (See Appendix B), they "pose a regulatory challenge" for the international legal system (Ruggie 2007, 8). The aim of this chapter is to analyse the content of both hard law and soft law instruments for MNC regulation in the field of HR. For that purpose, I will analyse the role of international law/international Human Rights Law while providing the exception–the US Alien Tort Claims Act as an extraterritorial mechanism for bringing complaints for HR abuses. Moreover, I will analyse the Codes of Conduct, Global Compact, 'Protect, Respect, Remedy' Framework and Guiding Principles, ILO Tripartite Declaration, UN Norms, and OECD Guidelines for Multinational Enterprises as relevant soft law instruments. These mechanisms are important to present, as they will show the possible extent of regulating corporate behaviour.

3.1 Human Rights violations by Multinational Corporations

Besides MNCs' strong contribution to the world economy, they also have influence on HR. According to The Europe–Third World Centre (CETIM) research,[10] TNCs have engaged in HR violations–mostly connected with "damage to the environment, child labour, financial crime, inhuman working conditions, ignoring of workers' and trade union rights, attacks on the rights of workers and the murder of union leaders, the corruption and illegal financing of political parties, forced labor, the denial of the rights of peoples" (Ozden 2005, 4–5). While some are directly engaged in these violations, many influence HR indirectly–in the form of a joint venture with governments and the like.[11]

As a response to direct HR violations by MNCs, numerous cases were filed in 1999 against German, American and Austrian MNCs and their subsidiaries for using forced labour and slave labour during World War II, brought under the US ATCA (Ramasastry 2002, 122).[12] As

[10] It is "a research and publication center devoted to North–South relations and an organization active at the UN defending and promoting economic, social and cultural rights, and the right to development" (Europe–Third World Centre 2015).

[11] Except direct and indirect complicity, there is another categorization– 'silent complicity' which "reflects the expectation on companies that they raise systematic or continuous human rights abuses with the appropriate authorities" (Caphalm and Jerbi 2001, 347).

[12] "Over 400 German companies used slave labour made available by the Nazis during the Second World War", and to settle the lawsuits, the German government, together with their MNCs, decided to provide the fund of $5.2 billion for that purpose (Ramasastry 2002, 122).

globalization has made MNCs more vulnerable, more "cases have been filed against companies in extractive industries for their ongoing operations in China /Bao Ge v. Li Peng/, Columbia /Rodriquez v. Drummond Co./, Ecuador /Aguinda v. Texaco, Inc. .../, Nigeria /Kiobel v. Shell and Wiwa v. Shell/", etc. (Schrage 2003, 160).

It is important to mention two cases from 2013 which present the extent of direct liability and were issued concerning Shell Corporation (an Anglo–Dutch MNC). The first included the Dutch Shell Nigeria case, where the plaintiffs (in a few lawsuits) sued the parent company–Royal Dutch Shell for oil spills caused by its subsidiary. This case is representative of the "civil liability claims that have been brought before The Hague District Court in 2008/09" (Enneking 2014, 45). Even though the Hague District Court dismissed the majority of the cases on the basis that the oil spills were the result of sabotage,[13] two cases were left in the procedure (oil spills in 2006 and 2007) for which a subsidiary was held liable and needed to pay compensation for the damage (*ibid.*, 47). The second case (Kiobel v. Royal Dutch Petroleum) also included civil liability claims. The plaintiffs sued a Shell subsidiary for being engaged in HR violations perpetrated by the Nigerian military regime in the 1990s. The case was brought under the New York District Court and later under the US Supreme Court, but it was dismissed on the basis of lacking subject matter (*ibid.*, 49–51). There are many similar lawsuits related to direct liability claims. These presented are among the few cases related to extractive industry, but MNCs in developing countries have also faced numerous charges of HR violations in the branch of the automotive industry, such as the Iwanowa v. Ford Motor case,[14] in supply chain markets, such as Sinaltrainal v. Coca–Cola,[15] and others, the majority of which was dismissed.

As stated earlier, MNCs have also been engaged in HR violations where they implicitly violate HR, like in the cases of Exxon Mobil in Indonesia, Unocal Corporation in Myanmar, and others. In both situations, implicit and explicit violations of HR, the difficulty of MNC regulation lies in the limited liability of their owners, who are accountable only for the corporation's debt

[13] Under Nigerian law, "the operator of an oil pipeline is not liable for harm resulting from oil spills caused by sabotage" (Enneking 2014, 46).

[14] Plaintiff Iwanowa "filed the instant suit on her own behalf and on behalf of a class of thousands of persons who werče compelled to perform forced labour for Ford Werke between 1941–1945"(Iwanowa v. Ford Motor Co 1999) at its Cologne plant while seeking the compensation for the violations of HR. However, "the Complaint is dismissed in its entirety, with prejudice" (*ibid.*).

[15] In 2001, the Columbian trade union Sinaltrainal demanded the compensation of $500 million for the death of a few workers and members of the National Union for Food Industry. The case was filed under the US ATCA and brought before the US District Court, but was rejected because of the lack of subject matter (Harvard Law Review Association 2009, 580–582).

(Černič 2008, 308), leaving behind the violations of HR committed by their subsidiaries (Ruggie 2008, 191). The statement of the president of ABB (ASEA Brown Boveri) Group that he "would define globalization by the freedom for /his/ group to invest where it wants /…/ to produce what it wants /…/ supplying itself where it wants" just confirms that claim (Ozden 2005, 6). This puts an even stronger emphasis on the role of MNCs in the cases of indirect complicity, since it is hard to prove MNCs' engagement in HR abuses and make them liable for their actions. Moreover, the importance of indirect complicity in HR violations is also addressed in the Report of the Special Representative of the Secretary–General John Ruggie on the issue of human rights and transnational corporations and other business enterprises, presented at the Eight Session of the Human Rights Council, in which Ruggie recognized the importance of indirect complicity, "where the actual harm is committed by another party, including governments and non–State actors. Due diligence can help a company avoid complicity" (United Nations, Human Rights Council 2008, 20). Therefore, I will emphasize the role of the indirect complicity of MNCs and the extent of their liability in the case study.

3.2 Hard Law

As written in the Art. 1 (1) of the United Nations Charter (UNC), the UN "determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" (Charter of the United Nations 1945, Art. 1.1). HR are derived from dignity, and MNCs have to respect the minimal International Human Rights (IHR) duties which are incorporated into 'core rights' (such as the right to life, liberty and physical integrity) and 'direct impact rights' (associated with individuals and groups which are the most vulnerable, because the actions of MNCs affect them directly). Labour rights, environmental rights and the rights of indigenous peoples pose a major concern because they are likely to be abused, particularly in developing countries, where state regulation is poor (Kinley and Tadaki 2004, 968). International hard and soft law instruments are important in this regard, as they promote accountability for these abuses.

Hard law can be described as 'culpa tenet suos auctores', a Roman legal principle which means that the only person liable to a fault is he, who is the direct author of it. This is applicable to MNCs in the cases of the abuses of HR. The problem is that International Tribunals as a form of international accountability do not recognize individual accountability for HR abuses under

international law,[16] nor impose liability for such violations. On the contrary, they only acknowledge liability under international criminal law. Until now, there have only been obligations for States as the main actors in the prevention of HR abuses, but MNCs also operate in developing countries with low regulative power. In those cases, such countries are either incapable of protecting HR in relation to business entities, or are involved in violations as joint venture partners with MNCs (Ruggie 2008, 190). Therefore, the question is to what extent current mechanisms can hold MNCs liable for HR violations.

International Human Rights Law (IHRL) as a field of International law lays the obligation to protect, respect, and fulfil HR and fundamental freedoms on States (Weissbrodt and Vega 2007, 146). The obligations to prevent third parties from abusing HR, to facilitate, provide and promote access to rights to rights–holders, and not to intervene with an individual's economic, social and cultural rights (ESCRs), or civil and political rights (CPRs), are binding for the State. While there is an obligation for States to protect HR, there is no international legal obligation and limitation for MNCs in that context. As Wallach states, "the implementation of this duty is left to discretion of states in the exercise of their domestic jurisdiction" (Wallach 2010, 140). When becoming parties to treaties,[17] countries also have duties and obligations set by international law. They are obligated to respect (not to interfere with the enjoyment of HR), to protect (individuals and groups from violations) and to fulfil HR (to take positive actions to ensure the enjoyment of HR) (United Nations Office of the High Commissioner for Human Rights 2015). The UNC also emphasizes "equal rights and self–determination of peoples" and promotes "higher standards of living, full employment, and conditions of economic and social progress and development'' (Charter of the United Nations 1945, Art. 55). In the Preamble it "reaffirms faith in fundamental human rights" (*ibid.*, Art. 3). Its articles 55 and 56 declare that the UN shall respect and promote HR, as well as member states, who will take actions to preserve them. While the UN Preamble reaffirms the essential role of HR, in the 'Declaration on Principles of International Law concerning Friendly Relations and Co–operation among States in accordance with the Charter of the United Nations' the UN also addresses the principle of non–interference by stating that "no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State" (Declaration on Principles of International

[16] International Tribunals such as the International Criminal Tribunal for Rwanda, International Criminal Tribunal for the Former Yugoslavia, and International Criminal Tribunal for Nuremberg.

[17] Such as those under the International Bill of Human Rights.

Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970, Art. 1.1), giving power to the state to deal with MNCs only in those terms.

The General Assembly's adoption of the Universal Declaration of Human Rights on 10 December 1948 and integration of the civil, political, economic, social and cultural rights provided the international human rights framework with a new dimension. It is important to mention that the UDHR contains in its Preamble a principle according to which "every individual and every organ of society /.../ 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" (Universal Declaration of Human Rights 1948, 2). It seems that the UDHR can be read as a group of principles only dealing with HR duties, seeing as only one article (Art. 29) highlights the duties.[18] As Ruggie pointed out, MNCs have the power to affect these rights (Ruggie 2007, 14–16). I argue that this vertical orientation of the UDHR, which casts states as main actors (with the power to determine the implementation of HR within their territory), leads to the issue of HR abuses by MNCs being dependent on states' capability to regulate MNCs.

Besides the provisions of the UDHR, the 1974 Charter of Economic Rights and Duties of States highlights the role of political sovereignty of States in order "to regulate and exercise authority over foreign investment /and/ supervise the activities of transnational corporations within /their/ national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations" (Charter of Economic Rights and Duties of States 1974, Ch. 2, Art. 2). Regarding the UN treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Economic, Social and Cultural Rights (ICESCR), and International Covenant on Civil and Political Rights (ICCPR), we can say that they are imposing duties for businesses in the sphere of general obligations for the protection of HR. Article 2.1 (d) of the ICERD condemns racial discrimination by "any persons,

[18] According to the article 29 Universal Declaration of Human Rights: "(1) Everyone has duties to the community in which alone the free and full development of his personality is possible; (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society; (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations" (Universal Declaration of Human Rights 1948, Art. 29).

group, or organization" (International Convention on the Elimination of All Forms of Racial Discrimination 1965, Art. 2) in each state party. Furthermore, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are addressing stricter commitments for businesses (MNCs), i.e. article 2(e) CEDAW refers to enterprises where it sets the obligations of states to take measures for the elimination of discrimination against women by businesses (Convention on the Elimination of All Forms of Discrimination against Women 1979, Art. 2). General Comment 31 by the HR Committee claims that under the ICCPR individuals would be fully protected if the Covenant protected them also from acts committed by businesses and private persons. However, the Covenant, contrary to the UDHR, does not contain a single provision regarding the duty. "The UDHR, the ICCPR, ICESCR make reference to private actors, but only indirectly: they stipulate that they do not authorize 'any State, group or person' to engage in activity that would infringe international HR" (Macklem 2005, 282). It should be noted that the Committee was the purpose of receiving reports by states in order to confirm their compliance with the Convention and hearing their complaints (Wallach 2010, 143).

Even though these conventions serve as a fundamental framework for human rights law, they are not directly enforceable against MNCs. In response to the cases of HR violations by MNCs, new instruments are still being developed, including: a non–binding extra–legal regulation, the legal regulation of TNC behaviour imposed by states, the institute of civil and criminal responsibility, and the complicity of legal persons in national law in order to prevent, monitor, prosecute and sentence human rights violations by companies (Wawryk 2003, 53–54).

3.2.1 Extraterritoriality: United States Alien Tort Claims Act

As an exception to international mechanisms, extraterritoriality is an important part of MNCs' accountability for HR abuses. In that context, the US Alien Tort Claims Act (ATCA) is a unique 'mechanism' which allows foreign citizens to bring complaints under the ATCA for torts committed "in violation of the law of nations or treaty of the US" (Kinley and Tadaki 2004, 939) and to impose corporate liability under International human rights (IHR) norms (*ibid.*).[19] Similarly, other US federal acts such as the Racketeer Influenced and Corrupt Organizations

[19] The only similar mechanism is the European Union's Regulation 44/2001 of 22 December 2000, but it only applies to member states (Kinley and Tadaki 2004, 940).

Statute (RICO) and the Torture Victim Protection Act (TVPA) also have extraterritorial implications, but only in cases of torture and extrajudicial executions. The conditions under which the ATCA can be invoked are precise: only foreigners can bring an action under the ATCA regardless of whether the domestic remedies are exhausted, which is opposite to the conditions for the TVPA. Moreover, the presented case must be in violation of international law or international human rights law, or more specifically, in 'violation of the treaty' of which the US is a signatory/party, or in violation of customary international law, while environmental violations are excluded (Isa and Feyter 2009, 82). As stated by Stephens and Ratner,

> US federal courts have near–universal jurisdiction. They may hear any civil case: introduced by a foreigner, introduced by a victim of a serious violation of the 'law of nations', or customary international law, in force in the US, regardless of where the crime was committed, regardless of the nationality of the perpetrator (US or foreign citizen), knowing that the defendant in the case must be on US soil when the suit is brought (this is the only connecting factor) (Stephens and Ratner 1996, 9; Worldwide Movement for Human Rights 2010, 181).

As for holding MNCs accountable overseas, this mechanism (extraterritorial legislation) has several limitations. First such limitation is in relation to the interpretation of 'the law of nations'. As S. Joseph argues, while some HR are included (like torture, forced labour, etc.), others are not (like environmental rights, expropriation of private property, etc.) (quoted in Kinley and Tadaki 2004, 940–941). The problem is that the most common violations committed by MNCs, like those against economic, cultural and social rights, are almost excluded. Furthermore, "the utility of the ATCA is limited by the state action requirement" (*ibid.*, 940). The ATCA's rule is that non–state actors can be accountable, but only if they acted together with state officials who relied on their aid, with the exceptions of piracy, slave trading, genocide, and war crimes, for which they can be accountable *per se*. The problem is how to make corporations accountable in the cases where they are acting alone–without state aid and without engaging with state officials. The final limitation is related to the courts and their need to establish "personal jurisdiction over foreign defendants" (*ibid.*, 941), since the ATCA has the authority to do so (*ibid.*). This will be further discussed in the Yadana pipeline project–Unocal/Chevron case study in the following chapter, where the role of the ATCA is essential in the Doe v. Unocal lawsuit.

3.3 Soft law and voluntary mechanisms

Voluntary mechanisms, namely 'Codes of Conduct' (in the following text Codes), are initiatives for businesses which aim to adopt and follow guidelines and codes in order to improve HR standards. They are not legally binding, even though they contain the principles and rules of IHRL, but it is in the interest of business to adopt them (Macklem 2005, 284–285). Mainly, these Codes are written commitments, focused on observing HR in relation to employees and customers, CSR, rule of law, HR, worker's rights, environmental protection, etc. Moreover, the opportunity which 'Codes of Conduct' have and other mechanisms do not is that they can directly impact on the businesses' behaviour by tackling all forms of production, and can therefore identify, more precisely than other mechanisms, the standard that is governing a specific MNC (*ibid.*). Numerous business entities have incorporated 'Codes of Conduct' into their internal codes for conducting business. However, in regard to HR abuses, their prevention lies in developing a strategy by businesses for their regulation (*ibid.*).

3.3.1 Global Compact

The Global Compact (GC) was launched in 2000 by the UN as an initiative for businesses to operate in a responsible and sustainable manner. It does not represent a code of conduct, but a collaborative platform for businesses. It is based on reports and implementation practice which businesses share among them in order to adopt the best practices. The significance of this mechanism is that (unlike other mechanisms) it binds both the signatory corporation and its leadership to follow its principles (United Nations Global Compact Office 2007, 6). The initiative asks corporations to "embrace, support and enact, within their sphere of influence" (*ibid.*; United Nations Global Compact 2015), a set of core HR embraced in 10 principles:

> Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights;
>
> Principle 2: Make sure that they are not complicit in human rights abuses;
>
> Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
>
> Principle 4: The elimination of all forms of forced and compulsory labour;
>
> Principle 5: The effective abolition of child labour;

Principle 6: The elimination of discrimination in respect of employment and occupation;

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: Undertake initiatives to promote greater environmental responsibility;

Principle 9: Encourage the development and diffusion of environmentally friendly technologies;

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery (United Nations Global Compact 2015).

It is important to observe that the first two principles are based on the UDHR, the following three (principles 3–6) on the ILO Tripartite Declaration, while principles 7–9 are based on environmental principles (the Rio Declaration), and the last one (principle 10) on the UN Convention against Corruption (Bauhmann 2009, 32). In regard to businesses and HR, the first two principles are the most important since they highlight the responsibility of businesses to support and protect HR within their sphere of influence, and secure that the corporation is not complicit in HR abuses. The main component of the GC is the Communication on progress (COP), which serves to "advance transparency and accountability; drive continuous performance improvement; safeguard the integrity of GC and UN; and help to build a growing repository of corporate practices to promote a dialogue and learning" (Global Compact Network Belgium 2015).

Taking into consideration the classification of the mechanism, Woods emphasizes its three categories: Learner, which has a one–year status for submitting an incomplete COP; Active, where businesses have to "fulfil minimum requirements" (Woods 2015, 641); and Advanced, in which they also "have to provide information on implementation of the 10 principles, their action in support of UN goals and issues and their sustainability, governance and leadership" (*ibid.*). Their failure to do so would result in a "change in participant status to non–communicating and can eventually lead to the delisting of the participant" (Global Compact Network Belgium 2015), but there is always a possibility to join again.

According to Woods, the mechanism's shortcoming is its voluntary and non–mandatory structure, which often fails to regulate businesses' behaviour. The evidence lies in the GC's membership specifications, which state that even if the member state fails to accomplish the

demands, it can reapply for membership, and that does not prevent the same country from repeating the breaches (Woods 2015, 641–643). In addition, the GC is limited in distinguishing the terms 'sphere of influence' and 'complicity' regarding HR violations–the guidance on measures and reports is lacking penalties for failing to adopt and respect the principles, and is limited in the identification of duties for MNCs as opposed to States (Arnold 2010, 373). Therefore, the most serious critiques address the accountability mechanism, arguing that corporations are free to choose what they like and what to implement.[20] Woods defines the best the Global Compact's accountability 'mechanism' as "the ability of... participants to be answerable to their stakeholders for their implementation actions" (Woods 2015, 644) resting on the duty to annually submit their COP. Besides the obvious lacking accountability mechanism, the Global Compact also lacks a monitoring mechanism which leads to the failure to prevent human rights abuses, while only leaving the option for its members to highlight positive and negative practice in a COP. Nevertheless, the 'distrust' of this mechanism lies in the image of the UN as a tool, since a country can use its flag and be represented as a member without making any changes or progress. It does not guarantee that the same business will not be engaged in 'bad practices' and violations of HR (*ibid.*, 642–645).

3.3.2 'Protect, Respect, Remedy' Framework

In 2011, the Guiding Principles (GP) were endorsed by **UN Human Rights Council in 2011** for implementing Ruggie's 'Respect, Protect, Remedy' Framework. It highlights the State's duty to prevent HR abuses, ensure corporate responsibility to respect HR, and provide access to remedies. The GP includes 31 principles and addresses the duties and obligations of States for their implementation.

[20] The Annual review in 2011 reported that policy implementation is at a much lower level than it should be (Global Compact Implementation Survey 2011, 5).

A) Protect

According to International law, the state is obligated to protect the enjoyment of HR within its territory. It is also responsible to prevent HR abuses caused by MNCs under the same terms, but it is not responsible for abuses abroad. According to the commentary of principle 7, when the host state fails to protect HR "home States /.../ have roles to play in assisting both /.../ corporations and host States to ensure that businesses are not involved with human rights abuse, while neighbouring States can provide important additional support" (United Nations Office of the High Commissioner for Human Rights 2011, 14).

B) Respect

This principle derives from the International Bill of HR and is recognized globally. According to this principle, businesses have to "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; /and/ seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts" (ibid., Art. 13). In answer to the question 'How do MNCs know that they are respecting HR', John Ruggie presented the concept of HR due diligence and included steps for MNCs in order to "identify, prevent, mitigate and account for how they /MNCs/ address their impacts on human rights" (*ibid.*, Art. 15b). The additional request which Ruggie imposes is that MNCs comply with the national law and manage HR risks (Ruggie 2008, 194). This addresses the responsibility of MNCs to conduct timely impact assessments and integrate them in their policies and reports (De Lange 2014, 3).

C) Remedy

Besides the responsibility to protect, the state's duty is also to provide remedies for the victims of HR abuses. According to principle 26, the state's duty is to regulate domestic mechanisms and reduce obstacles (law and other barriers) in order to provide remedies and secure interdependence of the court system and justice, away from the corruption and businesses' pressures on State agents. As Ruggie states, each principle is important: 'The duty to protect' "lies at the very core of the international human rights regime" (Ruggie 2008, 191); 'The duty to respect', "because it is the basic expectation society has of business" (*ibid.*); and 'Access to remedy', "because even

the most concerted efforts cannot prevent all abuse" (*ibid.*). The strongest criticism comes from NGOs, especially Human Rights Watch (HRW), arguing that

> without any mechanism to ensure compliance or to measure implementation /.../ they cannot actually *require* companies to do anything at all. Companies can reject principles without any consequence–or publically embrace them while doing absolutely nothing to put them into practice /.../ they also fail to push governments hard enough to ensure that companies respect human rights (Lackey 2013, 4).

3.3.3 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The ILO Tripartite Declaration (TD) is addressed to "governments as well as to employers and workers and their respective organizations" (Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2006, Art. 1), with the aim to "encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties" (*ibid.*, Art. 2). This Declaration calls upon states to respect labour rights while relying on the UDHR and international covenants adopted by the UN General Assembly. Even though the TD is on a voluntary basis, it is important to analyse how it is linked to setting obligations for MNCs, and how its mechanisms can contribute to the implementation.

Regarding the content of the TD, the first paragraph addresses the obligation to respect and follow the ILO Declaration on Fundamental Principles and Rights at Work and its Follow–up (1998), since it embraces the fundamental obligations and rights such as: freedom of association, the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination (Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2001, 18). While the TD sets numerous HR,[21] the role of the nation state is to apply them. The critique of this mechanism is that there are no safeguards for these rights and no guarantee is provided for the individual to practice these rights and bring complaints (Kinley and Tadaki 2004, 950).

[21] Obligations for states are contained in Art. 8 which states that "all parties /.../ should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles" (Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2006b, Art. 8).

Regarding the implementation, it is divided into 3 parts according to the aim and efficiency. The first part is focused on the efficiency of the Subcommittee on Multinational Enterprises, which was later replaced with the MNE Segment of the Policy Development section of the ILO's Governing Body, whose functions are "to conduct periodic surveys on the effect given to the /.../ Declaration" (Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2001, 5). These surveys serve as a starting point for examining policies and practices in order to make improvements and changes, if needed. Since they are based on confidentiality, it is hard to tell whether MNCs failed to respect HR, and, more importantly, what is the role of the implementation mechanisms, and whether the name of the company must be kept confidential. Černič argues that the implementation of the TD in terms of periodic reports "does not support corporate responsibility, but rather undermines efforts to make corporations to small extent accountable" (Černič 2009, 30), so the mechanisms for periodic reports must be reinforced. The second part of the implementation procedure provides the interpretation procedure. Besides surveys, the request for interpretation of TD must arise "from an actual situation, between parties to whom the Declaration is commended" (Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 2006, 19).The Subcommittee on Multinational Enterprises receives complaints and waits for approval from the officers to provide the interpretation.

The problem which Černič sees is that interpretations "cannot be invoked to challenge violations of national law, international labour conventions and recommendations, or matters falling under the freedom of association procedure" (Černič 2009, 31). That means that it is not necessary to exhaust all domestic remedies before requesting an interpretation. Judicial bodies do not function as regular bodies, but instead serve to clarify the interpretation, which is the reason why they cannot deliver decisions. That is a huge problem for MNCs, since there is no effective monitoring body. Even though there is a lack of awareness of the TD framework,[22] A. Clapham stated that "despite the fact that the Tripartite Declaration contains only recommendations, the Declaration provides material evidence that the international labour law regime has come to include human rights obligations for national and multinational enterprises" (Capham 2006, 216;

[22] Low number of surveys to the ILO Office: "reports from 169 respondents in 100 countries: tripartite partners in ten countries, 65 governments, employers' organizations in 29 countries, and workers' organizations in 45 countries" (Černič 2009, 32).

Černič 2009, 32). All presented issues regarding limited capacity and other problems considered, the only advantage of the TD lies in its universal application.

3.3.4 Norms on the responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights

The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms) "are the first non voluntary initiative accepted at international level" (Weissbrodt and Kruger 2003, 903). Even though they do not have legal standing, the UN Commission on Human Rights, emphasized the role of the Norms by claiming that they contain "useful elements and ideas for consideration" (Budel 2008, 101). Besides the aim to bind the states in a way that would help national governments to adopt and provide mechanisms for implementing the Norms, they also strive to impose obligations on MNCs so that they would "within their spheres of activity and influence /.../ ensure respect of and protect human rights recognized in international as well as national law" (Kinley and Tadaki 2004, 947). The issue is how to make MNCs accountable for any of these obligations (Hillemanns 2003, 1070).

Regarding their content, along with a wide range of HR, the Norms cover labour, environmental, and anticorruption principles and best practices of CSR, while elaborating the legally binding treaties and non–binding guidelines.[23] As Hillemanns states, they represent a "restatement of existing international human rights law, humanitarian law, international labor law, environmental law, anti–corruption law and consumer protection law that already does or should apply to companies' conduct" (*ibid.*, 1070). Under the Preamble, it is stressed that the UDHR shall serve as a starting point to respecting and promoting HR and fundamental freedoms. It should also serve as a ground for making development in international law by imposing obligations and responsibilities. In the first part of the Norms, under the title 'General obligations', states are assigned the duty to promote and ensure the enjoyment of HR and ensure that HR are respected by other actors, such as MNCs. Therefore, as Hillemanns argues, six obligations can be deducted:

[23] Such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and OECD Guidelines for Multinational Enterprises.

1) to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses;

2) to ensure that they do not benefit directly or indirectly from those abuses;

3) to refrain from undermining efforts to promote and ensure respect for human rights;

4) to use their influence to promote respect for human rights;

5) to assess their human rights impacts;

6) to avoid complicity in human rights abuses (ibid., 1073).

The next section deals with the right to equal opportunity and non–discriminatory treatment based on sex, race, language, religion, etc. According to this section, corporations should adjust their policies with national and international law to fulfil the fundamental rights of their workers. Moreover, corporations should abstain from any activities related to international crimes against persons, such as crimes against humanity, genocide, torture, etc. The Commentary of the Norms also adds other possibilities and acts in which MNCs could be engaged and thus contribute to the violation of HR, such as the production and supply of military goods and other activities that could lead to HR abuses (*ibid.*, 1074). The rights of workers are contained in the fourth section, which stipulates that rights should be provided by national and international law, especially by the ILO. Besides the rights of corporations over workers, it also includes the settlement of disputes over collective bargaining agreements (Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 2003, Art. 7–9). The Norms include the respect for national sovereignty and human rights, which are contained in the fifth section. They impose the duties for MNCs to respect national and international law and civil, cultural, economic, political, and social rights in order to fulfil HR (*ibid.*, Art. 10–12). They also contain provisions where MNCs' duty is to ensure safety and quality of their services, and adjust their policies according to standards and laws in order to ensure the preservation of the environment in countries where they operate (*ibid.*, Art. 13).

Implementation, of the highest importance for any operation, depends on the proper mechanism. Besides being required to adopt and implement provisions under the Norms into their rules of conduct and make periodic reports, MNCs also have to include the UN Norms into their trade agreements and business dealings. The fact that the Norms stipulate that MNCs shall be monitored periodically by the UN and other mechanisms, national as well as international,

makes their implementation more successful. They further state that international mechanisms shall provide compensation for HR abuses in cases of violation of this mechanism, but until now the US Alien Tort Claims Act has been the only fully developed mechanism (as will be presented). The issue which arose among States and produced a discussion and disagreement is the issue of imposing liability before the International Criminal Court. For a successful implementation, the Norms have also secured an independent and transparent monitoring system–to 'force' corporations to conduct periodic evaluations in order to become subject to periodic monitoring, and comply with international and national mechanisms. Therefore, the Commission on HR reported that "States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises" (*ibid.*, Art. 17). Implementation under Norms includes monitoring and reporting mechanism that corporations need to follow. In that process are included experts and professionals, as well as country reporters that collect information and then allow business enterprise to respond on allegations, or they take proper steps and measures in cases of violation of the Norms. In that context, the role of States is to reinforce legal framework to ensure that business enterprises comply with the Norms and abide their HR obligations, while the duty of MNCs is to provide reparation for those persons affected in cases of failure (Hillemanns 2003, 1077). Therefore, the implementation of the Norms could produce an effective system/mechanism for corporate liability for HR abuses (*ibid.*, 1074–1077).

3.3.5 Organization for Economic Co–operation and Development Guidelines for Multinational Enterprises

The Organization for Economic Co–operation and Development's Guidelines for Multinational Enterprises (the Guidelines) is another voluntary mechanism for transforming business governance into responsible business conduct aiming to protect and respect HR, while constituting a part of a broader set of obligations contained in the OECD Declaration on International Investment and Multinational Enterprises. The Guidelines are the only instrument formally adopted by state governments with recommendations for MNCs operating on their territory. They impose an obligation on States to establish a National Contact Point (NCP) to ensure a follow–up on the state/domestic level. The role of the Guidelines is best represented by Peter Costello's statement that the "Guidelines are not a substitute for nor should they be

considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non–legal character, particularly concerning the international operation of these enterprises" (Organisation for Economic Co–operation and Development 2000, 32; Černič 2008, 79).

Even though this mechanism does not strictly define the term 'multinational', it applies to all entities within the MNC, which also includes the parent company and subsidiary. Therefore, as the parent company has a duty to comply with the Guidelines and monitor the subsidiary, the subsidiary also has a duty to follow the Guidelines in order to conduct its business in a more ethical and moral way. In respect to Human Rights, this mechanism states that MNCs should "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitment" (OECD Guidelines For Multinational Enterprises 2008, Part 1, Ch. 2, Art. 2). This 'provision' is not clear enough because it leaves space for interpretation. Despite the explanation in the commentary which clearly states that MNCs have to act in accordance with the host state's regulation (both domestic and international), this still depends on the country's engagement and treaty commitments. In addition, the Commentary of General Policies also highlights that the host government has the responsibility to promote HR, but the MNCs operating on its territory also have the duty to uphold its regulation–especially treaty obligations, particularly the Universal Declaration of Human Rights.

The role of labour rights is recognized in the Forth Chapter, where it is written that businesses should "contribute to the effective abolition of child labour /... and/ elimination of all forms of forced or compulsory labour" (*ibid.*, Part 1, Ch. 4, Art. 1) while referring to all principles contained in the ILO Declaration on Fundamental Principles and Rights at Work (1998), Convention 182 concerning the worst forms of child labour, and the principle of non–discrimination (*ibid.*, Part 3, Ch. 1, Art. 22).

The advantage of this mechanism lays in its implementation procedure. In order to implement its principles, there are two mechanisms included for the clarification of the Guidelines: the National Contact Point and OECD Investment Committee, which are combined with the advisory committees of business and labour federations. Each OECD member state has to establish a NCP, which has the role to ensure/monitor the implementation of the Guidelines. The primary responsibility for the implementation is hence on the state government/national level. The

corporation's responsibility is to apply these principles on the quotidian basis, whereas the state government has the role to contribute to the implementation. The role of the Guidelines is to help both the state and corporations deal with the issues covered by the Guidelines (*ibid.*, 30–35). Despite the effort to provide guidance for businesses' behaviour, these provisions are not written in mandatory terms. The voluntary nature of the Guidelines is also confirmed by the International Organization of Employers, International Chamber of Commerce, and Business and Industry Committee to the OECD, who state in their common report, 'Business and Human Rights', that MNCs are "expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent" (International Chamber of Commerce *et al*. 2006, 4). Regardless of its voluntary nature, soft law may develop into a hard law instrument/international treaty.

This chapter highlighted the main mechanisms, both soft–law and hard–law, which regulate corporate actions with regard to human rights. It is evident that international law cannot regulate corporate activities in this regard (with the exception of the US ATCA), but there are numerous voluntary mechanisms that can make an impact on businesses. Even though soft–law mechanisms cannot make MNCs accountable for their actions because of their voluntary nature, some of them include sanctions for noncompliance. In this way, by setting obligations and sanctions for corporations, they make a step forward in CSR. In the following chapter I will test the 'Protect, Respect, Remedy' Framework, which is a global standard in CSR, with the emphasis on the US ATCA in the Doe v. Unocal litigation and the OECD Guidelines, which regulate the corporate behaviour of OECD members.

4 Case study: Yadana pipeline project, Myanmar

The duty of MNCs in host countries is to comply with national laws, but the issue arises when the state is not capable of regulating MNCs' activities. This poses a problem especially in developing countries such as Myanmar because those countries often "lack institutional capacity to enforce national laws and regulations", thus allowing businesses to violate HR (Ruggie 2008, 192). This issue becomes more essential when those violations are committed by the state actors acting together with MNCs in the form of a joint venture, which is exercised in two stages: State and MNC. This case study will present the 'Protect, Respect, Remedy' Framework and elaborate on these two levels. It also includes the Doe v. Unocal lawsuit in order to show the extent of corporate liability for implicit HR abuses, which have continued to occur even after the litigation against Chevron Corporation.

In order to explore the extent of corporate liability, I will firstly present Myanmar's profile and environment in which MNCs operate, and the controversial Yadana pipeline project performed until 2005 by Unocal Corporation, and later by Chevron Corporation. After presenting the subject matter, I will explore the extent of corporate liability by testing corporate compliance with the international standards for CSR while implementing the contemporary international mechanisms, namely the 'Protect, Respect, Remedy' Framework, together with the Alien Tort Claims Act and OECD Guidelines, and consider the role of the Global Compact.

4.1 Myanmar's profile

4.1.1 History

Myanmar (ex Burma), a country in Southeast Asia, was for years under British rule (1826–1948). After the independence in 1948, the country became the 59th member of the UN, and U Nu the first prime minister. During the period 1958–60 the Anti–fascist Peoples Freedom League (AFPFL) ruled the country, but a switch came in 1962, following the removal of U Nu from power and his subsequent replacement with Ne Win and his programme, the 'Burmese way to Socialism'. This programme transformed the society from open to closed, seeing as the newspaper was banned and the aim was to nationalize the economy and create a single–party state (Topich and Letich 2013, 91). The era of military dictatorship ended in 1974, but "Burma continued to be personally exploited by people at the top, while ethnic groups scattered around the country continued to be marginalized" (Myanmar Burma 2015).

The important events that followed were the opening of the border with China in 1988, and formation of the State Law and Order Restoration Council (SLORC),[24] which renamed the country Myanmar, and the capital Yangon (formerly Rangoon). The largest source of SLORC's income, which helped to rule the country and commit terror (such as HR abuses), was provided by the oil corporations operating in Myanmar. Except HR violations, "the junta /State peace and Development Council (SPDC)/ has incorporated drug trafficking into the country's permanent economy, so that Burma now supplies 60 % of the world's heroin and 80 % of that drug sold in Canada. Under the SPDC, Burma has more than doubled drug exports" (Ismi 2001). As a response to such acts, SLORC received strong critiques from various international actors such as the US Congress, UNHRC, ILO, Amnesty International, etc. (Free Burma Coalition 2005).

Concerning that period (1988–1997), the US Office of Foreign Assets Control stated that the Government of Myanmar "had committed large–scale repression of the democratic opposition in Burma, and declared a national emergency with respect to the actions and policies of that government" (Office of foreign assets control 2015, 3), and as a response began to implement its programme for sanctions to Myanmar. Therefore, in 1997 the US banned new investment in Myanmar (*ibid.*, 3). Moreover, in 2003 the US took additional steps to punish the ruling military junta and banned the importation of Myanmar's product into the United States (*ibid.*). The situation in the country changed in 2005, when the government tried to rewrite the constitution, but without success because of the strong opposition of pro–democracy parties. This effort lasted until 2008, when Myanmar finally drafted a constitution and started changing laws and making administrative changes that are still present today (BBC 2015).

4.1.2 Basic information and economy

Myanmar (ex Burma), officially the Republic of the Union of Myanmar is a country in South–East Asia with total 676,578 sq km in size (See Figure 4.1). It is one of the poorest countries in Asia despite its natural resources (such as timber, tin, antimony, zinc, copper, natural gas, hydro–power) (Central Intelligence Agency 2015). Even though its first elections after 20 years took place in 2010, the country still remains under military regime (See Appendix C) (Bertelsmann Stifung 2012, 7).

[24] In November 1997 it was replaced with the State Peace and Development Council (SPDC) (Free Burma Coalition 2005).

Figure 4.1: Myanmar–Summary statistics

Region	South–EasternAsia
Surfacearea (sq km)	676578
Population (est., 000)	53719
Pop. density (per sq km)	79.4
Capital city	NayPyiTaw
Capital city pop. (000)	1016
Currency	Kyat (MMK)

Source: UN Data (2015).

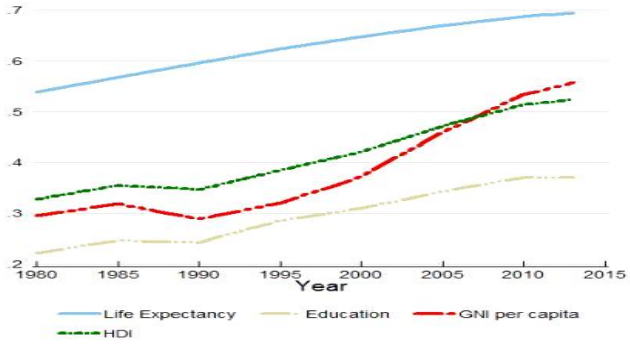
Myanmar's religious structure is manly Buddhist since 89 % of total population practice Buddhism while 4 % are Christian and Muslim (Central Intelligence Agency 2015). According to the Human development index (HDI) indicators contained in the 'Human Development report 2014', HDI value in 2013 was 0.524 which ranked the country at 150th place (out of 187) and marked the country as the poorest one in the region (See Figure 4.2) (United Nations Development Programme 2014, 2–3). In the period form 1980–2013 the HDI value increased by 59.6 %. In the same period the "life expectancy at birth increased by 10.2 years, mean years of schooling increased by 2.3 years and expected years of schooling increased by 2.6 years" (*ibid.*) while the Gross national income (GNI) per capita increased by 468.7 % (See Figure 4.2 and Figure 4.3) (*ibid.*).

Figure 4.2: Myanmar's HDI Trends based on consistent time series data and new goalposts

	Life expectancy at birth	Expected years of schooling	Mean years of schooling	GNI per capita (2011 PPP$)	HDI value
1980	55.0	6.0	1.7	0,703	0.328
1985	56.9	6.2	2.2	0,826	0.355
1990	58.7	5.9	2.4	0,679	0.347
1995	60.5	7.1	2.7	0,837	0.385
2000	62.1	7.5	3.0	1,177	0.421
2005	63.5	8.3	3.4	2,084	0.472
2010	64.7	8.6	4.0	3,423	0.514
2011	64.8	8.6	4.0	3,599	0.517
2012	65.0	8.6	4.0	3,793	0.520
2013	65.2	8.6	4.0	3,998	0.524

Source: United Nations Development Programme (2014, 2).

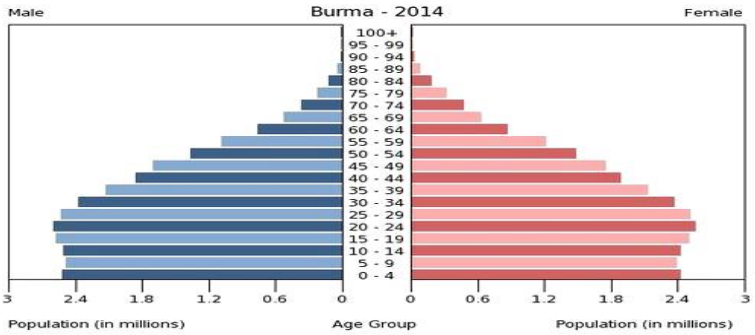
Figure 4.3: Trends in Myanmar's HDI component indices 1980–2013



Source: United Nations Development Programme (2014, 2).

"In Myanmar, 25.6 % of the population lives below the poverty line" (Asian Development Bank 2015) and they mainly live in rural areas. With population of total 53,7 millions, 0.3 % are homeless while 'share of working poor' (below $2 a day) counts 60.8 % (*ibid.*). Regarding the population structure (See Figure 4.4), according to population 'growth rate' statistics,[25] it shows us that form 2010–2015 the number incised annually by 0.8 % of which just 33.6 % live in urban area, while the majority of population (cca. 70 %) live in rural areas (UN Data 2015). According to the GDP Annual growth Rate data, the GDP expanded 7.8 % in comparison to the previous year when was low as 6.5 % (See Figure 4.5), while the GDP in 2014 amounted 64.33$ billions and reached the highest value comparing with the previous years (Trading economics 2015).[26]

Figure 4.4: Population pyramid



Source: CIA World Factbook (2015).

[25] The Central Intelligence Agency 'The World Factbook'

[26] In 2005 amounted 11.99$ billions and incriesed from 45.8$ billions in 2010 to 64.33$ billions in 2014 (Trading economics 2015).

Figure 4.5: Myanmar GDP Annual Growth Rate

Source: Trading economics (2015, 20 September).

The reason that MNCs operate in Myanmar is because of its natural resources. After opening foreign trade for private corporations in 1988, export and import grew rapidly.[27] "Myanmar's exports increased by 6.8 times between 1985 and 2003; during the same period its imports grew by 5.5 times" (Kudo and Mieno 2007, 5). Regarding the trade volume per capita for that period, it "increased from US $25 in 1985 to US $35 in 1990, US $85 in 1995, US $92 in 2000 and US $106 in 2003" (*ibid.* 2009, 106). Because of the gas and natural resources as main export commodities and the engagement of foreign direct investments, "Myanmar's external sector has improved since 2000" (*ibid.* 2007, 1). It is estimated that in 2007 the trade volume was $8.7 billion. That was a result of the Yadana and Yetagun pipelines, since they made 45 % of the export. In addition, in 2007 the oil sector contributed with more than 90 % ($474.3 million) of the FDI.[28]

The GDP per capita for the last three years (2012–2014) amounted to $4,700 (2014 est.), $4,400 (2013 est.), and $4,000 (2012 est.) respectively. In the year 2014, 37.1 % of the GDP went to agriculture, 21.3 % to industry,[29] and 41.6 % to services (CIA Factbook 2015). Exports for the year 2014 amounted to $8.962 billion, and for the year 2013 to $9.022 billion, particularly of the following products: "natural gas, wood products, pulses, beans, fish, rice, clothing, jade and gems" (*ibid.*), with the main trade partners being "China (63 %), Thailand (15.8 %), India (5.7 %)" (*ibid.*) for the year 2014. Imports for the past two years amounted to $12.7 billion (2014 est.) and $9.462 billion (2013 est.), and the import products were: "fabric, petroleum products, fertilizer, plastics, machinery, transport equipment; cement, construction materials, crude oil;

[27] The number of cca. 1000 importers/ exporters in 1989 grew to 2700 in 1990 and 9000 by 1997 (Kudo and Mieno 2007, 5).

[28] 2.1 % of the exports go to Korea, while 2.7 % of the imports come from Korea (Earth Rights International 2008b, 12).

[29] The "industrial production growth rate: 12 % (2014 est.)" (CIA Factbook 2015).

food products, edible oil" (*ibid.*), and main trading partners "China 42.4 %, Thailand 19 %, Singapore 10.9 %, Japan 5.4 %" (*ibid.*) for the year 2014. Regarding foreign investment for the year 2015, China remained the largest investor with 27.5 % ($14.494 million), followed by Thailand, Singapore, Hong Kong, etc. Power (36.34 %, $19.325 million) and oil and gas (31.96 %, $16.993 million) remained the key sectors (Pricewaterhouse Cooperts 2015, 12; *ibid.*).

4.1.3 Corporate and Human Rights regulation

Myanmar's legal system has roots in British law, such as the 1914 Burma Companies Act,[30] since it was a British colony. This Act prohibited foreign investors to become stakeholders, so corporations could not "directly invest in any local Myanmar company /.../ but if a corporation finds a Myanmar company for a good investment, the only suitable option is to partner with that company in a joint venture" (Invest in Myanmar 2015).

Direct foreign investment in Myanmar was prohibited until 1988, but since the adaptation of the Foreign Investment Law foreign investment has grown rapidly,[31] especially from China and South Korea, and later from Western corporations (Squire Sanders 2012, 2). The Foreign Investment Law allows 100 % ownership by foreign companies operating in Myanmar in case of direct investment, but otherwise permits joint–venture projects like "partnerships or limited companies with any individual, firm, cooperative, or state–owned enterprise of Myanmar" (ASEAN–Korea Centre 2004, 1) (such as the Yadana pipeline project) with the requirement that "the foreign capital shall be at least 35 per cent of the total capital" (The Union of Myanmar Foreign Investment Law 1988, Art. 6), with a "minimum investment level /of/ US$ 500,000 for manufacturing /and/ US$ 300,000 for services" (ASEAN–Korea Centre 2004, 4).

Moreover, the Foreign Investment Law established an administrative body for accepting FDI, the Foreign Investments Commission (FIC) (The Union of Myanmar Foreign Investment Law 1988, Art. 24), which was with the adoption of the Myanmar Citizens Investment Law (MCIL) in

[30] Burma Companies Act "contains provisions on key matters such as the registration of companies, the management and conduct of companies' affairs, financial reporting and audit requirements for companies, share capital and capital raising matters, duties of directors and winding up of companies" (Directorate of Investment and Company Administration 2015, 1)

[31] Adopted by the State Law and Order Restoration Council (SLORC) on 30 November 1988; it includes: "the promotion and expansion of exports; exploitation of natural resources that require heavy investment; acquisition of high technology; supporting and assisting production and services involving large capital; opening up of more employment opportunities; development of works that save energy consumption; and regional development" (Squire Sanders 2012, 2).

1994 replaced by the Myanmar Investment Commission (MIC). There are numerous other laws which regulate foreign investment, such as the State–Owned Economic Enterprises Law (1989), Private Industrial Enterprise Law (1990), Myanmar Mines Law (1994), etc. (ASEAN–Korea Centre 2004, 4–5). The fact that Myanmar does not have an environmental law is an important factor in regulating the environmental impacts produced by Unocal and the Yadana project. Moreover, according to the Land Acquisition Act, the government can expropriate the land where it finds the interest to do so, like providing the land for MNCs' activities (Aguirre 2015). In connection to land expropriation, according to the ILO Report, human rights in Myanmar are often abused–particularly labour rights, such as by forced labour, child labour, etc. It is also reported that most killings, torture, and rape were carried out by the Myanmar army (Tatmadaw), which governs the country (*ibid.*).

These violations are even more widespread because of the fact that Myanmar is not a signatory party of most of the HR treaties incorporated into international law. Otherwise, as a signatory party, the country would be bound to respect its obligations postulated by a treaty. While it is a signatory of all women's HR conventions,[32] the Rights of the Child Conventions,[33] and Freedom of Association and Protection of the Right to Organize Convention, it is not a signatory of the majority of treaties such as: the International Bill of Human Rights, Prevention of Discrimination on the Basis of Race, Religion or Belief, Protection of Minorities, Slavery and Slavery–Like Practices,[34] Protection from Torture, Regional Conventions, etc. What is the most important, since MNCs are likely to abuse HR in the field of labour rights, is that Myanmar is not a signatory of any of the forced labour treaties except the Convention concerning Forced or Compulsory Labour (signed in 1955),[35] and therefore is not bound by their norms, which in a sense gives MNCs space to abuse HR (University of Minesota 2015). Myanmar is a party to the Geneva Conventions (ratified in 1992) as the core of humanitarian law, whose common "article 3

[32] Except the Optional Protocol to the Convention on the Elimination of Discrimination against Women (University of Minnesota 2015).

[33] Except the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (*ibid.*).

[34] Except the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (*ibid.*).

[35] Not signed are: the Equal Remuneration Convention, Abolition of Forced Labour Convention, Discrimination (Employment and Occupation) Convention, Employment Policy Convention, Convention concerning Occupational Safety and Health and the Working Environment, and Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (*ibid.*).

sets minimum standards for conflict not of international character, including prohibitions of torture and cruel, humiliating or degrading treatment of those taking no active part in hostilities" (Burma Link 2014). It also ratified the Convention on the Prevention and Punishment of the Crimes of Genocide (ratified 1949) and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (ratified 1957) (The Graduate Institute Geneva 2015).

Besides complying with international obligations, a country has to comply with customary law. In that context, the country voted in favour of the UDHR in 1948, which lists all basic human rights which are incorporated into customary international law. As a member of the Association of Southeast Asian Nations (ASEAN) regional organization since 1967 and the chair for the year 2014, Myanmar has to act in accordance with the Charter, which states that its members have to respect HR and adhere to the rule of law.[36] The fact that the UN listed the country as the most corrupt, since its domestic corporations are governed by the military regime's elite, gives MNCs a favourable ground for HR violations. One of such cases is Union Oil Company of California (Unocal) and its involvement in the Yadana pipeline project. Moreover, most of the economy is controlled by the state *per se* or in partnership with a corporation, like in the Unocal case.

4.2 Yadana pipeline project and Human Rights violations

In 1985, the Ministry of Energy invited foreign companies for oil and gas exploration and invested $2.3 billion in this sector for attracting new investments (Kudo and Mieno 2007, 18).[37] The Yadana pipeline project was carried out at that time by Unocal Corporation in a joint venture with Myanmar's military regime, and later from 2005 by Chevron Corporation. This pipeline project, besides being a great economic contribution for the country, was also a source of serious HR violations, such as forced labour, slave labour, etc., as will be presented in the following text.

4.2.1 Unocal Corporation

[36] The purpose of ASEAN is contained in Art. 1:"to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms". The aim of the ASEAN Intergovernmental Commission on Human Rights (AICHR) is contained in the ASEAN Charter and its Art. 13, where the AICHR has "to uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity and to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties" (The ASEAN Charter 2008, Art. 1–14).

[37] The exports between 1985 and 2003 incresed by 6.8 times and imports by 5.5 times (*ibid.*, 5). The Ministry also invested in other sectors such as manufacture, tourism etc. (Kudo and Mieno 2007, 18–19).

Union Oil Company of California (Unocal), founded in 1890 in Santa Paula, California by Lyman Stewart and Wallace Hardison, was purchased in 2005 by Chevron Corporation. In the early stages of the corporation's development, Unocal decided to expand its business and focus on research, refining, distribution, and marketing.[38] After World War II, when the expansion of foreign markets progressed rapidly, Unocal realized that expansion was necessary for further development and survival on the market. Therefore, in 1997 the company started to expand overseas, mostly in Asia, where it relocated from California as soon as it opened its twin headquarter in Malaysia. The corporation soon became known for its energy projects in Asia and gas pipelines that connected foreign markets.[39] As evidence of the company's development and rapid growth in its power, the Unocal chairman and chief executive officer Roger C. Beach stated that "over the past two years, we have created a new Unocal, with exploration and production making up more than 75 % of our net property and equity investment. We are now the world's largest non–state–owned E&P /exploration and production/ company" (Lawrence and Trolley 2002, 6).[40]

Regarding its investment in Myanmar, the ground for new investment was unstable since the country (Myanmar) was the source of human rights abuses carried out by its military regime. Because of the HR violations at the time of Unocal's signing the contract with SLORC, the US Department of State threatened to impose economic sanctions against Myanmar and ban new investments, as already explained. However, Unocal paid several million dollars (cca. $10 million) to Myanmar's government (Winston 1999, 18) to accelerate the signing of the contract in order to gain the concession and avoid the ban on foreign investment (Free Burma Coalition 2005). Therefore, the Unocal Corporation started to carry out the Yadana pipeline project in 1992 as a shareholder in the project (owned 28 % of shares) (Winston 1999, 17) in partnership with the French oil Company TOTAL and Myanmar's military regime (Earth Rights International 2008b, 18). This project constituted a corridor across the Thai–Myanmar border which carried natural gas (together with the Yetagun project) (Kudo and Mieno 2007, 18).[41]

[38] The reason why UNOCAL decided to expand its business to other countries (such as Myanmar) was mainly because of the rocky ground and heavy oil in Western countries (Lawrence and Trolley 2002, 6).

[39] Including Bangladesh, Azerbaijan, China, Thailand, Turkmenistan, Vietnam, Thailand and Burma

[40] "Unocal sees strong growth from international projects and prospects" (Lawrence and Trolley 2002, 6).

[41] The Yetegun project followed the Yadana pipeline project; it was an offshore gas field in the Andaman Sea.

The role of the Yadana pipeline was to deliver gas to a power plant near Bangkok. The Yadana field was located 43 miles of Myanmar's coast, "estimated to have six trillion cubic feet of gas with a market value of $6.5 billion" (Free Burma Coalition 2005). It was also estimated that it would generate $200 million/year revenue (Winston 1999, 17) with the daily production of 650 million cubic feet (Free Burma Coalition 2005). The project was the biggest business in Myanmar with foreign partners and contributed to renovation projects such as schools, farms, and electricity, but it also brought HR abuses (Marcks 2001, 307–308).

Besides its great contribution to the region, this project brought serious violations of human rights. These violations were reported by numerous NGOs at the time, such as Earth Rights International which was the most active one (as it will be discussed in the following text). As the project developed, the military regime moved forces there "to secure the area for the consortium" (Earth Rights International 2008b, 18). Even though the government agreed to provide the security to the area by establishing the State Law and Order Restoration Council (SLORC) as the ruling body, instead of bringing peace and security it brought HR violations and abuses. These violations were connected with "forced relocation, forced labour, rape, killings, torture and confiscation of property" (Human Rights Watch 2012). SLORC, as the most responsible for these violations, also undertook operations of clearing the ground (removing villagers, burning houses…), all for the realization (i.e. constructing the road for the pipeline) and security of the Yadana pipeline project.

In the early stages of the talks with activists, the statement of Unocal's representative Imle confirmed, albeit not directly, Unocal's engagement in HR abuses by stating: "Let's be reasonable about this. What I'm saying is that if you threaten the pipeline, there's going to be more military. If forced labour goes hand in hand with the military, yes, there will be more forced labour. For every threat to the pipeline, there will be a reaction" (quoted in Lawrence and Trolley 2002, 4). Besides this statement which indirectly confirms the presence of HR violations, the presence of HR violations was also confirmed by a non–governmental organization, the Free Burma Coalition, which reported that

> Since 1991, at least 12 Karen and Mon villages were moved by SLORC to make way for battalion stations and Unocal/Total's field headquarters. Men and women are forced to break rocks and carry dirt to build railways, trenches, and roads for the pipeline security forces, and made to cut trees for lumber to build military bases. As a result people are dying of beatings, malnutrition, sickness and starvation (Free Burma Coalition 2005).

As a response to such acts, rebel groups tried to disturb the project by setting ambushes and launching attacks, but without success. While Unocal Corporation kept denying its involvement in these atrocities, strong criticism came not only from the general public, but also from its stakeholders (Anderson 2000, 465). Even though Unocal Corporation was not directly engaged in HR violations and denied its relationship with HR abuses, it was considered responsible as the government's partner. Unocal was considered responsible for the abuses primarily because of the fact that they occurred because of the project's presence. Unocal's presence in Myanmar resulted in and concluded with a lawsuit that was filed in the US, because at the domestic level there was no functioning judicial system (Earth Rights International 2008b, 18) with the Doe v. Unocal litigation (1994–2005) (as it will be presented in the following chapter) (Anderson 2000, 465).

4.2.2 Chevron Corporation

In 2005, after the Doe v. Unocal lawsuit, Chevron Texaco Corporation purchased Unocal in stocks and shares which valued $18 billion. Since the US government had imposed sanctions on foreign investment in Myanmar, Chevron decided to buy Unocal Corporation in order to expand its business to Myanmar. In that way Chevron avoided ban for foreign investment (imposed by US government) and continued with the Yadana project. From 2005 to 2006 the export of gas to Thailand doubled in price, with the Yadana project contributing half of that income, $1.1 billion, and by 2007 the project brought approximately $969 million annually. Moreover, Chevron's net income for the year 2007 was $18.7 billion, which is more than the GDP in 98 countries today (Earth Rights International 2008a, 8).

Leaving aside the project's contribution as the source of the largest income for the country, it brought human rights violations like the previous company (Unocal). Even though information about the project and the previous company, Unocal Corporation (especially the Doe v. Unocal lawsuit), was not and still is not available on Chevron's website (all data is strictly confidential), its involvement in HR abuses has been highlighted by Earth Rights International (which also

previously contributed to the Doe v. Unocal lawsuit), which has addressed those violations in its reports.[42] Moreover, in 2007, Chevron announced a new advertising campaign, 'Power of Human Energy', where it stressed that it could "provide resources more intelligently and respectively" (Earth Rights International 2008a, 51) and that the Yadana project would help the region meet the energy needs, but these promises did not come through.

At Chevron's annual general meeting on 27 April 2005, activists addressed the abuses related to the Yadana Project. Based on the data collected between 2003 and 2008, Earth Rights International (ERI) outlined these abuses in 2008 and accused Chevron of being involved. According to the ERI reports, Chevron continued to use forced labour and, like the previous company–Unocal Corporation, relied on Myanmar's military regime for securing the Yadana pipeline project. ERI additionally stated that the corporation was indirectly engaged in those violations by supporting the military's use of forced labour, torture, and rape (Earth Rights International 2008a, 3).

The UN General Assembly reacted on overall abuse of HR (including the project) by adopting the resolution 'Situation of human rights in Myanmar', in which it stresses the need "to end the systematic violations of human rights and fundamental freedoms" (General Assembly Resolution 2007, 3) and to take measures for its elimination. Moreover, one year later, the US State Department's report also acknowledged the worsening situation in Myanmar with regard to HR violations, and expressed concern over the use of forced labour, especially children's (Earth Rights International 2008a, 15). Even though the resolution addressed Myanmar's government directly, it has also had an impact on the realization of the Yadana project and Chevron's business, since the corporation acts in a joint venture with the government.

4.3 Yadana pipeline project and the extent of corporate liability

As addressed in the reports, statements, and resolutions, the Yadana pipeline has been a source of HR abuses. This sub–chapter will examine the extent of corporate liability. For that purpose, it will include the 'Protect, Respect, Remedy' Framework, which is used as a global standard in CSR, and the OECD Guidelines, which contain guidelines for corporate behaviour.

[42] Such as 'The Human Cost of Energy' in 2008 (Earth Rights International 2008a).

4.3.1 United Nations Guiding Principles for Multinational Enterprises

4.3.1.1 Protect

Under the first principle ('the state duty to protect HR') it is emphasized that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication" (United Nations Office of the High Commissioner for Human Rights 2011, 3). According to this principle, Myanmar has a duty to ensure the enjoyment of HR within its territory. Nevertheless, the state, which is governed by a military regime, is involved in the abuses of HR, particularly in the field of labour rights, i.e. forced labour, and has failed in the protection of the individual's rights. In its haste to secure the Yadana pipeline project, the state did not take any steps to prevent HR abuses. Moreover, it has systematically denied its relationship with HR abuses, even though numerous Intergovernmental organizations (IGOs) and NGOs, as explained earlier, reported evidence that showed the opposite. Instead of protecting and preventing HR, it has been a source of HR abuses, which were supported by both Unocal Corporation and later Chevron Corporation.

As a result of its failure to protect HR and its engagement in HR abuses, Myanmar was sanctioned by the ILO. Since the 1960s, the country has been called to stop using forced labour after it refused to cooperate with the ILO Commission of Inquiry (Anphoblacht 2001). Moreover, the country failed to comply with the ILO conventions, especially the Convention on the Forced labour, despite being a signatory. Therefore, in 2000 the ILO recommended a number of measures, as it found that Myanmar was not implementing the prior recommendations of the Commission of Inquiry 1998 (International Labour Organization 2012). For that reason ILO adopted several resolutions The UN also drafted several resolutions concerning the situation in Myanmar.[43]

By highlighting the role of the State in the protection of HR, this pillar addresses the need for specific protection, especially where the businesses are controlled or owned by the State, such as the Yadana pipeline case. That means that Myanmar should have adopted the "preventative and remedial measures, including policies, legislation, regulations and adjudication" (United Nations

[43]Such as: Resolution adopted by the International Labour Conference at its 87th Session (Geneva, June 1999) and Resolution concerning the measures recommended by the Governing Body under Art. 33 of the ILO Constitution on the subject of Myanmar, adopted by the International Labour Conference at its 88th Session (Geneva, June 2000).

Office of the High Commissioner for Human Rights 2011, 3) for preventing HR abuses within its territory. Moreover, in the operational principles of the 'Protect, Respect, Remedy' Framework, it is stated that each country should "enforce laws /.../; Provide effective guidance to business enterprises on how to respect human rights throughout their operations; Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts" (United Nations Office of the High Commissioner for Human Rights 2011, 4). As explained in the sub–chapter concerning law and regulations, it is evident that the country failed in law enforcement. It also failed in providing proper law regulations that could be used to secure HR opposed to business entities.

Funding by governments,[44] in 2013 the 'Centre of responsible business' was established as a guidance for businesses to address the HR issues, but the duty to investigate and "redress abuses through effective policies, legislation, /and/ regulations" (*ibid.*, 3) was not fulfilled since Myanmar's legal system, as already presented, has not been capable to prevent HR abuses. On the other hand, the US as the home state of Unocal Corporation, was expected to regulate extraterritorial activities of its companies. Therefore, the role of the US was to ensure Unocal's compliance with HR standards and regulations while operating abroad. Nevertheless, the duty to protect is also recognized by international law, which states that the Government/State has the primary obligation to protect HR. Myanmar not only failed in protecting HR, as it did not create a regulatory framework, but it also "prohibited recourse to judicial remedy" (Aguirre 2015)–as will be presented under the 'Remedy pillar' (*ibid.*).

4.3.1.2 Respect

4.3.1.2.1 Unocal Corporation

Business responsibility to respect HR, which is independent of the state's obligation to uphold its HR obligations, derives from the 11th provision. In that regard, corporations have to conduct "consultation/s/ with potentially affected groups" (United Nations Office of the High Commissioner for Human Rights 2011, 19) and "treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate" (*ibid.*, 25). However, this principle, which is important in minimizing risks for HR violations, was not respected by Unocal

[44]Such as: UK (DFID), Norway, Switzerland, Denmark (DANIDA), Netherlands and Ireland (The Danish institute for Human Rights 2015).

Corporation. Moreover, the corporation ignored the voices of the people whose rights have been abused. Unocal's continuation of the project shows the lack of their interest in respecting HR.

Guided by the moral duty to respect and promote HR, Unocal Corporation incorporated this obligation into its Corporate Code–'Code of Conduct', namely, the 'Code of Conduct for Doing Business Internationally'. Regarding the business in Myanmar, Unocal claimed that their operations would be focused on respecting and protecting HR while improving the lives of the local population. Moreover, the corporation claimed that during the operations they would secure that no HR is violated. Unocal's 'Code of Conduct' included the requirement for the company to "meet the highest ethical standards in all of /... its/ business activities" (Anderson 2000, 497). The code called for the company to:

1. Meet the highest ethical standards in all of our business activities /.../;
2. Treat everyone fairly and with respect /.../;
3. Maintain a safe and healthful workplace /.../;
4. Use local goods and services as much as practical, whenever they're competitive and fit our needs;
5. Improve the quality of life in the communities where we do business /.../;
6. Protect the environment /.../;
7. Communicate openly and honestly /.../;
8. Be a good corporate citizen and a good friend of the people of our host country (*ibid.*).

These principles required Unocal to conduct business in a way that would respect employees, offer equal opportunity for employment and professional advancement, protect the health and safety of its workers, contribute in enhancing people's rights, protect the environment while adopting the host state law in its governance, etc.

However, as ERI reports, these promises brought little improvement to health care and education in Myanmar (Earth Rights International 2008b, 44). The presence of the military around the pipeline area resulted in the decline of the living standard and environmental degradation.[45] United Nations Children's Fund (UNICEF) reported in the documents 'Children

[45] The price of food has doubled; the inflation resulted with incapability of villagers to affor dmedical assistance and education for their children etc. (Gianni 1999, 5). Moreover, "the ecosystems of the Tenasserim Division, considered

and Women in Burma' (1995) and 'The State of the World's Children' (1999) that health problems increased, the malaria caused numerous deaths and the infant mortality rate also increased (in 1999 was 8.1 %) (United Nations Children's Fund 1999, 96).

As we can notice, despite the proof that the company was engaged in most serious violations of HR, the corporation kept taking the stand that HR are respected, with the emphasis on their incorporation into its Code of Conduct. We can see that the company's activity in Myanmar was not consistent with its Code of Conduct, as it was accused of slave labour, torture, rape, and other HR violations and did not impose the duty to adhere to the existing laws and norms (Anderson 2000, 496). The 11th provision further requires that businesses "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (United Nations Office of the High Commissioner for Human Rights 2011, 13). Unocal Corporation had the duty to report such abuses, but this mechanism of 'early warning' was not applicable in practice. Therefore, the Guidelines failed in this regard.

Moreover, the Guidelines include "a requirement for human rights due diligence /that/ is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights" (*ibid.*, 7), such as the Yadana pipeline project. This also imposed the duty on Unocal to take additional steps and collaborate with the State agencies where appropriate in order to protect HR. The role of due diligence was important in this context, as it includes steps to "prevent and mitigate adverse human rights impacts" (*ibid.*, 20). This includes conducting impact assessments while incorporating important findings into the corporation's policies, but in Myanmar most of these steps have been just symbolic–Unocal was symbolically engaged in this process–the company avoided to provide reports and other information related to the project that could harm its interest (the project).

4.3.1.2.2 Chevron Corporation

Regarding the duty to respect HR, Chevron in its 'Business and Ethic Code' clearly stated that "Chevron's Human Rights Policy reaffirms our long standing support for universal human rights. We condemn human rights abuses. This commitment is encompassed in The Chevron Way vision

bythe World Wide Fund for Nature to be one of their 200 globally significant ecosystems, have been seriously affected by the construction of the pipeline" (*ibid.*, 13).

and values and other corporate policies that ensure that we operate safely and responsibly and in compliance with applicable laws and regulations" (Chevron 2014, 9).

Even though it condemned HR violations in its Business Code, there have been numerous reports that clearly state differently–that the company has engaged in violations of HR. Besides ERI's reports, such reports have also been provided by other organizations, such as Human Rights Watch, Amnesty International, etc. To eliminate those claims, Chevron adopted the 'Human Rights Policy' in 2009, which replaced the 'HR Statement'. In this document the company listed all duties and responsibilities regarding human rights because it recognized the role that corporations have in respecting and ensuring the enjoyment of HR by stating that "although governments have the primary duty to protect and ensure fulfilment of human rights, Chevron recognizes that companies have a responsibility to respect human rights and can also play a positive role in the communities where they operate" (*ibid.*). Moreover, Chevron highlighted that it would conduct its business in compliance with the UDHR, ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration), and other international principles, such as the Voluntary Principles on Security and Human Rights,[46] as addressed in principle 17 of the Guidelines.

In conducting business in Myanmar, the company has continued to violate HR in relation to forced labour. The UDHR, based on which the company is conducting its business, in Art. 4 sets the list of specific rights, where the emphasis is on slavery interpreted as forced labour.[47] Moreover, forced labour is also prohibited under the ILO Declaration. Even though the ILO Declaration states that the primary responsibility of elimination of forced labour is on States, the issue arises where the state's military regime is directly engaged in using forced labour. In that context, Chevron has been aware of such issue, but it still continues with the project and is thus contributing to the creation of the issue. In this regard, the concept of due diligence (often addressed as a human rights risk) is important in acquiring new business and thus accepting new obligations (Giersch 2013).[48] According to this principle, in regard to the acquisition of Unocal,

[46] Similar to the Global Compact, but it only gives specifications for security and HR, without mechanisms for their implementation and monitoring.

[47] "UNHCHR defines contemporary slavery as including debt bondage, serfdom, forced labour, child labour and child servitude, trafficking of persons and human organs, sexual slavery, children in armed conflict, sale of children, forced marriage and the sale of wives, migrant work, the exploitation of prostitution, and certain practices under apartheid and colonial regimes" (Peterson 2010).

[48] "In corporate law, due diligence is the process of conducting an intensive investigation of a corporation as one of the first steps in a pending merger or acquisition /…/ understanding all of the obligations of the company: debts,

Chevron had to be aware of all information relating to the company and its risks, as it needed to comply with the concept of due diligence. Therefore, in the process of acquiring Unocal, Chevron needed to check all the activities of the company as well as those information and activities related to their business partners, non–State and State entities, and their suppliers. Chevron was introduced to all the issues regarding Unocal's violations of HR, and instead of securing HR protection, it has continued with the practice of forced labour. Following due diligence, the corporation should have minimized the risk of its involvement in HR abuses. Had it followed the steps of the concept of due diligence, the corporation could not have said that it did not know of HR violations and the actions of its subsidiaries. Despite its engagement in the protection of HR by the creation of HR policies and participation in several voluntary mechanisms, including the Voluntary Principles on Security and Human Rights, the corporation has continued its project in Myanmar with violating HR.

4.3.1.3 Remedy

The Guideline's principle 25 defines states' duty to "take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy" (United Nations Office of the High Commissioner for Human Rights 2011, 27). Besides the 'Protect, Respect, Remedy' Framework, this principle is also contained in the UDHR (Art. 8) and Covenant on Civil and Political Rights (Art. 3). According to this principle, there are two levels of analysis of the compliance with this principle, home state and host state, which are responsible to ensure access to remedy.

4.3.1.3.1 Home State and access to remedy (Doe v. Unocal)

Regarding the home state regulation (the US), the remedy is secured by domestic courts with the application of the US ATCA. The ATCA is responsible for the extraterritorial complaints in regard to HR against US corporations. Since a lawsuit under domestic legislation in Myanmar was not an option, the plaintiffs in the Doe v. Unocal case, represented by ERI, brought the case

pending and potential lawsuits, leases, warranties, long–term customer agreements, employment contracts, distribution agreements, compensation arrangements" (US Legal 2015).

under the US ATCA in 1994. The case was settled in 2005 with the compensation to the plaintiffs.

A) Plaintiffs' Claims

The plaintiffs claimed that Unocal "was liable for torts committed against them by the Myanmar's military for the benefit of the Yadana project" (Marcks 2001, 309). The accusations also regarded the expropriation of property, relocation of villages by the defendants, use of forced labour, and other HR abuses (*ibid.*).[49] Therefore, they sought damages for:

> violation of the Racketeer Influenced and Corrupt Organizations Act ('RICO'); forced labor; crimes against humanity; torture; violence against women; arbitrary arrest and detention; cruel, inhuman, or degrading treatment; wrongful death; battery; false imprisonment; assault; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence per se; conversion; negligent hiring; negligent supervision; violation of California Business and Professions Code at 17200; injunctive and declaratory relief (Yale Law School 2015).

On the other hand, Unocal denied its engagement with SLORC in HR abuses and claimed that the case should be dismissed.

B) Procedure

During the procedure, two conflicting decisions emerged in determining the subject of liability. Regarding the first decision, the case was brought under the US District Court of California in 1997. In determining the subject of liability, the court first considered the state actor requirement for ATCA claims upon Unocal's motions "to dismiss for failure to state a claim" (Ramasastry 2002, 134) and Unocal's motion for summary judgment, then decided to proceed with the case (*ibid.*, 132–134). The court, chaired by Judge Paez, stated that Unocal could be held accountable under public international law if the plaintiffs proved that Unocal had acted with Myanmar's military regime, and on that basis, it could also be held accountable independently for using forced labour (*ibid.*). In explanation, the court noted that private actors could be liable under international law where state action is absent by referring to the Karadzic decision:

[49] Such as murder, assault, rape, etc.

"participation in the slave trade violates the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals" (*ibid.*, 133).

In the continuance of the lawsuit, the allegations of forced labour were supported by the fact that "the private defendants /.../ have paid and continued to pay SLORC to provide labour and security for the pipeline, essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labour" (US District Court 1997), and the court therefore concluded that these allegations "are sufficient to constitute an allegation of participation in slave trading under ATCA" (*ibid.*). Unocal filed a complaint (a motion to dismiss) while denying its relationship with forced labour and putting emphasis on a strictly business relationship with SLORC, which the court rejected on the basis that "Unocal and its officers knew or should have known about SLORC's practices of forced labour and relocation when they agreed to invest in the Yadana gas pipeline project, and that, despite this knowledge, they agreed that SLORC would provide labour for the joint venture" (*ibid.*). After the failure of Unocal's motions to dismiss for failure to state a claim, the lawsuit proceeded in 2000 with motions for summary judgement before the US Court of Appeals for the Ninth Circuit. Oppositely from the previous judgement, the Ninth Circuit Court dismissed the case. During the process, the Ninth Circuit Court started with the analysis of the historical presence of Unocal in Myanmar from the 1990s. It acknowledged that the military regime had used forced labour to construct the roads for the pipeline project by noting that "according to the deposition testimony of plaintiffs and witnesses, the military forced plaintiffs and others, under threat of violence, to work on these projects /.../ and to serve as porters for the military for days at a time" (Ramasastry 2002, 134). Moreover, the court referred to an ILO report from 1998 which addressed the non–compliance by Myanmar with the ILO conventions, of which the most important is the Forced Labour Convention No. 29, which prohibits the use of forced labour. The use of forced labour or 'modern slavery', as the plaintiffs addressed it, presents the violation of the *ius cogens* norm. Still, the court dismissed the lawsuit despite the evidence "that forced labour was being utilized and that the Joint Venturers benefited from the practice" (Ramasastry 2002, 136).

The court's decision was based on the analysis of the US Military Tribunal (USMT) proceedings during World War II concerning the use of forced labour.[50] In application of the

[50] "In reaching its decision, the Tribunal acknowledged that the German slave labour program was created and supervised by the Nazi government, and that it would have been futile and dangerous for these defendants to have objected" (Ramasastry 2002, 136).

analysis to the Unocal case, the court addressed the free will of participation in the Yadana project, as noted in the USMT proceedings. Regarding Unocal's liability, the court put more emphasis on the direct vs. indirect impact, as described in the Flick Case,[51] where Unocal "must have taken active steps in cooperating or participating in the forced labour activities" (*ibid.*, 137). In the end, the District Court dismissed the case on the basis that there was "no evidence that Unocal 'participated in or influenced' the military's unlawful conduct /... or/ 'controlled' the Myanmar military's decision to commit the alleged tortious acts" (Doe v. Unocal Corp. 2000, Section 3, Part 3; Ramasastry 2002, 138) even though the corporation shared the military's goal in order to secure the project's continuance. That decision was made on the basis of 'colour of law' and the joint participation of Unocal Corporation and Myanmar's military in HR abuses, and therefore, the liability of the corporation *per se*. After the decision, "the plaintiffs appealed the dismissal of the international human rights claims under the /Alien Tort Statute/ ATS to the United States Court of Appeals for the Ninth Circuit" (Earth Rights International 2015) while the defendants still asked for the dismissal of the entire case.

In 2002, the US Court of Appeals for the Ninth Circuit reversed the District Court's decision and decided to proceed with the case because it determined that the plaintiffs had presented enough evidence for a trial. The trial started in 2003 with Judge Chaney presiding. The Judge, by way of explaining the conditions for establishing the ground for liability (plaintiffs must prove the level of control), stated that "plaintiffs' failure to prove eradication of the subsidiaries' separate personalities does not preclude from proving defendants controlled specific aspects of the Yadana project to an extent beyond that permissible by a mere owner" (Los Angeles Superior Court 2004, 7). Thereupon she set a trial for June, but Unocal decided to settle the lawsuit by compensation to the plaintiffs (Earth Rights International 2015).

4.3.1.3.2 Host State and access to remedy

Regarding the host state, the role of Myanmar's government is to ensure under its legal system (national criminal, civil, and administrative law) the domestic means for the liability of MNCs. However, it is hard to bring corporations to justice. Access to remedy has posed a problem for victims of HR abuses in Myanmar, especially for those violations connected with land rights/land

[51] "In the Flick Case, Weiss took active steps with the knowledge and approval of his superior to procure forced labourers so that the company could increase its production quota" (Woodsome and White 2002, 25).

acquisition, since the judiciary lacks the capacity to deal with those cases. Moreover, there have been several challenges to securing the remedy, such as the imbalance of power which resulted in the incapability of the legal system to guarantee fair trial. Moreover, the judicial system is not independent from the authority, and there is no efficient access to remedy. "Multinational corporations argue that cases should proceed in the courts where the abuses took place, rather than where they are headquartered. But local victims cannot always afford or obtain representation and local judiciaries frequently lack the independence to adjudicate these cases credibly against powerful investors" (Ganesan 2012). In conclusion, as presented in the chapter concerning law and regulations in Myanmar, it is obvious that the state failed to secure remedy and thus failed in compliance with the Remedy principle.

4.3.2 Organization for Economic Co–Operation and Development: Guidelines for Multinational Enterprises

Even though Myanmar is not an OECD member, complaints can be brought by MNCs registered in a member country. The National Contact Point serves as a mediator among parties. The United States, as a home country of both Unocal and Chevron, is a member of the OECD, and its commitment to comply with the OECD goals and standards also applies to its MNCs. This means that Chevron as a US corporation has to follow the OECD goals and has a responsibility to follow its initiatives, such as the OECD Guidelines. The principle which is particularly significant to the corporation's business in Myanmar falls under the General policies, which state that enterprises have to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments" (OECD Guidelines For Multinational Enterprises 2008, 14). This principle sets the obligation for corporations to collaborate with the government in order to meet the highest standard in HR protection. However, this principle has been violated by both Myanmar's government and Chevron Corporation, since they have been engaged in HR violations.

The Guidelines also impose the obligation for corporations to contribute to "economic, social and environmental progress" (*ibid.*) in order to achieve sustainable development which is recognized internationally–in Brundtland Report, Rio Declaration, and UN Agenda 21.

According to Section 3 (1),[52] Chevron Corporation has failed in disclosing information and consulting with the community regarding the Yadana project. This has affected the community near the Yadana pipeline, which has faced serious health issues, environmental degradation, and increasing poverty, as the military forced the local communities to grow foods for them and stole their money. Moreover, the project caused environmental degradation that affected the wildlife and forests. Consultation with local communities is of great importance, since their participation is essential in reaching the goal of sustainable development.

The Guidelines also assign the duty for MNCs to "respect HR of those affected by their activities consistent with the host governments' international obligations and commitments" (OECD Guidelines For Multinational Enterprises 2008, 14). That provision emphasizes the role of Myanmar's international law obligations, both customary and treaty, which also applies to non–state actors. Hence Chevron, while operating in Myanmar, needs to respect this duty. Some of these obligations address the use of child labour, rape and other forms of sexual violence, destruction of livelihoods, and forced labour carried out by the military (Earth Rights International 2008b, 26). Forced relocation, an important issue in the Yadana pipeline project, is contained in the Guiding Principles on Internal Displacement, which include the obligation for states to protect indigenous peoples, minorities, and other groups against displacement, and are recognized as the normative framework for that purpose (Earth Rights International 2008b, 27).

As a member of the UN and a party to the UN Charter, Myanmar has a duty to promote and respect HR and fundamental freedoms. As a party to CEDAW and the Convention on the rights of the child (CRC), it has a duty to ensure legal protection for the rights of women and protect the rights of children. Moreover, in regard to forced relocation, it has to ensure that every minor will be "free from arbitrary or unlawful interference with his or her privacy, family, or correspondence" (Convention on the rights of the child 1989, Art. 16a). This provision prohibits forced relocation, and a duty of the State is to ensure it, instead of abuse it. However, the Yadana pipeline project is included in the controversy surrounding the breach of the Guidelines by the participating parties. Chevron and Myanmar's government are directly linked to the abuses of HR, with Myanmar still not following its international obligations. The failure to ensure HR

[52] "Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance" (OECD Guidelines for Multinational Enterprises 2008, Section 3, Art. 1).

means that Chevron neglected the obligations under section 2 (1) and 2 (2) of the Guidelines and therefore failed to manage the risk of HR abuses.

Under the third section of the Guidelines, MNCs are encouraged to "ensure that timely, regular, reliable and relevant information /…/ regarding their activities" (OECD Guidelines For Multinational Enterprises 2008, Part 1, Section 3, Art. 3). This stresses the obligation of transparency, which is also recognized by the Global Compact,[53] Global Reporting Initiative, and other transparency initiatives. Both Myanmar and Chevron failed to fulfil their obligation of providing information, for they have never reported nor provided information to the local community. Chevron has also failed in reporting the financial situation, especially regarding the payments to the military regime, which, according to the Guidelines, has to be disclosed to the public (Earth Rights International 2008b, 33).

The provision under which MNCs have to contribute to the elimination of forced labour is particularly significant. It is contained in the Forth Chapter, which determines that corporations should eliminate and prevent the use of forced labour while respecting labour regulations, law, and international labour standards (OECD Guidelines for Multinational Enterprises 2008, Part 1, Section 4, Art. 1c). Prohibition of the use of forced labour is recognized not only by the Guidelines, but also customary international law, in the international treaties like the ICCPR, Rome Statute, and ILO Conventions. Myanmar, by ratifying the Convention Concerning Forced or Compulsory Labour, committed not to "impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations" (Convention concerning Forced or Compulsory Labour 1932, Art. 4), therefore it has to secure that no MNC is involved in such acts On the national level, Myanmar's law also prohibits the use of forced labour, and as a result of its awareness of this issue, in 2000 the Ministry of Home Affairs equalled forced labour with a criminal offense.[54] Under the same direction, specifically under clause 6, it further explained that "any person who fails to abide by this order shall have action taken against him under the existing law" (International Labour Organization 2015).

The US NCP, which is a part of the Bureau of Economics, Energy and Business Affairs, has received numerous complaints and recommendations, especially from Human Rights Watch,

[53] Businesses have to, in respect to the 10 principles, promote HR, labour rights, environmental protection, and transparency.

[54] Direction of state peace and development council, Supplementing Order No. 1/99– 35 (Government of the Union of Myanmar 1999).

stating that the US NCP "has missed many opportunities to hold multinational companies accountable for meeting the OECD's human rights, environmental, labour, and other social responsibility benchmarks" (Human Rights Watch 2010). Except Myanmar's role to uphold its international law obligations, the US NCP failed to address and take action regarding Chevron's breaching of the principles contained in the Guidelines. In addition, the Universal Periodic Review (UPR) stated that the US NCP not only failed in the case of Myanmar, but also "has not been effective in implementing the OECD guidelines" (Centre for Constitutional Rights *et al.* 2010, 5) in general, since "no successful resolution of any U.S. NCP complaint is known" (*ibid.*).

4.3.3 Final remarks

It is clear that the Yadana pipeline project *per se* does not present an unlawful action, but it has provided grounds for HR abuses by providing support and finances to the military regime. Regarding the lawsuit, in the section 'colour of law', the court did not take into consideration financing as a factor of Unocal's participation nor ground for liability. It is also important to stress that both Myanmar and Unocal benefited from the Yadana project, and thus were both involved in accusations. Nevertheless, the court could have applied the Tadic case,[55] under which Unocal would have been liable for having control over the relevant units; however, even if Unocal had supplied the military, it would have been hard to prove the *mens rea* requirement for its participation in HR abuses. Of all cases brought under the Alien Tort Claims Act, Doe v. Unocal proceeded furthest and it represents a case which proves that compensation can be provided under ATCA (Mongoven 2006).

This lawsuit presents a far–reaching process in corporate responsibility and suggests that corporations can be liable for HR abuses, no matter if acting alone or in a joint venture with the government/military regime. Therefore, I support Ruggie's claim that the US ATCA "can be used globally to identify egregious human–rights violations" (quoted in Mongoven 2006) and that this case can serve as an inspiration to international law to formulate rules for corporate liability. Leaving aside the lawsuit, which presented the extent of corporate liability, it is important to mention that both Unocal and Chevron have systematically violated international mechanisms

[55] According to the Tadic case (paragraphs 131 and 137) "/.../ it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity /…/ The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions /…/" (Klip and Sluter 2001, 979–980).

while not complying with them. Besides failing to comply with international norms and being sanctioned because of the presence of HR violations, Myanmar as the host country has also failed to provide a legislative framework for HR protection. In testing the OECD Guidelines, we can see that the Chevron Corporation did not comply with most of the provisions, while the United States, in its role as the home country, did not provide any response to its noncompliance. Furthermore, the UPR has been declared as ineffective in general, not just in Myanmar's case.

Besides the OECD mechanism, it is clear that the 'Protect, Respect, Remedy' Framework did partially influence corporate accountability in regard to the role of the home state to provide remedy. As with the OECD Guidelines, the Chevron Corporation has not complied with the requirement to respect HR in spite of the fact that the provisions to protect HR are incorporated into the Corporate Code. This shows how mechanisms for corporate liability cannot prevent such abuses from MNCs. I believe that as an outcome of the Yadana project's presence, Myanmar started with a revision of the Constitution and other administrative regulations and laws in 2008 in order to strengthen the national law. By now we can see that it is well on the way towards corporate regulation in the country.

Conclusion:

As we can notice, the international community made efforts by setting corporate social responsibility (CSR) norms and guidelines to enhance MNCs' responsibility for human rights. Even though their content is not designed to make corporations accountable because of their voluntary nature, they are a step forward in setting obligations for respecting human rights.

The first part summarized the development of CSR, while the second part elaborated its essential mechanisms. However, we can see that neither the international mechanisms nor international law specify MNCs' accountability in the field of human rights violation, although some provisions may be seen as applying, but not yet used. At the very beginning, these mechanisms faced criticism and some of them failed from the start, such as the UN Norms, even though that the very mechanism could have made a huge difference in terms of accountability. The presented US mechanism, the Alien Tort Claims Act, implemented in the case study, takes the essential role for that purpose, since it took the Doe v. Unocal case farthest. Unfortunately, this mechanism is only applicable to the US corporations operating abroad, while international mechanisms still fail to enforce corporate accountability. Nevertheless, this case study showed the extent of corporate accountability and the role of international mechanisms.

In regard of the case study, we can emphasize the distinction between the domestic and international framework in setting the accountability mechanisms in the case of Unocal/Chevron. The role of the domestic judiciary system and the role of the state to protect are put under scrutiny by applying the UN 'Protect, respect, remedy' Framework. Even though this obligation of the state to protect is set by international law and other mechanisms as well as treaties, the obvious result is the failure of states to comply with international standards. It is evident that international mechanisms lack the enforcement procedure in order to hold corporations responsible for further HR abuses. Even though the Doe v. Unocal lawsuit resulted in extrajudicial settlement, it did not prevent or make an example of the corporation to stop violating HR. Even though there was no final verdict, by equalling forced labour with slavery (which is forbidden under *jus cogens*) it suggested that Unocal Corporation could have been found guilty in this process. This presents a huge step towards corporate liability. Moreover, we can also presume that Chevron did know all facts and circumstances related to Unocal, but it did not stop using forced labour and thus violating HR. It is also evident that the company is not complying with the OECD Guidelines, and that the role of the home state, the US, has not been fulfilled in that regard. It is also presented that the company failed to comply with the ILO

standards. Regarding the 'Protect, Respect, Remedy' Framework, the company also fails in this case since the Myanmar's military is still engaged in HR violations together with Chevron, the respect of HR under Chevron's code of conduct is not being realised and Chevron also failed in due diligence. Still, the remedy for victims falls under the State's obligations, but until now (even though the judiciary system is facing its transformation) it has not provided a system for accountability. According to ERI "Chevron remains vulnerable to liability for the abuses committed by the associated security forces" (Earth Rights International 2008, 4) due to its involvement in the Yadana Project.

This thesis provided the answer to the research questions set at the beginning: 'What is the role of the international community in setting corporate social responsibility in the area of human rights' and 'To which extent can the international community/nation states hold corporations responsible for human rights abuses'. The role of international community is explained and analyzed in the first two chapters with setting the framework for regulating corporate behaviour. The role of international community is the establishment of mechanisms that regulate corporate behaviour which serve also as a tool for regulating corporate liability.

The answer on the second research question lies in the case study analysis where these mechanisms were tested. The case study presented the non–compliance of both corporations with international mechanisms, but also showed the power of US ATCA which was used in Doe v. Unocal litigation and thus presented the extent of international mechanism for corporate liability. Even though that Unocal Corporation paid the compensation to the victims, this case showed that corporations can be accountable for human right violations. Unfortunately, this mechanism (US ACTA) can be used only for bringing complaints against US corporations, but I believe that establishment of similar mechanism that could be used globally (e.g. tribunal) can produce success in corporate accountability. Besides the contribution of international mechanisms in setting the ground for corporate regulation, their failure in protecting human rights (exception US ATCA) and ensuring enforcement mechanisms for accountability is evident and confirms my hypothesis that 'existing framework for corporate regulation is not directly enforceable against corporations and does not provide grounds for their liability'.

Povzetek magistrskega dela v slovenskem jeziku

Vprašanje kršitve človekovih pravic s strani korporacij igra pomembno vlogo pri regulaciji mednarodnih korporacij. Nekatere raziskave kažejo, da korporacije pogosto ignorirajo socialni vidik korporativne dejavnosti, medtem ko se osredotočajo na čim večji dobiček in tako (ne)posredno kršijo človekove pravice (Wallace 2014, 386). Take kršitve se pogosto nanašajo na prisilno delo, delo otrok, zatiranje pravice do svobode združevanja in govora, kršitve okoljskih pravic in podobno (Dhnarajan in Metheven 2014, 14). Te kršitve so še bolj očitne v državah v razvoju, ki pogosto niso zmožne uvesti pravnih sankcij za kršitve človekovih pravic, zlasti za kršitve, ki so implicitno storjene s strani korporacij. Tudi obstoječa mednarodna ureditev na področju človekovih pravic je državno usmerjena, saj je v skladu z mednarodnimi pravom. Le–to namreč določa, da so države glavni dejavniki in nosilci človekovih pravic, vendar jih pogosto ne uspejo zaščititi (Duruigbo 2008, 2).

V zadnjih letih so se z vprašanjem korporativne odgovornosti za zlorabo in kršitve človekovih pravic ukvarjali številni mednarodni akterji od vlad, organizacij za človekove pravice, nevladnih organizacij, poslovnih skupin, Združenih narodov, Organizacije za ekonomsko sodelovanje in razvoj do Mednarodne organizacije za delo in drugih akterjev (Dhnarajan in Metheven 2014, 6–7). Nujnost za ureditev korporativnega obnašanja se je leta 1974 začela izražati s spremembami v retoriki mednarodnih institucij ter z vzpostavitvijo Centra Združenih Narodov za transnacionalne korporacije. Temu je sledila priprava kodeksa o transnacionalnih korporacijah, leta 1977 (znan kot 'Osnutek kodeksa') (United Nations Commission on Transnational Corporations 1983). To je bil prvi poskus urejanja korporativne dejavnosti z nalogo ugotavljanja pravic in odgovornosti korporacij in držav gostiteljic, vendar je bil opuščen leta 1992 (Mujih 2012, 125–135). Še en poskus vzpostavitve režima na področju tujih naložb je izdelala Organizacija za ekonomsko sodelovanje in razvoj leta 1976 s smernicami za multinacionalna podjetja (Organization for Economic Co–operation and Development 2008, 29). Smernice so del Deklaracije Organizacije za ekonomsko sodelovanje in razvoj o tujih naložbah in multinacionalnih družbah (*ibid.*, 9–11). Leto dni kasneje je Mednarodna organizacija za delo sprejela 'Tristransko deklaracijo' o načelih za multinacionalna podjetja (International Labour Organization 2006a, 19). Vse te pobude so bile zasnovane na prostovoljni osnovi, zato so leta 2003 Združeni narodi poskušali narediti korak naprej. Želeli so se oddaljiti od prostovoljstva z normativi glede odgovornosti nadnacionalnih družb in drugih podjetij za človekove pravice (Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003). Le–ti določajo odgovornosti v zvezi s človekovimi pravicami in neposredno obravnavajo vse napetosti in

vprašanja prejšnjih 'prostovoljnih družbenih odgovornosti podjetij': bistvo človekovih pravic v mehanizmih in dokumentih, izvajanje in spremljanje le–teh ter vprašanje vključevanja deležnikov (Ruggie 2007, 828). Še en poskus Združenih Narodov je pobuda Global Compact 2000 (Global Compact Network Belgium 2015), ki služi kot platforma za dialog med podjetji in civilno družbo. Ta prostovoljna pobuda se ukvarja s spodbujanjem načel Združenih Narodov o varstvu človekovih pravic, delovnih standardih, varstvu okolja in boju proti korupciji (Hillemans 2003, 1069). Čeprav je tem pobudam manjkalo širše mednarodno priznanje, so prispevale k razvoju določanja standardov za korporacije, saj bolj jasno opredeljujejo, kaj je treba storiti. Kot rezultat tega procesa so leta 2011 Združeni Narodi podprli vodilna načela za izvajanje okvira 'Zaščita, Spoštovanje, Rešitev', ki služi kot globalni standard za preprečevanje zlorab človekovih pravic povezanih s korporacijami (Evans 2010, 740). Čeprav so te pobude prispevale k večji ozaveščenosti za urejanje delovanja multinacionalnih korporacij, niso zagotovile pravnega okvira za odgovornost. Prav tako tega ne zagotavlja mednarodno pravo, ki določa, da so države glavni nosilci odgovornosti za zaščito in zagotavljanje človekovih pravic. Delovanje in odgovornost korporacij niso njegov neposredni predmet (Karavias 2013, 82). Problem neobstoječega mednarodnega režima v primerih kršitev človekovih pravic je bistvenega pomena v državah v razvoju, kar je prikazano tudi v študiji primera, ki predstavi implicitno odgovornost pravnih oseb za zlorabo in kršitve človekovih pravic.

Študija primera prikazuje projekt plinovoda Yadana, ki ga korporacija Unocal izvaja skupaj z vlado v Mjanmaru. Prvi del študije je posvečen korporaciji Unocal in tožbi Doe v. Unocal, v kateri so bile kršitve človekovih pravic povezane z življenjskim standardom, prisilnim delom, pravico do preživetja z delom in pravico do zdravja. Unocal je kršil ne samo pravico do življenja, ampak tudi dostojanstvo osebe, ki predstavlja osnovo za vsako človekovo pravico. Ta primer je pomemben za obravnavo implicitne korporativne odgovornosti za kršitve človekovih pravic, prvič vložene na podlagi ameriškega zakona 'Alien Tort ClaimsAct'. Proces se je zaključil z zunaj–sodno odškodnino tožnikom leta 2005. Študija primera je zato pomemben mejnik v smeri implicitno–korporativne odgovornosti in odgovornosti podjetij za splošno zlorabo človekovih pravic, saj je Unocal plačal odškodnino.

Magistrsko delo temelji na naslednjih raziskovalnih vprašanjih:

Kakšna je vloga mednarodne skupnosti pri oblikovanju družbene odgovornosti gospodarskih korporacij na področju človekovih pravic?

V kolikšni meri lahko mednarodna skupnost/nacionalne države krivijo korporacije za kršitve človekovih pravic?

Varstvo človekovih pravic je primarna odgovornost države kot glavnega akterja v skladu z mednarodnim pravom o varovanju človekovih pravic. Ko korporacije delujejo v državah v razvoju, domača zakonodaja teh držav pogosto ne nalaga sankcij multinacionalnim korporacijam v primeru raznih kršitev. To pomanjkanje poudarja potrebo po mednarodnem odzivu in mednarodni ureditvi. Prav zato je pomembno obravnavati vlogo mednarodne skupnosti pri določanju odgovornosti korporacij. Študija primera pokaže, do katere mere mednarodna skupnost smatra, da so korporacije odgovorne za kršitve človekovih pravic. Čeprav obstaja režim za odgovornost korporacij, moja hipoteza v magistrski nalogi poudarja, da odgovornost korporacij ni neposredno izvršljiva in mednarodni režimi niti ne dajejo ustrezne podlage za njihovo odgovornost. Da torej dobim odgovor na raziskovalna vprašanja, bom v nalogi analizirala primarne vire kot so konvencije, deklaracije (najpomembnejše so tiste Združenih Narodov, Organizacije za ekonomsko sodelovanje in razvoj ter Mednarodne organizacije za delo), določbe mednarodnega prava in sekundarnih virov. Uporabila bom različne metodološke instrumente za odgovore na raziskovalna vprašanja. Magistrska naloga bo torej razdeljena na tri dele.

V prvem delu bom zagotovila pregled literature s poudarkom na opredelitvi, definiciji in vlogi multinacionalnih korporacij in družbene odgovornosti podjetij. Tu zajamem tudi razvoj mednarodnega okvira z namenom, da predstavim razvoj pobud in mehanizmov za zagotavljanje družbene odgovornosti podjetij s strani mednarodnih organizacij. Poglavje pomeni osnovo za naslednja poglavja. Uporabila sem analitične metode za analizo primarnih in sekundarnih virov ter analizo koncepta družbene odgovornosti korporacij in povezala vse to z obnašanjem korporacij. Tako ugotavljam odgovornost korporacij za kršitev človekovih pravic.

V drugem delu analiziram mednarodne mehanizme za družbeno odgovornost korporacij. V analizo zajamem tako imenovano 'trdo' pravo (mednarodno pravo/mednarodno pravo človekovih pravic, zakone in ameriški zakon 'Alien Tort Claims Act') in mehanizme 'mehkega' prava ustreznih akterjev kot so: Združeni Narodi, Mednarodna organizacija dela in Organizacija za gospodarsko sodelovanje in razvoj. Cilj tega poglavja je predstaviti vsebino različnih mehanizmov ter hkrati tudi predstaviti pozitivne in negativne strani vsakega, da bi dobili

odgovor, v kolikšni meri so korporacije odgovorne za zlorabo in kršitev človekovih pravic. Za doseganje cilja uporabim analizo primarnih virov in deskriptivno metodo. To poglavje bo služilo kot osnova za izvajanje mehanizmov, vsebovanih v naslednjem poglavju.

Prvi dve poglavji odgovorjata na prvo raziskovalno vprašanje 'Kakšna je vloga mednarodne skupnosti pri oblikovanju družbene odgovornosti gospodarskih družb na področju človekovih pravic'. Tretji del je bistvenega pomena, saj predstavlja preizkus mednarodnih mehanizmov na študiji primera 'projekt plinovoda Yadana' v Mjanmaru. Tu testiram skladnost in kompatibilnost delovanja korporacij z mednarodnimi mehanizmi ter ugotavljam, do katere mere so lahko korporacije odgovorne za kršitve človekovih pravic. Za doseganje tega cilja predstavim profil Mjanmara, ki vključuje zgodovino, ekonomijo in druge predpise države ter okolje, v katerem delujejo korporacije. Naslednje podpoglavje bo posvečeno projektu plinovoda Yadana in kršitvam človekovih pravic, najprej v zvezi z Unocal korporacije in kasneje s korporacijo Chevron, ki pojasni svojo vlogo v projektu in vpletenost v zlorabe človekovih pravic. Zadnje podpoglavje je posvečeno izvajanju mednarodnih mehanizmov, in sicer vodilnih načel Združenih Narodov za večnacionalne družbe (okvir 'Zaščita, Spoštovanje, Rešitev') in smernic Organizacije za gospodarsko sodelovanje in razvoj. Znotraj prvega okvira 'Zaščitita' sem preučila vlogo Mjanmara pri zaščiti in varovanju človekovih pravic. Drugi okvir 'Spoštovanje' je namenjen analizi korporativne skladnosti z obveznostjo spoštovanja človekovih pravic. Prikaz tretjega okvira 'Rešitev' pa vključuje predstavitev tožbe Doe v. Unocal, kjer predstavim vlogo ameriškega zakona ATCA in obseg odgovornosti korporacije Unocal za implicitno zlorabo človekovih pravic. Drugi mehanizem, vključen v tem podpoglavju, bodo smernice Organizacije za gospodarsko sodelovanje in razvoj, kjer ugotavljam obseg skladnosti z obveznostmi v okviru tega mehanizma, tako s strani korporacije *per se* in s strani domovine, in sicer Združenih držav Amerike. V analizi bom uporabila poročila, končno sodbo primera ter primarne in sekundarne vire mednarodnih mehanizmov. To poglavje bo zaključilo celotno raziskavo in pomagalo zagotoviti odgovor na raziskovalno vprašanje 'V kolikšni meri lahko mednarodna skupnost/nacionalne države krivijo korporacije za kršitve človekovih pravic'.

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APPENDIX:

APPENDIX A: The World's Biggest Public Companies

Source: Forbes 2015

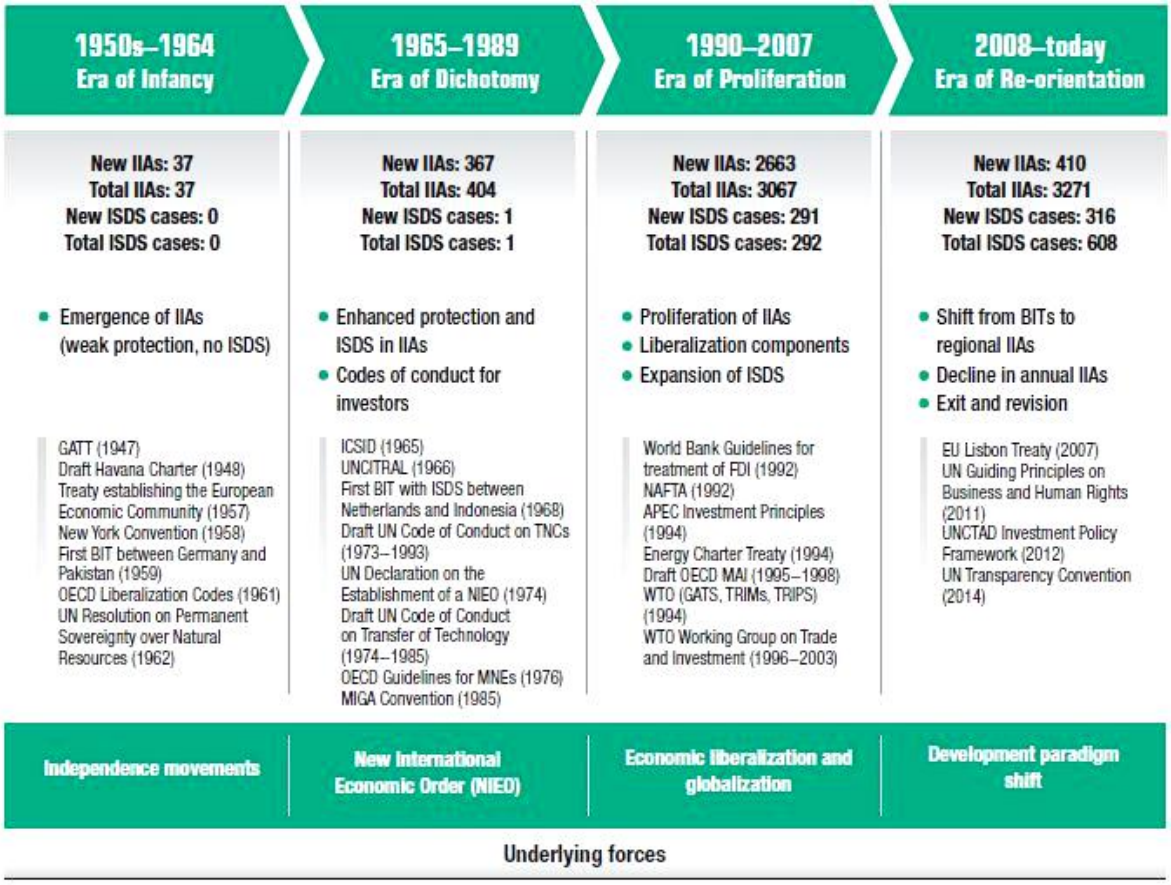
	Rank	Company	Country	Sales	Profits	Assets	Market Value
	#1	ICBC	China	$166.8 B	$44.8 B	$3,322 B	$278.3 B
	#2	China Construction Bank	China	$130.5 B	$37 B	$2,698.9 B	$212.9 B
	#3	Agricultural Bank of China	China	$129.2 B	$29.1 B	$2,574.8 B	$189.9 B
	#4	Bank of China	China	$120.3 B	$27.5 B	$2,458.3 B	$199.1 B
	#5	Berkshire Hathaway	United States	$194.7 B	$19.9 B	$534.6 B	$354.8 B
	#6	JPMorgan Chase	United States	$97.8 B	$21.2 B	$2,593.6 B	$225.5 B

	Rank	Company	Country	Sales	Profits	Assets	Market Value
	#7	Exxon Mobil	United States	$376.2 B	$32.5 B	$349.5 B	$357.1 B
	#8	PetroChina	China	$333.4 B	$17.4 B	$387.7 B	$334.6 B
	#9	General Electric	United States	$148.5 B	$15.2 B	$648.3 B	$253.5 B
	#10	Wells Fargo	United States	$90.4 B	$23.1 B	$1,701.4 B	$278.3 B
	#11	Toyota Motor	Japan	$252.2 B	$19.1 B	$389.7 B	$239 B
	#12	Apple	United States	$199.4 B	$44.5 B	$261.9 B	$741.8 B
	#13	Royal Dutch Shell	Netherlands	$420.4 B	$14.9 B	$353.1 B	$195.4 B

	Rank	Company	Country	Sales	Profits	Assets	Market Value
	#14	Volkswagen Group	Germany	$268.5 B	$14.4 B	$425 B	$126 B
	#15	HSBC Holdings	United Kingdom	$81.1 B	$13.5 B	$2,634.1 B	$167.7 B
	#16	Chevron	United States	$191.8 B	$19.2 B	$266 B	$201 B
	#16	Wal–Mart Stores	United States	$485.7 B	$16.4 B	$203.7 B	$261.3 B
	#18	Samsung Electronics	South Korea	$195.9 B	$21.9 B	$209.6 B	$199.4 B
	#19	Citigroup	United States	$93.9 B	$7.2 B	$1,846 B	$156.7 B
	#20	China Mobile	China	$104.1 B	$17.7 B	$209 B	$271.5 B

APPENDIX B: Bilateral investment trade agreements timeline

Source: World Investment report (2015)



Source: UNCTAD.
Note: Years in parentheses relate to the adoption and/or signature of the instrument in question.

APPENDIX C: Myanmar country profile

Source: UN Data (2015)

Economic indicators			
GDP: Gross domestic product (million current US$)	2013	63031	
GDP: Gross domestic product (million current US$)	2010	41518	
GDP: Gross domestic product (million current US$)	2005	11931	
GDP: Growth rate at constant 2005 prices (annual %)	2013	7.5	
GDP: Growth rate at constant 2005 prices (annual %)	2010	10.2	
GDP: Growth rate at constant 2005 prices (annual %)	2005	13.6	
GDP per capita (current US$)	2013	1183.5	
GDP per capita (current US$)	2010	799.5	
GDP per capita (current US$)	2005	237.8	
GNI: Gross national income per capita (current US$)	2013	1183.1	
GNI: Gross national income per capita (current US$)	2010	799.5	
GNI: Gross national income per capita (current US$)	2005	237.8	
Gross fixed capital formation (% of GDP)	2013	35.7	
Gross fixed capital formation (% of GDP)	2010	22.9	
Gross fixed capital formation (% of GDP)	2005	12.7	
Exchange rates (national currency per US$)	2013	988.00	Official rate.
Exchange rates (national currency per US$)	2010	5.58	Official rate.
Exchange rates (national currency per US$)	2005	5.99	Official rate.
Balance of payments, current account (million US$)	2013	-1128	
Balance of payments, current account (million US$)	2010	1574	
Balance of payments, current account (million US$)	2005	582	
CPI: Consumer price index (2000=100)	2013	166	Index base 2006=100. 2012.
CPI: Consumer price index (2000=100)	2010	156	Index base 2006=100.
CPI: Consumer price index (2000=100)	2005	297	

Environment			
Threatened species	2014	285	
Forested area (% of land area)	2012	47.7	
Proportion of terrestrial and marine areas protected (%)	2014	4.1	
Population using improved drinking water sources (%)	2012	86.0	
Population using improved sanitation facilities (%)	2012	77.0	
CO2 emission estimates (000 metric tons and metric tons per capita)	2011	10440/0.2	
Energy supply per capita (Gigajoules)	2012	13.0	

Social indicators			
Population growth rate (average annual %)	2010-2015	0.8	
Urban population growth rate (average annual %)	2010-2015	2.5	
Rural population growth rate (average annual %)	2010-2015	<	
Urban population (%)	2014	33.6	
Population aged 0-14 years (%)	2014	24.5	
Population aged 60+ years (females and males, % of total)	2014	9.5/7.9	
Sex ratio (males per 100 females)	2014	94.4	
Life expectancy at birth (females and males, years)	2010-2015	67.1/63.0	
Infant mortality rate (per 1 000 live births)	2010-2015	48.9	
Fertility rate, total (live births per woman)	2010-2015	2.0	
Contraceptive prevalence (ages 15-49, %)	2007-2013	46.0	
International migrant stock (000 and % of total population)	mid-2013	103.1/0.2	Refers to foreign citizens.
Refugees and others of concern to UNHCR	mid-2014	1184001	Stateless persons population refers to persons without citizenship in Rakhine State only.
Education: Government expenditure (% of GDP)	2007-2013	0.8	
Education: Primary-secondary gross enrolment ratio (f/m per 100)	2007-2013	78.8/78.0	
Education: Female third-level students (% of total)	2007-2013	55.3	
Intentional homicide rate (per 100,000 population)	2008-2012	15.2	
Seats held by women in national parliaments (%)	2015	6.2	