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Covenants and Corporations*

Abstract

Traditionally understood, human rights law is designed to provide protection to individuals from arbitrary use of state power. States, however, are not the only powerful actors that can impact the enjoyment of human rights. It has increasingly been observed that business activity can have detrimental human rights effects. Yet, international human rights law has been slow to react to the challenges posed by corporations. Human rights instruments are primarily directed towards states. The two major universal covenants on human rights —the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are no exception. Although the recent commentary issued by the treaty bodies of the two Covenants acknowledge the role potentially played by private actors within the framework of human rights protection, their jurisprudence does not extend the obligations to the actors beyond the state. States are under the obligation to regulate abuses by private entities and are usually encouraged to do so domestically through legislation and adjudication. As such, the article surveys the decisions of domestic courts in which the contents of the two Covenants have played a role in defining the human rights obligations of corporations directly. In one of its landmark decisions, the US Supreme Court has characterized the ICCPR as 'being of little utility'. However, the district courts have not followed this dicta and found the Covenant to ascertain norms of international law with a potential reach to private and non-state actors. Examination of the cases across different jurisdictions reveals that the two Covenants play a relevant role despite their limited scope.

Résumé

Selon l'approche traditionnelle, les droits de l'homme sont consacrés à la protection des individus contre l'utilisation arbitraire du pouvoir d'État. Cependant les États ne sont pas les seuls à pouvoir influencer de manière négative les droits de l'homme. De plus en plus souvent ces derniers subissent également les effets désavantageux des activités économiques. Pourtant le droit international des droits de l'homme ne réagit que lentement aux défis lancés par les entreprises. Les instruments du droit international des droits de l'homme s'exercent en priorité contre les États. Les deux instruments universels les plus significatifs -le pacte international relatif aux droits civils et

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politiques (PIDCP) et le pacte international relatif aux droits économiques, sociaux et culturels (PIDESC)- ne font pas exception. Bien que le commentaire le plus récent publié par les organes des deux pactes reconnaisse l'influence en puissance des acteurs privés sur le domaine de la protection des droits de l'homme, leur jurisprudence n'étend cependant pas les obligations à d'autres acteurs que ceux de l'action étatique. Les États ont le devoir de réguler les abus du secteur privé et sont en général encouragés à le faire de manière interne, au moyen des lois et de la jurisprudence. Ainsi l'article suivant analyse les décisions de juridictions nationales dans lesquelles le contenu des deux pactes cités ci-dessus joue un rôle direct dans la définition des obligations faites aux entreprises en matière de droit de l'homme. Dans l'une de ses décisions de principe la Cour suprême des États-Unis a considéré le PIDCP comme présentant "peu d'utilité". Cependant, les cours fédérales de district n'ont pas suivi cette décision et ont considéré que le pacte recèle des normes de droit public international possédant l'aptitude à être étendu au secteur privé ainsi qu'aux acteurs non étatiques. L'analyse des cas de ces diverses juridictions révèle que les deux pactes, bien que possédant un domaine d'application restreint, jouent un rôle non négligeable.

Zusammenfassung

Nach traditionellem Verständnis dienen die Menschenrechte dem Schutz des Einzelnen vor dem willkürlichen Gebrauch staatlicher Gewalt. Allerdings haben nicht nur Staaten die Macht, das Ausleben von Menschenrechten zu beeinflussen. Zunehmend ist zu beobachten, dass wirtschaftliche Tätigkeiten nachteilige Auswirkungen auf die Menschenrechte haben können. Dennoch reagiert die internationale Menschenrechtsordnung nur langsam auf die Herausforderungen durch die Unternehmen. Das menschenrechtliche Instrumentarium richtet sich in erster Linie gegen Staaten. Die beiden bedeutendsten universellen Menschenrechtspakte – der Internationale Pakt über bürgerliche und politische Rechte (IPbpR) und der Internationale Pakt über wirtschaftliche, soziale und kulturelle Rechte (IPwskR) bilden dabei keine Ausnahme. Obwohl der jüngste Kommentar, welchen die Vertragsorgane der beiden Pakte erlassen haben, die potentielle Rolle privater Akteure im Rahmen des Menschenrechtsschutzes anerkennt, erstreckt ihre Rechtsprechung die Verpflichtungen nicht auf Akteure über den staatlichen Bereich hinaus. Die Staaten sind verpflichtet, Missbräuche privater Einrichtungen zu regulieren und werden für gewöhnlich dazu ermutigt, dies innerstaatlich durch Gesetzgebung und Rechtsprechung zu tun. In diesem Sinne untersucht der Beitrag die Entscheidungen innerstaatlicher Gerichte, in denen die Inhalte der beiden Pakte eine unmittelbare Rolle bei der Definition von menschenrechtlichen Verpflichtungen von Unternehmen spielten. In einer seiner Grundsatzentscheidungen hat der US Supreme Court den IPbpR als „von geringem Nutzen" charakterisiert. Allerdings sind die district courts dieser Einschätzung nicht gefolgt und haben festgestellt, dass der Pakt völkerrechtliche Normen mit einer potentiellen Ausdehnung auf private und nichtstaatliche Akteure feststelle. Die Untersuchung der Fälle über verschiedene Jurisdiktionen hinweg zeigt, dass die beiden Pakte trotz ihres eingeschränkten Anwendungsbereichs eine relevante Rolle spielen.

I. Introduction

Traditionally understood, human rights law is designed to provide protection to individuals against arbitrary use of state power.[1] States, however, are not the only actors that can impact the enjoyment of human rights. International organisations,[2] insurgent or rebel groups,[3] companies,[4] and private individuals[5] can all have detrimental impacts on human rights. Corporations in particular, have been implicated in various human rights abuses ranging from denial for freedom of movement[6] to child labour,[7] human trafficking,[8] torture,[9] and killings.[10] Yet, international human rights law has been slow to react to the challenges posed by corporations. Human rights instruments are primarily directed towards states. The two major universal covenants on human rights—the International Covenant on Civil and Political Rights (ICCPR)[11] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[12] are no exception.

The ICCPR, the ICESCR and the optional protocols thereof, together with the Universal Declaration of Human Rights are referred collectively as the International Bill of Human Rights and they represent authoritative statements of international human rights norms.[13] The two Covenants were opened to signature and ratification in 1966, and entered into force in 1976, when the necessary thirty-five ratifications had been received. Currently, there are 168 and 164 state parties to the ICCPR and ICESCR respectively. Both Covenants have treaty bodies that are committees of independent experts that monitor implementation of the treaties and are created in accordance with

1 M Freeman, *Human Rights: An Interdisciplinary Approach* (2011), at 15..
2 J Wouters et al., *Accountability for Human Rights Violations by International Organizations* (2010)..
3 A Roberts and S Sivakumaran, "Lawmaking By Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law" *Yale J. Int'l L.* (2012)..
4 S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004). N. MCP Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (2002)., D Kinley and J Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations At International Law," *Virginia Journal of International Law* (2004)., MT Kamminga and S Zia-Zarifi, *Liability of Multinational Corporations Under International Law*, (2000). J.L. Cernic and T. van Ho, *Human Rights and Business: Direct Corporate Accountability for Human Rights,* (2015).
5 *Kadic v Karadzic,* 70 F.3 d 232 (2nd. Cir. 1995).
6 *Yeo and ors v Nippon Steel & Sumitomo Metal*, Judgment on remand from the Supreme Court, 2012 Na 44947.
7 *Flomo and 22 additional child plaintiffs v Firestone Natural Rubber Company*, LLC, Appeal judgment, 643 F3 d 1013 (7th Cir 2011).
8 *Doe v. Nestle et. Al,* SA, 748 F. Supp. 2 d 1057 (C.D. Cal. 2010).
9 *Saleh and ors v L-3 Communications Titan Corporation and ors*, Decision on Motion to Dismiss, 436 F.Supp.2 d 55 (D.D.C. 2006).
10 *Wiwa and ors v Royal Dutch Petroleum Company and ors*, Motion to dismiss, Case No 96 CIV 8386(KMW).
11 International Covenant on Civil and Political Rights, Opened for signature 19 December 1966, (entered into force 23 March 1976).
12 International Covenant on Economic, Social and Cultural Rights, Opened for signature 16 December 1966, (entered into force 3 January 1976).
13 J. Donnely, *Universal Human Rights,* (1989).

the provisions of the treaty that they monitor: the Human Rights Committee (HRC) monitors compliance with the ICCPR, whereas the Committee on Economic, Social and Cultural Rights (CESCR) is associated with the ICESCR. The primary function of the Committees is to review periodic reports submitted by state parties. In addition to the reporting procedure, the Optional Protocols of the respective Covenants provide competence to the Committees to receive and consider communications from individuals whose rights are claimed to have been violated.[14]

Under current international law only states can become parties to the Covenants. Although the recent commentary issued by the treaty bodies of the two Covenants acknowledge the role potentially played by private actors within the framework of human rights protection, their jurisprudence does not extend the obligations to the actors beyond the state. The Committees' interpretation of the obligations retains the primacy of states. States are under the obligation to regulate abuses also by private entities and are usually encouraged to do so domestically through legislation and adjudication.[15] Seen in this light, the two Covenants can be applied to the conduct of private entities such as corporations mainly in two ways: at an international level, indirectly through the obligations that states have under the Covenants; or through enforcement of the Covenants against private parties in domestic legal systems either by legislation or adjudication. This article is concerned with the application of the two Covenants to corporations (horizontal application) in domestic courts. Such an application of international human rights law to non-state corporate actors, it is argued here, promises significantly to promote more effective global human rights enforcement by addressing the impact of corporations domestically which state-centric human rights regime is poorly equipped to deal with.

As such, the article proceeds in two parts: the first part analyses the extent to which the provisions of the Covenants are applicable to the conduct of corporations first by looking into the actual provisions of the Covenants and the extent that they contain references to the private persons such as corporations and later, by focusing on the

14 Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976. Currently, 115 of the 168 states parties to the ICCPR are also parties to the First Optional Protocol. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/63/117, on 10 December 2008 entry into force 5 May 2013. As of September 2016, 21 of the 164 states parties to the ICESCR are also parties to the First Optional Protocol.

15 ICCPR: Under Art. 2(2) of the Covenant, States Parties undertake to take the necessary steps to adopt legislative or other measures to give effect to the Covenant rights. …" HRC recognizes that States Parties have latitude in deciding how to fulfill their Covenant obligations. See the Report on 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties', Prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, June 2007.

interpretation given by the treaty bodies to the provisions of the two treaties.[16] The second part of the article analyzes the decisions of domestic courts in which the contents of the two Covenants have played a role in defining the human rights obligations of corporations *directly*. For that purpose, cases in domestic courts against corporations alleging human rights abuses are analyzed. The theoretical basis of such an inquiry lies in Article 2(3) of the ICCPR according to which states parties undertake to ensure that a person whose rights are violated has an effective remedy and that a person claiming such a remedy has his/her rights determined by competent authorities provided by the State's legal system.[17]

II. Corporate Human Rights Obligations and the Covenants

1. Direct Human Rights Obligations in the Covenants (?)

Legal scholars are divided on the question of whether the two Covenants may be interpreted so as to apply to private actors such as corporations. Those scholars who argue that such an interpretation may be conceivable argue that certain provisions of the Covenants make references to entities other than states and thus potentially impose obligations on those entities. In their preambles, both Covenants contain implicit as well as explicit formulations to that effect. The idea that the rights contained therein '*derive form the inherent dignity of the human person'* has been taken to imply that individuals are entitled to basic protection of their human interests simply by virtue of the fact that they are human beings.[18] Accordingly, the primary concern from the perspective of human rights law is that these entitlements are realized not only by states but also by other entities who may potentially violate such rights.[19]

The fifth perambulatory paragraph of both the ICCPR and the ICESR can be seen as supporting this idea. The relevant section of the paragraph common to both instruments reads: 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights'.[20] Some scholars have interpreted this provision to imply that at a

16 In addition to the secondary literature, the United Nations Treaty Bodies Database is used as the main source for searching for the documentation of the two Committees. Available at; http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx.

17 ICCPR, Art 2(3).

18 N Jägers, "The Legal Status of the Multinational Corporation Under International Law," in M Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), at. 39..

19 D Bilchitz, "A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles" in D Bilchitz and S Deva *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, (2013), p. 113. Bilchitz argues that therefore all such entities are assumed to have the obligation not to violate human rights and to play a role in ensuring that they are realized. Ibid.

20 Preamble paragraph 5 of the International Covenant on Civil and Political Rights (opened for signature 16 December 1966; entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Preamble paragraph 5 of the International Covenant Economic, Social and Cultural Rights (opened for signature 16 December 1966; entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

minimum individuals have duties not to violate human rights.[21] Consistent with this view is the argument that certain Articles of the two Covenants which are not *expressly tied* to the state action requirement should be interpreted as imposing duties on all entities.[22] A more general argument underlying this view is that if two reasonable interpretation of a provision are possible, the interpretation that affords better protection of human rights should be adopted.[23]

The scholars who argue for the existence of direct obligations on private entities find additional support in common Article 5(1). The provision expressly addresses private individuals and groups of persons. The article reads in its relevant part: '[n]othing in the present Covenant may be interpreted as implying for any State, *group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant'.[24] The reference to the 'group' and 'person' in the provision led scholars to suggest that the wording could apply to any individual or group, including corporations, thus implying duties on them at least to do no harm. [25]

It is suggested that this expansive reading of the two Covenants conforms with the principal rule of treaty interpretation as laid down in Art 31 of the Vienna Convention on the Law of the Treaties.[26] Article 31 states; 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[27] The HRC has also adopted an almost similar approach in one of its concluding observations adding that the interpretation has to take into consideration of subsequent practice.[28]

Conversely, others argue that this expansive reading does not correspond with the drafting history of the Covenants which were historically geared towards protecting the rights of individuals against state action.[29] In so far as it concerns the common Article 5(1), it is suggested that the legal significance of the concept of private duties has been diluted by the adoption of the human rights treaties.[30] It is argued that by

21 J Paust, "Human Rights Responsibilities of Private Corporations," *Vanderbilt Journal of Transnational Law* 35(2002), at 813..

22 J L Cernic, "An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights" in Cernic *supra note 4,* at 39, emphasis original. The author in particular refers to Articles 7, 8, and 10(1) of the ICCPR and Articles 1(2) of the ICESCR.

23 Ibid.

24 The provision is derived from the Art 30 of the UDHR and is also echoed in Art 17 ECHR as well as Art 28 (3) (a) ACHR.
Emphasis added.

25 Supra note 22.

26 Jägers, *supra note 4,* at 40.

27 Adopted 22 May 1969; entered into force 27 January 1980, 1155 UNTS 331.

28 Concluding Observations, United States, UN Doc. CCPR/C/USA/CO/3/Rev. 1, 18 December 2006, at para. 10.

29 M Karavias, *Corporate Obligations Under International Law* (2013), p. 26. K. Nowrot, "New approaches to the international legal personality of multinational corporations towards a rebuttable presumption of normative responsibilities." 9 *Journal of Global Legal Studies* (1993), 5.

30 Karavias, ibid, at 24.

omitting to define the scope of potential private duties, especially in contrast to the well defined obligations of states, the drafters of the Covenants distanced themselves from the concept rather than affirming it.[31] The overall discussions show that the texts of the relevant of human rights treaties have raised more questions than they have provided answers in relation to those instruments' third-party application.[32]

2. State's Positive Obligations Regarding Corporations

While scholars are divided as to whether the text of the Covenants establish obligations on private entities, what is less disputed as a matter of international law is the requirement imposed on state parties to take measures to prevent abuses by private third parties.[33] The commentaries issued by the treaty bodies acknowledge the growing need to include private entities within the framework of human rights protection by requiring states to protect against the abuse of human rights by non-state actors.[34] Article 2(1) of the ICCPR requires states to 'respect' and 'ensure' the Covenant rights to all individuals within their territory and subject to their jurisdiction without any distinctions 'such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[35] Although there is no explicit reference to 'duty to protect' in this provision, the HRC has considered that a state's obligations under this article can only be fulfilled by taking positive steps to prevent, punish, investigate and redress abuse by both state and non-state actors. [36]

General Comment 31 on the nature of states' obligations under the ICCPR is the most explicit pronouncement of state's positive obligations associated with the duty to protect against the acts of private parties. The Comment states that 'positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its

31 Ibid, at 24 and 80.
32 Ibid*,* at 22.
33 C M Väzquez, "Direct Vs. Indirect Obligations of Corporations Under International Law," *Colum. J. Transnat'l L.* 43(2004). E.A. Posner, *The Twilight of Human Rights Law* (2014*),* at 22..
34 J Nolan, "All Care, No Responsibility?" in L. Blecher et al, *Corporate Responsibility For Human Rights Impacts –New Expectations and Paradigms* (2014), at 9.
35 Supra note 11.
36 This conclusion is also supported by the UN Guiding Principles on Business and Human Rights, adopted unanimously by the UN Human Rights Council. The first Principle of the Guidelines reiterates 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'. Also, in 2015 the Inter-American Court of Human Rights, in the case of *Kaliña and Lokono Peoples v Suriname,* found Suriname responsible for the violation of the right to collective property and political rights. Part of the Court's assessment was based on the aforementioned principle. The court found that Suriname had failed to comply with this 'safeguard' since it did not ensure an 'independent social and environmental impact assessment prior to the start-up of [the] mining, and did not supervise the assessment that was made subsequently'. IACtHR, *Case of Kaliña and Lokono Peoples v Suriname,* November 2015.

agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'.[37] The Comment further states that a violation of Art 2 of the ICCPR may occur 'as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'[38] Although the wording does not explicitly refer to corporations, the terms 'private persons or entities' clearly includes private business enterprises.[39] The practice of the HRC substantiates this finding.[40]

The CESCR has also stated that the ICESCR imposes an obligation on State Parties to prevent violations of the rights therein by private actors.[41] An example would be states' obligation to prevent third parties from 'compromising equal, affordable, and physical access to sufficient, safe and acceptable water'.[42] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights contain a similar interpretation of the states' obligations. According to the Guidelines the ICESCR requires states 'to *protect* the covenant rights', which includes the 'states' responsibility to ensure that [...] transnational corporations over which they exercise jurisdiction, do not deprive individuals of their [covenant] rights'.[43]

The preceding discussion suggests that the two covenants as interpreted by their treaty bodies provide for corporations to have at least indirect human rights responsibilities by holding states responsible for the acts of private parties. This, however, is not a flawless approach; the Committees do not have the power to impose sanctions, provide remedies, or issue legally binding judgments.[44] The implementation of their decisions is left to the discretion of states parties.

III. Covenants and Corporations in Domestic Legal Orders

The Covenants can play a more direct and effective role in relations among private parties in domestic legal systems. This is also permitted by international law. The implementation of international human rights law is realized through the domestic legal system of states.[45] Moreover, under Article 2(3) of the ICCPR, states are under the

37 Human Rights Committee, *General Comment 31: The Nature of the General Obligation on States Parties to the Covenant,* Para 8, UN Doc. CCPR/C/21/Rev. 1.Add.13 (2004).
38 Ibid, paragraph 8.
39 Supra note *16,* at 14.
40 For examples of the decisions of the HRC relating to business enterprises see, supra note 16.
41 D M Chirwa, "Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" *Melb. J. Int'l L.* (2004)..
42 Ibid.
43 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Adopted at Maastricht, 22–26 January 1997. In: Human Rights Quarterly, Vol. 20 (1998), at 691.
44 Posner, supra note 34, at 42.
45 Ibid. B Stephens, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations," (2002). A general duty to bring internal law into conformity with obligations under international law has been affir-

obligation to provide effective remedy to those whose rights are violated "*notwithstanding* that the violation has been committed by persons acting in an official capacity".[46] In this light, the article now turns to the potential role that the Covenants have in domestic legal systems in relation to alleged human rights abuses by corporations.

Depending on the applicable domestic law, international law can become operative in national legal systems mainly in two ways: international law may be automatically incorporated into domestic law, or it may need to be transformed before it is invoked before or applied by a domestic courts. The two jurisdictions that concern this article, the US and Japan[47] both follow the constitutional system of automatic incorporation. However, the impact of treaty law is significantly restricted by the requirement that the treaties have to be 'self-executing' to have a domestic effect.

The difference between self-executing and non-self-executing treaties is that self-executing treaties are those that 'immediate[ly] creat[e] rights and duties of private individuals which are enforceable and [are] to be enforced by domestic tribunals.'[48] Non-self-executing treaties on the other hand 'require implementing action by the political branches of government or... are otherwise unsuitable for judicial application.'[49] As the following case law analysis suggests, the doctrine of self-execution has significant impact on the effective implementation of the Covenants in domestic courts.

1. Case Selection Criteria

The cases relied in this article are extracted from Oxford University Press' database on International Law in Domestic Courts (ILDC). [50] The database covers international law as applied in the domestic courts of around 70 jurisdictions. As of June 2017 there are 1794 cases reported in the database 1039 of which have human rights as a sub-

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med by the PCIJ (*Exchange of Greek and Turkish Populations [Advisory Opinion]*). The precise method of this implementation is regarded as falling within the internal jurisdiction of states. A Tzanakopoulos and CJ Tams, "Introduction: Domestic Courts as Agents of Development of International Law," *Leiden Journal of International Law* (2013), at 4. See, also *Kadic v. Karadzic,* which states that: 'the law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations'. *Kadic,* supra note 5.

46 Supra note 11.

47 See infra note 52 and accompanying section on case selection criteria.

48 *Flores and ors v Southern Peru Copper Corporation,* 414 F.3 d 233 (2 d Cir. 2003). A California Supreme Court decision in 1952 was the first published judicial decision to apply the federal-state concept of self-execution. See, DL Sloss, "The Death of Treaty Supremacy: An Invisible Constitutional Change" (2016), at 3. In *Fujii v. California*, a California court ruled in favor of human rights claimants, striking down a California law that discriminated against Japanese nationals because it conflicted with the Charter's human rights provisions. *Sei Fujii v. California,* 38 Cal. 2d718,242 P.2d617 (1952). The Court in *Sei Fujii v. California* held that the human rights provisions of the UN Charter were 'non self-executing'. The judgment impacted other jurisdictions, including Japan. See, Y Iwasawa, *International Law, Human Rights and Japanese Law* (2008), at 45.

49 Ibid.

50 http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts.

ject matter. The search for key words 'company' and 'corporation' was carried out which returned 267 and186 numbers of cases respectively. From these results a data set was created excluding cases that do not concern allegations of human rights abuses committed by corporations. Among the cases that form the primary database another search for the key words 'covenant', 'ICCPR' and/or 'ICESCR' was carried out which then resulted in total number of 15 cases. Fourteen among the 15 cases that conform these requirements originate in the US courts. The remaining one case is from Japan.

2. Domestic judicial interpretation of the Covenants in Corporate Human Rights Cases: Invoking International Law in the US Courts

The proliferation of the human rights cases against private parties in the US is mainly due to a uniquely American law called Alien Tort Claims Statute (ATS). [51] The ATS provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'[52] According to the ATS the plaintiffs can pursue their claims under two separate limbs: 'the law of nations' or 'a treaty of the United States'. The two limbs of the ATS provides an interesting inquiry concerning the status of the Covenants in domestic courts; because the US is not a party to the ICESCR; and although it is party to the ICCPR, the treaty is not self-executing, meaning that the Covenants cannot be invoked using the treaty prong of the ATS as such.[53] Therefore, the large majority of the cases have been brought under the first, 'law of nations' limb of the ATS. The courts have used the term 'law of nations' as a synonym for 'customary international law'.[54] However, they have not always been explicit in distinguishing the two prongs of the ATS in their analysis.[55]

Before focusing on corporate human rights cases, several judicial decisions need to be mentioned in order to understand the role, or lack thereof, of the Covenants. The seminal decision that gave rise to the modern ATS litigation was *Filartiga v. Pena-*

51 Supra note 47. The Statute is also called Alien Torts Claim Act (ATCA).

52 28 U.S.C. § 1350.

53 However, an argument was raised concerning the ICCPR suggesting that the treaty can be used under the treaty prong by using the ATS to provide enabling legislation for the ICCPR. This argument was explored in depth by K D A Carpenter, "International Covenant on Civil and Political Rights: A Toothless Tiger?" 26 *North Caroline Journal of International Law* (2000).

54 *See generally Kadic v. Karadzic*, 70 F.3 d 232, 239 (2 d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2 d 876, 884 (2 d Cir. 1980); *Flores and ors v Southern Peru Copper Corporation,* 414 F.3 d 233 (2 d Cir. 2003). However, to what extent the two terms overlap is a matter of debate among the courts, with some adopting a narrower approach and suggesting that only norms that are peremptory *(jus cogens)* should form the 'law of nations'. In Doe v. Unocal Corp., for example, the court argued that only *jus cogens* norms are actionable. 110 F. Supp. 2 d 1294, 1304 (C.D. Cal. 2000), *vacated on othergrounds,* 403 F.3 d 708 (9th Cir. 2005).

55 *Flores,* supra note 50; *Abdullahi III, Abdullahi (individually and on behalf of the Estate of Lubabatau Abdullahi) v Pfizer Incorporated*, Trial Decision on Remand, Case No 01 Civ 8118 (WHP).

Irala. [56] In *Filartiga,* a Paraguayan family successfully sued a former Paraguayan police officer for the torture and death of a family member. The main issue before the court was whether torture by a state official constituted a violation of the law of nations, and if it did so, whether it would establish jurisdiction under the ATS. The court held that international law must be interpreted as it has evolved and currently exists among modern nations and not as it was in 1789 when the ATS was enacted. Relying on numerous international agreements, including the ICCPR, the court in *Filartiga* held that officially sanctioned torture violates established international human rights norms, and thus the law of nations. The *Filartiga* court construed the ATS 'not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.'[57]

The *Filartiga* decision was significant because it ascertained the ATS as providing non-nationals with a cause of action in tort for certain egregious breaches of international law committed against them, even when such conduct took place abroad. Thus, it both provided domestic remedies for violations of international law as well as confirmed the idea that human rights and fundamental freedoms are of universal concern. [58] Following *Filartiga*, several successful cases were brought under the ATS against individuals responsible for torture or other gross violations of human rights. In *Kadic v Karadzic*,[59] the ATS liability was extended to individuals acting in a private rather than an official capacity.[60] Further, in *Doe v. Unocal*, it was held for the first time that a case can be brought against a corporation under the ATS.[61]

The landmark decision on the status of the Covenants, in particular the ICCPR, and the scope of the ATS was the US Supreme Court's decision in *Sosa v. Alvarez-Machain.*[62] *Alvarez* was a Mexican national, who was suspected to have tortured and killed a United States Drug Enforcement (hereinafter DEA) agent. The DEA engaged another Mexican national, *Sosa*, to kidnap *Alvarez* and hand him over to them. *Alva-*

56 *Filartiga,* supra note 56. Between 1789 and 1980, US federal courts asserted jurisdiction under the statute in only three instances. See, F Larocque, "Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort" *Osgoode Hall LJ* (2008), 612..

57 *Filartiga,* supra note 56.

58 The recent Supreme Court decision *Kiobel,* however curtailed the scope of the ATS significantly, requiring the lower courts to apply presumption against extraterritorial application of the Statute that had been rebutted in the *Filartiga*. According to the *Kiobel* court, the presumption could only be overcome if the plaintiff's claims 'touch and concern the territory of the United States … with sufficient force to displace the presumption'. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

59 Kadic, supra note 5.

60 Ibid. *Kadic* concerned the liability attached to *Radovan Karadzic* as the de facto head of the Bosnian Serb enclave of Srpska during the Bosnian war. In *Kadic,* the court found that genocide was a violation of the law of nations and the ATS provided jurisdiction over private actors who assisted in such violations.

61 *Doe v. Unocal Corp* 963 F Supp 880 (CD Cal 1997). In the US, human rights cases against corporations have also been brought on the bases of Torture Victims Protection Act, Racketeer Influenced and Corrupt Organization Statute, as well as ordinary federal tort and state laws.

62 *Sosa v Alvarez-Machain*, Decision, Docket No 03-339, 542 US 692 (2004), 124 S.Ct. 2739 (2004), 159 L.Ed.2 d 718 (2004), 72 USLW 4660 (2004).

rez was kept by *Sosa* for a day after which he was transferred to the US authorities and brought to trial. Eventually, *Alvarez* was acquitted of the underlying chargers. Upon his acquittal, he invoked the ATS and brought claims against *Sosa*, alleging arbitrary arrest and violations of the law of nations.

Citing *Filartiga* with approval, the US Supreme Court in *Sosa* instructed that the lower courts may allow ATS suits based on present day customary international law rules. However, the Court did not give a clear guidance on the scope of the applicable norms apart from requiring them to be 'specific, universal, and obligatory' and comparable to the international norm rules recognized at the time the ATS was enacted in the 18th Century.[63] *Alvarez's* claim of arbitrary detention did not meet this threshold. *Alvarez* had cited the UNDHR and Article 9 of the ICCPR to substantiate his claims. The Court held that the two instruments, 'despite their moral authority, have little utility under the standard set out in this opinion'. As it concerns the ICCPR the court reasoned that the treaty was understood to be non-self-executing at the time of its ratification by the United States and therefore, could not establish the relevant and applicable rule of international law.[64]

Alvarez also sought to establish that the prohibition against arbitrary arrest has become binding customary international law. However, the court found little authority to support his claim, holding that; 'a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy'.[65]

The *Sosa* Court's dicta of ICCPR being of little utility does not conform with its reference to *Filartiga* with approval. It can be inferred that *Sosa,* by approving *Filartiga*'s reasoning, affirmed that the ICCPR can be considered as a source of customary international law, notwithstanding its status in the US domestic legal system. The lack of explicit pronouncement on the issue, however, allowed future courts to replicate *Sosa's* finding without paying due attention to the distinction between the two limbs of the ATS and disregarding the cumulative impact of the treaties in deciding the contents of customary international law.[66]

63 *Sosa,* ibid. The Court held that: '*Whatever* the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted'.

64 Ibid.

65 Ibid.

66 See, for example, *Abdullahi III, Abdullahi (individually and on behalf of the Estate of Lubabatau Abdullahi) v Pfizer Incorporated*, Trial Decision on Remand, Case No 01 Civ 8118 (WHP).

3. Covenants and Corporate Human Rights Litigation

As stated above, *Sosa* was the defining decision concerning the role of the Covenants in corporate human rights litigation.[67] Prior to *Sosa*, arbitrary detention claims were raised in *Wiwa v. Royal Dutch Petroleum Company*. There, the court, while assessing allegations of torture, summary execution, and arbitrary detention, cited the ICCPR among other international legal instruments as a source of applicable law.[68] The court held that those allegations violated fully recognized rights of international law. The court also found that 'cruel, inhuman, or degrading' conduct, 'while falling short of torture and summary execution, violates international law and is hence cognizable under the ATS'. Among other sources, the court cited the ICCPR to substantiate this finding.[69]

Similarly, prior to *Sosa,* in *Rodriquez v Drummond Company* a US district court relied on the Covenants with approval in ascertaining whether the relevant norm was part of customary international law. The court in *Rodriquez* recognized the right to associate and organize as actionable under the ATS citing Article 22 of the ICCPR and Article 8 of the ICESCR as principles of international law sufficiently specific, universal, and obligatory so as to qualify as norms of customary international law and to create an actionable claim under the ATS. [70]

In two other cases preceding *Sosa, Sarei and Flores*, the courts considered whether the right to life and health in the context of environmental harms were specific, universal and obligatory norms of international law so as to qualify as actionable under the ATS.[71] Both cases held that they were not. In *Sarei v. Rio Tinto*,[72] the court among other sources, considered the ICCPR, and held that '[it] cannot conclude that 'the rights are sufficiently 'specific" that their alleged violation states a claim under the ATS, or that nations universally recognize they can be violated by perpetrating environmental harm'.[73] What is interesting in *Sarei* is that the court also considered whether the United Nations Convention on the Law of the Sea (UNCLOS), which was signed but not ratified by the US, reflected customary international law. The

67 *Sosa* itself did not concern a corporate defendant. In fact, the Court referred to corporate liability only very briefly, in a footnote. While discussing the need for any actionable norm to be sufficiently definite the Court noted that a 'related consideration is whether international law extends the scope of liability... to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual'. *Sosa*, supra note 64, footnote 20.

68 *Wiwa and ors v Royal Dutch Petroleum Company and ors*, Motion to dismiss, Case No 96 CIV 8386(KMW).

69 Ibid. Subsequently *Wiwa* was settled out of court.

70 *Estate of Valmore Lacarno Rodriquez and ors v Drummond Company Incorporated and ors,* Decision on Motion to Dismiss, 256 F.Supp.2 d 1250 (N.D. Ala. 2003).

71 *Sarei and ors v Rio Tinto PLC and Rio Tinto Limited*, Judgment on Motion to Dismiss; *Flores and ors v Southern Peru Copper Corporation*, Appeal Judgment, Docket No 02-9008, 414 F.3 d 233 (2 d Cir. 2003).

72 In *Sarei* residents of the island of Bougainville in Papua New Guinea (PNG) filed suit against Rio Tinto alleging that the company was complicit in war crimes and crimes against humanity committed by the PNG army during a secessionist conflict in Bougainville; environmental impacts of the company harmed their health in violation of international law; and the company engaged in racial discrimination while hiring workers.

73 Ibid.

court held that a large portion of the UNCLOS reflected customary international law and consequently, the treaty, despite not being ratified, might provide the basis for an ATS claim.

In *Flores and ors v Southern Peru Copper Corporation* the court considered whether the rights to health and life were sufficiently definite to be binding rules of customary international law for the purpose of subject matter jurisdiction under the ATS. [74] The plaintiffs, among other sources, relied on Article 12 of the ICESCR[75] and Article 6(1)[76] of the ICCPR. First, the court, citing *Filartiga,* required that alleged violation be a 'clear and unambiguous' rule of customary international law. It then moved on to assert that, far from being 'clear and unambiguous', the statements relied on by plaintiffs to define the rights to life and health (Art 12 of the ICESCR among others) are 'vague and amorphous'.[77] The court held; '[t]hese principles are boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them'.[78]Second, as for the ICCPR, the *Flores* court noted that the Covenant was not a self-executing treaty. However, the court went on to consider whether the ICCPR was a source of customary international law, stating that the evidentiary weight of the treaty would have increased if the 'states parties have taken official action to enforce the principles set forth in the treaty either internationally or within their own borders'.[79] This implies that the Court considered the status of the treaty not for the sake of the treaty prong of the ATS, but for its value in ascertaining customary international law and found that Article 6(1) of the ICCPR 'is insufficiently definite to give rise to a rule of customary international law because no other provision of the ICCPR so much as suggests an international law norm prohibiting intra-national pollution, the ICCPR does not provide a basis for plaintiffs' claim that defendant has violated a rule of customary international law'.[80]

The findings of pre-*Sosa* courts, despite their restrictive interpretations at times, nevertheless provided a more subtle analysis of the applicable law and the role that different sources of international law played in defining the scope of the law of the nations in comparison to the courts following *Sosa.* For example, in one of the post-*Sosa* cases in which cruel, inhuman, degrading treatment and arbitrary detention allegations

74 *Flores and ors v Southern Peru Copper Corporation, Appeal Judgment*, Docket No 02-9008, 414 F.3 d 233 (2 d Cir. 2003). *Flores* concerned a US copper mining corporation operating in Peru, which has emitted large quantities of sulphur dioxide and fine particles of heavy metals into the air and water allegedly causing plaintiffs severe lung diseases and respiratory illnesses. The plaintiffs brought claims under the ATS alleging that the pollution caused by the company's operations constituted a customary international law offence because it violated their 'right to life' and 'right to health'.

75 Article of 12 of the ICESCR states that: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

76 Article 6(1) of the ICCPR reads: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

77 *Flores,* supra note *50*.

78 Ibid.

79 Ibid.

80 Ibid.

were raised, the court found those claims not to be actionable under the ATS.[81] The court based its finding on *Sosa'*s holding that the ICCPR did not create enforceable obligations in the federal courts.[82] What the court did not discuss was the extent to which a non-self-executing treaty such as the ICCPR might still be cited as evidence of customary international law.

More recent judgments, however, have adopted a more comprehensive analysis of the scope of customary international law. In *Abdullahi v Pfizer Incorporated,*[83] Nigerian citizens brought claims against *Pfizer Incorporated* under the ATS, alleging that the company had engaged in medical experimentation on human subjects without obtaining informed consent, as a result of which eleven children died and others suffered various forms of disability. The question before the court was whether non-consensual medical experimentation conducted in Nigeria by *Pfizer Incorporated* violated a norm of customary international law. The plaintiffs invoked Article 7 of the ICCPR among several other international legal instruments. The trial court dismissed the plaintiffs' claims for not being sufficiently specific, universal, and obligatory to establish a private right of action under the ATS, as dictated by *Sosa.*[84] However, the appeals court reversed the finding stating that the district court's approach misconstrued both the nature of customary international law and the scope of the inquiry required by *Sosa*;[85] The majority held that;[86]

> *'It is clear that, as the court mentioned in Sosa, the Universal Declaration of Human Rights and the ICCPR themselves could not establish the relevant, applicable rule of international law in that case. Nonetheless, the ICCPR, when viewed as a reaffirmation of the norm as articulated in the Nuremberg Code, is potent authority for the universal acceptance of the prohibition on nonconsensual medical experimentation. ... [T]he fact that the prohibition on medical experimentation on hu-*

81 *Villeda Aldana and ors v Del Monte Fresh Produce*, NA, Incorporated and ors, Appeals decision, Docket No 04-10234, 416 F 3 d 1242 (11th Cir 2005), 18 Fla. L. Weekly Fed. C 696. Courts in other circuits, on the other hand, had found that cruel, inhuman, and degrading treatment universal and specific enough to meet the standards of *Sosa*. See *South African Apartheid Litigation v Daimier AG*, 617 F Supp 2 d 228, 253–4 (SDNY 2009); ILDC 1472 (US 2009); *Sarei v Rio Tinto Plc*, 650 F Supp 2 d 1004, 1028–9 (CD Cal 2009); *Bowoto v Chevron Corporation*, 557 F Supp 2 d 1080, 1093–4 (ND Cal 2008).

82 *Villeda Aldana*, ibid.

83 *Abdullahi v Pfizer Incorporated*, 562 F3 d 163, 176 (2 d Cir 2009).

84 Emphasis added. The plaintiffs have cited: (1) the Nuremberg Code, International Military Tribunal, Nuremberg, Germany, 1948; (2) the Declaration of Helsinki, World Medical Association, 1964; (3) the guidelines authored by the Council for International Organizations of Medical Services; (4) Article 7 of the International Covenant on Civil and Political Rights; and (5) the Universal Declaration of Human Rights, Resolution 217 A(III); UN Doc A/810 91, UN General Assembly, 1948 ('UDHR').

85 *Abdullahi,* supra note 85. "*Sosa* makes clear that the critical inquiry is whether the variety of sources that we are required to consult establishes a customary international law norm that is sufficiently specific, universally accepted, and obligatory for courts to recognize a cause of action to enforce the norm. Nothing in *Sosa* suggests that this inquiry can be halted if some of the sources of international law giving rise to the norm are found not to be binding or not to explicitly authorize a cause of action." Ibid.

86 Ibid, emphasis added, citations omitted.

mans without consent has been consciously embedded by Congress in our law and reaffirmed on numerous occasions by the FDA demonstrates that the United States government views the norm as the source of a binding legal obligation even though the United States has not ratified the ICCPR in full'.

In finding so, the majority relied on the precedent in *Khulumani v Barclay National Bank Ltd* in which the court held that: 'the treaties that the United States has neither signed nor ratified-let alone treaties like the ICCPR that the United States has signed but not ratified-may evidence a customary international law norm for ATS purposes where the treaty has been ratified widely and it is clear that the reason for the United States's failure to subscribe to the treaty was unrelated to the particular norm in question'.[87]

Similarly, in *Al-Quraishi and 71 additional unidentified plaintiffs v Nakhla and L-3 Services Inc,* the court considered the extend to which war crimes and cruel, inhuman, and degrading treatment committed by private parties constituted violations of the law of nations under the Alien Tort Statute. [88] The Court provided the following analysis:[89]

'In Sosa, the ICCPR in and of itself may not have sufficed to show that plaintiff's claim of arbitrary detention was a violation of the law of nations, given that other sources of international law were not found to support a similar consensus on claims of arbitrary detention. But this did not and does not mean that courts should never look to the ICCPR for guidance in evaluating the law of nations. Rather, the ICCRP must be viewed in conjunction with other sources of international law as part of a larger survey. And in the present case, when the ICCPR is considered alongside the many other sources of international law that address cruel, inhuman and degrading treatment in the Court's view a fair consensus emerges that [cruel, inhuman, degrading treatment] is indeed a violation of the law of nations'.

What is not so far been mentioned but also plays an important role is the indirect use of the Covenants to interpret the existing domestic law in certain cases. This is how the Court of First Instance in Japan in the case of *Arudou and ors v Earth Cure* implemented the ICCPR.[90] The case concerned complaints from customers in bath-houses in northern Japan, alleging discrimination against non-Japanese customers based on *inter alia* Article 26 of the ICCPR and Articles 5(f) and 6 of CERD.[91] Although the court held that the ICCPR and CERD would not directly regulate interpersonal relationships, "if private conduct specifically violates, or risks violating, another person's basic rights or equality, [t]hese provisions can be used to evaluate social norms".[92]

87 *Khulumani v Barclay National Bank Ltd*, 504 F3 d 254 (2 d Cir 2007).

88 *Al-Quraishi and 71 additional unidentified plaintiffs v Nakhla and L-3 Services Inc (formerly Titan Corporation)*, Decision on motion to dismiss, 728 F Supp 2 d 702 (D Md 2010), Civil No PJM 08-1696.

89 Ibid. Emphasis added.

90 *Arudou and ors v Earth Cure, Inc and Otaru City*, Japan, First instance judgment, Case No H 13(U) No 206, Hanrei Taimuzu No 1150 (2003.8.1) 185. This is the only non-US case emerged from the case law survey.

91 Ibid.

92 Ibid.

4. Concluding Remarks

The two Covenants primarily impose duties on states and therefore are not generally invoked in the disputes between the private parties. Nonetheless, above survey shows that the courts, at least in the US have relied on the ICCPR as evidence of customary international law in certain private disputes. Although the Covenants as such have played a considerable role in individual cases, it is difficult to make general inferences due to the sporadic nature of the case law. It can nevertheless be argued that the two instruments have a potential role to play in defining the contours of human rights norms applicable to corporations. This also depends on the extend to which they are invoked by the parties. Increasing reliance on the international human rights law in general and the two Covenants in particular will influence the attitude of the courts towards human rights treaties and ensure the continued relevance of the two treaties also at the domestic level.