In recent years a growing number of academics, NGOs and courts have sought ways to hold private actors (i.e. actors other than public authorities) accountable for alleged violations of human rights. This raises the question to what extent private actors have duties to avoid harming, protect and provide human rights. ‘Avoiding harm’ implies the negative obligation not to infringe upon human rights, while to ‘protect’ and ‘provide’ implies the positive obligations to practically realize, implement and secure these rights.

This paper will focus on one special kind of private actor: transnational corporations (TNCs). TNCs play a confronting role in our globalized world by challenging both the power and duties states historically have. The cases in which TNCs act in ways that undermine the human rights of people directly involved in their networks or outside of those networks make their position even more pressing. This paper investigates whether TNCs have the negative duty not to infringe upon human rights, or even have the positive duty to protect and contribute to the practical realization and implementation of human rights. Moreover the ultimate point of concern is whether TNCs can be held accountable for violations of such duties. This paper thereby seeks to go beyond the state-centric paradigm according to which human rights only imply duties and responsibilities of public authorities. It will review two philosophical approaches that focus on the assignment of ‘perfect’ human rights duties and responsibilities to relevant actors.¹: the capacity-approach and the publicness-approach. It will be submitted that these two approaches fail to legitimately allocate human rights duties and responsibilities upon

¹ Following Onora O’Neill’s (1996) interpretation of the Kantian notion of perfect and imperfect duties a perfect duty requires an agent, either the duty-bearer or the authority holding the duty bearer accountable, with no discretion in determining the content of that duty. Typical perfect duties are obligations under contracts or duties of justice. Imperfect duties do not require the specification of such agent-directed non-discretion but only an agent with freedom determining the content and performance of the duty. Typically these are duties of charity.
TNCs. The paper then assesses a novel non-ideal legal approach recently developed by Hugh Collins. Collins’ approach has a focus on consumers as relevant actors to hold TNCs accountable for violations of basic labour standards and human rights. Collins’ approach will used as a thought-experiment in order to flesh out how far such a private enforcement of human rights can be extended without the involvement of a public authority; be it a state-like entity or other public institution. It is concluded that a private enforcement approach is the most promising one in holding TNCs accountable for violating their *negative* duties not to harm and to respect human rights, while only public authorities can legitimately allocate *positive* duties to protect and practically realise human rights.

I. Transnational Corporations and Human Rights

*Transnational Corporations (TNCs)*

Transnational corporations have a disputable reputation with regard to human rights in zones of weak-, mixed or unwilling governance. With ‘weak-, mixed- or unwilling governance’ this paper refers to situations in which a state is either too weak to properly exercise political power, or multiple actors make a claim to political power, or the state is unwilling to fulfil the duties corresponding with its political power. Some TNCs are said to be complicit in human rights violations by states. For instance, when an internet company reveals the identity of certain individuals to, often authoritarian, authorities because of comments on social media, one may say that the company violates these individuals’ human rights to privacy and freedom of expression. An even more ‘direct’ threat to human rights is arguably posed by oil companies in the Niger Delta that operate in a context of weak-governance and are often the principal actor and not just complicit to another’s violations of human rights. The cases against Shell, unsuccessfully brought before American courts under the Alien Tort Claim Act (ACTA) are a telling example of a TNC engaged in presumable direct human rights violations due to their status as the provider of collective goods like security in the region they operate. Furthermore, TNCs producing goods by employing sweatshop workers in south-east Asia under degrading
conditions seem to violate these workers’ rights to security and subsistence. Mining companies often engage in environmentally degrading operations with human rights impacts. One may think for instance of Barrick Gold’s operations in Pacua Lama, polluting rivers which form the only freshwater supply for near-by agricultural communities, thus undermining their right to clean water. These cases not only raise questions concerning criminal responsibility and torts. They also call for potential further-going responsibilities TNCs might have in order to protect human rights especially when TNCs operate within a context of weak governance (Karp, 2014).

Although in general ‘corporations are unlikely to act in a manner that deliberately seeks to violate fundamental human rights’, TNCs are often aware of factual circumstances from which a reasonable person could deduce the existence of a serious threat for human rights: for instance, the conditions under which their goods are produced (Muchlinski, 2001, 44). Therefore, one may say that TNCs act at least negligently with regard to the possible human rights violations descending from their conducts. However, TNCs do not only directly or indirectly contribute to human rights violations. They also directly or indirectly promote and protect human rights. In fact, over the last years TNCs have widely and often in cooperation with NGO’s engaged in sustainability reporting and the implementation of codes of conduct. As such it seems that TNCs appear to be ‘rejecting a purely non-social role’ (Muchlinski, 2001, 37). This rejection offers an opportunity to investigate possible ways in which TNCs can bear human rights duties and responsibilities. It is submitted that an overly demanding duty would undermine the TNCs’ willingness to respect and protect human rights in a world without an overarching authority with the ability to hold them accountable. As such the TCNs’ willingness to take on a social role sets an important limit on them as potential bearers of a perfect duty in cases where there is no public actor to hold them accountable. Thus either private actors should be induced, through for example public pressure, to regulate themselves consistently or a public actor should be assigned a perfect duty to hold TNCs accountable.

*Human Rights*
When thinking about human rights in relation to the conduct of TNCs at the global level, one has to take into account the political dimension of human rights and to what extent this dimension influences the applicability of human rights to situations where private actors appear to be the violators of human rights. Because human rights are distinctively political in practice, one cannot simply transfer the prevalent human rights discourse to the regulation of private actors’ conduct. According to the traditional understanding of human rights one holds human rights against the state. Given this paper’s focus on moving beyond the state-centric paradigm, it is necessary to note that the conception of human rights employed here is not necessarily identical to the predominant conception that relies so heavily on states and public institutions in its legitimation. As Hugh Collins’ (2015) states, in the process of translating human rights to application in private law and the regulation of private relationships the meaning of those rights necessarily shifts.

II. Human Right and Private Relationships

The global economy and private relationships as subject

A wide range of public actors is obliged, under national and/or supranational law, to respect, protect and enforce human rights. However, it is not self-evident that similar obligations should apply to private actors. Private actors do not necessarily have the institutional function to actively serve public interests. Often they also lack the resources and legitimacy to do so. Thus the human rights discourse in the context of private relationships differs greatly from the traditional human rights discourse. Some theorists (Sangiovanni, 2008; Nagel, 2005; Meckled-Garcia, 2008; 2009) argue that the duties to protect human rights should not be extended to private actors at all or to any global practice that does not fall under the scope of responsibility of an independent public authority. These theorists maintain that for a state of affairs to trigger moral concern it must be authoritatively structured, i.e. there is no central authority with responsibility over the practice, otherwise it cannot be taken as a point of reference for the
assignment of perfect duties to relevant actors. However, this argument is based on a misunderstanding for the following two reasons: Firstly, the global economy is a relevant authoritatively structured social practice which has a profound impact on peoples livelihoods. Secondly, even if one argues that the global economy is not authoritatively structured and therefore does not trigger human rights concerns, there is initially no reason not to assign certain duties to private actors in cases of weak and/or unwilling states.

There is a great deal of scepticism about the applicability of normative claims to international economic private relationships, or even the international economy at large. Such scepticism is usually based on either economic or political arguments. An economic argument would be that states have pro tanto unilateral reasons to engage in international free market trade, opening up their own economies regardless of the conduct of other states. Therefore, the argument goes, the ‘international economy’ is not an authoritative practice as such; it is just a collection of successive unilateral decisions. A political argument would be that for a practice to trigger moral concern the structure of this practice should be authoritative: in absence of such authoritative structure the international economy cannot trigger the assignment of perfect duties of justice and consequently human rights duties outside of domestic relations. However, as Aaron James (2012) in his Fairness in Practice forcefully argues, ‘The global economy is constituted, in a fundamental sense, by an international social practice in which societies mutually rely on common markets’ (James, 2012, 3). He goes on to argue (James, 2012, 35-76) that this practice shapes the distribution of benefits and burden globally. The authoritarian institutions involved in this practice are not confined to just nation-states; a range of actors shape this social practice from International Organizations (WTO, ILO, IMF, World Bank, etc.), governance networks, and transnational firms and associations (James, 2012, 21-22). Conduct within and between these actors should be the subject of moral concern.

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2 A telling example is Nagel's (2008) argument that a 'bad' situation is not a matter of moral concern if no, legitimate and justifiable authoritative structured, better situation is conceivable. Along these lines he argues that the problem of 'global justice' is not a problem in absence of a sovereign, i.e. a 'world state'. And such a world state is arguably an even worse situation than our present one. Therefore the world as we know it does not trigger raise concerns of perfect duties of justice. Or in his words 'in absence of global sovereignty we may not be able to describe the world as unjust, But the absence of justice is a defect all the same' (Nagel, 2008, 119-120).
The question then is: Can such duties and responsibilities be justifiably and consistently be assigned to the relevant private actors? This is the question we will turn to.

**Human Rights and Corresponding Duties**

Following Shue (1996, p.35-64) I will distinguish three separate duties corresponding to human rights: (a) a duty to avoid harming, (b) a duty to protect from harming and (c) a duty to provide.\(^3\) I consider the first, usually called 'negative',\(^4\) duty to avoid harming human rights as universal (Shue, Griffin, Nussbaum) on the basis that any human being requires to possess these rights in order to be able to hold any other rights.\(^5\) The duties to protect and provide are positive duties, which require an active conduct from the duty bearer. The corresponding responsibilities to prevent violations and to provide for concrete entitlements descending from human rights, entitlements which at least include security and subsistence rights, are notoriously difficult to assign to other actors than states.\(^6\) These duties must be perfect duties and fall on specific actors for specific reasons (Karp, 2014, 63; O’Neill, 2005; Meckled-Garcia, 2008) because they require a ‘clear agent responsible for the duty, with no general agent-directed discretion as to what constitutes an adequate performance of the duty’ (Meckled-Garcia, 2008, 246). If the actor does have discretion concerning the performance of the duty, it is an imperfect duty of charity that only demands ‘that serious consideration be given by anyone in a position to provide reasonable help’ (Sen, 2004, 341). Stating that human rights duties must be perfect entail not only that accountability is integral to having human rights duties but, moreover, that in cases where the

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\(^3\) This paper will not go into discussions concerning the distinction between ‘to protect’ and ‘to provide’ (Nickel, 1993; Karp, 2014) nor concerning a potential duty to respect (Taylor, 1985; Waldron, 2007) which related to respecting other’s normative rights through an overarching moral framework since this ‘duty to respect’ is fully discretionary and therefore not included.

\(^4\) This is an oversimplification because, especially in relation to corporate actors, a duty to not to harm can and must include positive measures in our non-ideal world of unintended consequences.

\(^5\) The universal application of this duty does not imply a fundamental rights framework is the best way to address violations of this duty; criminal codes, contract law, and many constitutional rights create the same duty for every agent. Furthermore this negative duty is an imperfect one since, for instance, it is too heavy a burden for an individual to assess all possible consequences of her actions at all times. And in many instances these remedies seem more appropriate to address certain violations (Muchlinski, 2001). Furthermore, this counts for, at least, security and subsistence rights (See Shue, Nagel, Miller, Rawls, and note 6).

\(^6\) I talk of security and subsistence rights here since these rights are fundamental to having any other right (Shue). This does imply that there can be no responsibilities to other human or fundamental rights. But in the context of weak-, mixed-, and unwilling governance these rights are only operational when their justification identifies a private actor as relevant agent.
duty is imperfect the human rights discourse is not applicable. Thus for a human right to be claimable by the right holder there needs to be a corresponding bearer of a perfect duty. Because of this states are usually depicted as the relevant agents holding perfect duties. This is the basic criterion used in the assessment of the approaches: human rights duties must be perfect. Thus the questions remaining are: If states are either unwilling or unable to protect human rights and provide for their practical realization, can these perfect duties to protect and provide can fall on private actors and TNCs specifically? And how can TNCs be held accountable for violating their perfect human rights related duties?

III. Private actors’ responsibilities for human rights

The following section will review two ideal theories of private actors’ responsibility for human rights: the capacity approach and the publicness approach.

Capacity approach

A view advocated or hinted at by Onora O’Neill (2004), Robert E. Goodin (1988) and Leif Wenar (2007) is best described as the capacity approach (Karp, 2014, 89-115). This approach firstly acknowledges that in ideal theory the primary human rights responsibilities lie with public actors and especially states. However due to the fact that ideal theory's assumption of full compliance is never met in practice it seems arbitrary to exclude all other actors from having responsibilities in human rights practice (O’Neill, 2004). Secondly, the capacity approach promises to provide a consistent method of assigning these responsibilities to the relevant private actors where states are unwilling or unable to do so. The most developed capacity principle (Miller, 2001; Wenar, 2007) is as follows:

‘whichever agent or agency B has the capacity most effectively to protect or provide for X’s human rights, at least cost to self relative to other agents, and can do so at a cost to self that is not excessive, has a primary responsibility to protect and provide for X’s human rights.’ (Karp, 2014, 106)
One way to think of this approach is as a bridge over the gap that is left by an under-delivering state due to it either being unable or unwilling. Once the state fulfil its duties, the private actors are relieved of theirs. An example will illustrate what this capacity approach entails. Imagine a corporation active in a remote Amazonian rainforest where the state has no influence. This corporation provides basic preventive health care to its employees. According to the capacity approach this corporation has a duty to protect and provide basic health care not only to its employees but also to the other inhabitants of the region where they operate, given that it can do so at not too excessive costs. However the capacity approach has two interdependent flaws relating to the excessive costs.

Firstly, the approach can lead to very excessive costs for private actors which will undermine not only their willingness to cooperate but intrudes fundamentally on their autonomy as private actors (Karp, 2014, 103-114). Let us assume, for instance, that two corporations are operating in a bad or no-governance zone and one violates the basic human rights of the inhabitants by arbitrary arrests through a private or corporate controlled police force. According to the capacity approach the actor with the capacity to ‘most effectively’ protect or provide for the basic human rights has a duty to do so. However in this example it might well be that the other corporation than the one violating has also this capacity. This puts an excessive burden on that corporation acknowledging that it did not violate any rights. In fact, the approach cannot distinguish between the violating actor and the capable actor. Secondly, the approach provides no way of assessing what counts as excessive costs. All three apparent options to inform the approach with the means to assess excessive costs undermine the it since (1) the state is unable or unwilling from the start, (2) there is no international institution with the ability to assess these costs and assign the responsibilities and (3) assessment by private actors themselves leaves human rights responsibility entirely to the discretion of the private actor. It thereby

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7 This was arguably the case in Kiobel vs. Shell and Wiwa vs. Shell in which Shell itself requested and compensated military assistance which took part in human rights violations. See Ennekin (2012) for a brief overview and Esther Kiobel et al. v. Royal Dutch Petroleum et al., 621 F.3d 111 (2nd Cir. 2010), at 123. See also Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2nd Cir. 2000), at 92-93 for an overview of the factual background of the cases.
violates the basic criterion set out that human rights duties must be perfect duties, i.e. duties with no agent-directed discretion as what counts as adequate performance of the duty. Thus the capacity approach fails because it cannot allocate perfect duties and cannot assess or exclude excessive costs.

Publicness approach

David Jason Karp (2014, 116-161), after rejecting the capacity approach for the above mentioned reasons, advocates what he calls the 'publicness approach'. This approach states that only when private actors are relevantly public they possess responsibilities to protect and provide for human rights. According to this approach an actor is relevantly public when they have accepted and are 'accepted as having authority to act on behalf of the collective as agents with a “primary political role”' (Karp, 2014, 143). Factually it can be argued that certain actors are indeed playing a primary political role. For instance, in the weak-governance zone of the Niger Delta, Shell has a political role as the provider of collective goods and main face of governance. (Karp, 2014, 145). But, as Karp acknowledges, simply performing a primary political duty or providing public goods is not sufficient to constitute an actor as relevantly public and therefore as bearer of fundamental rights duties. This primary political role has to be accepted by the public and the actor itself. As such 'this account hinges primarily on the willingness of a particular actor, group, or institution to exercise political authority' (Karp, 2014, 145).

As such the publicness approach leaves, at least in the short term, the responsibilities to protect and provide up to the discretion of the TNCs themselves and thereby fails to identify a clear responsible agent with ‘no agent-directed discretion to what constitutes an adequate performance of the duty’ (Meckled-Garcia, 2008, 246). And the most likely outcome will be that once such an actor can be identified as public, it will either withdraw its Corporate Social Responsibility projects, or abandon the ‘context of weak or mixed governance’ in order to discharge its responsibilities. For a theory of human rights responsibilities of TNCs this is a very
minimal outcome to say the least. It leaves duties and corresponding responsibilities for fundamental rights to the discretion of private actors. Such discretion, even if it is only on the short term, does not fit the language of fundamental rights and duties.

Karp acknowledges (2014, 151) that the publicness approach is only likely to gain results in the long term and that it leaves individuals’ fundamental rights to be violated or under-fulfilled in the short-term, due to the withdrawal of capable non-state agents from governance functions, in order to make space for the establishment of robustly “public” institutions, which accept the responsibility to protect and provide for rights in the medium to long term’ (2013, 151, emphasis added). This statement seems to be defeating since the relevant ‘robustly public institution’ to be established and ‘accept[s] the responsibility to protect and provide’ is the state. Therefore the approach seems to focus on the wrong actor namely TNCs while it should be focussed on enhancing public authorities in order to protect individuals’ rights in the medium to long term.

Conclusions

The problematic situation that arises from the translation and application of ideal principles to practice shows, at least minimally, that an ideal approach cannot justifiably assign perfect human rights duties and responsibilities to TNCs. Neither can it single out the relevant actor, or system of actors, to hold them accountable for violations of individuals fundamental rights. Therefore this paper will shift focus towards a non-ideal approach that invokes novel interpretations of private law instruments in order to achieve the end of TNCs compliance with human rights. However, ideal considerations will not cease to operate in such an approach. In relation to human rights, new interpretations of private law mechanisms still need to identify the relevant and legitimate actors that have human rights duties without agent-directed discretion. In other words the fact that focus shifts towards private law measures does not alter the nature of human rights duties. Furthermore, in cases in which TNCs violate their duty the approach should identify the legitimate actor whose, non-discretionary, duty it is to hold these
TNCs accountable and take them to court.

The following section will introduce a non-ideal approach developed by Hugh Collins and assess whether this approach can be extended as to hold TNCs accountable for human rights violations in general, beyond the specific context of the sale of consumer goods produced under violation of international labour standards without the direct involvement of a state or public authority as primary duty bearer.

IV. Non-ideal Theory; Interpretations of Existing Legal Measures

Collins ‘Ethical Consumer’

In ‘Conformity of Goods, the Network Society, and the Ethical Consumer’ Hugh Collins (2014, forthcoming) takes a non-ideal and legal approach to the issue of TNCs and human rights. He proposes a novel and inspiring interpretation of existing legal instruments according to which consumers can hold TNCs accountable for violations of human rights, international labour standards, local labour law, and other accepted standards taking place in the chain of production. The following section will introduce Collins’ approach before extending it as to incorporate an assignment of, indirect, human rights duties and responsibilities to TNCs without the involvement of the state as agent either assigning duties to TNCs or holding them accountable. As such Collins’ novel approach will be used as a stepping stone in thinking about the assignment of human rights duties to TNCs. While extending Collins’ approach, this paper will conclude that such ‘constitutionalization’ of private law needs at some point, even though only minimally, the involvement of a public authority in order to guarantee consistently justifiable legal measures.

Collins’ argument has several carefully executed and crucial steps with which I will deal briefly. It should be noted that Collins’ concern is only indirectly with fundamental and human rights. His initial concern, triggered by the Manifesto on Social Justice in European Contract Law (2004), is to challenge the ‘traditional division of labour between contract law and public
regulation with respect to labour rights’ (Collins, 2014b, 3). He explores whether contract law should be ‘concerned not only with the protection of weaker parties to a contract but also other who might be adversely affected by contracts concluded in Europe’ (Collins, 2014b, 2). However, his approach can be seen as an attempt to re-interpret traditional contract law as to incorporate concerns for fundamental and human rights.

Collins’ argument seeks to indirectly hold TNCs accountable for violating their negative duty to avoid from harming and their duty to respect international labour standards and human rights. This indirect assignment of responsibility occurs through a novel interpretation of contract law. Furthermore, Collins only considers consumer sales law, which seems to limit the scope of his approach to TNCs from the productive sector, thus excluding TNCs working in extractive sectors. The framework he builds can be extended as to incorporate more than labour laws and production processes.

Collins addresses the problem that the violation of workers’ human rights or minimum international labour standards often take place ‘several contractual steps removed from’ the consumer purchasing a good. He argues that production processes take place within international networks of labour in which there is one ‘hub’ acting as principal agent. The argument states that in our present network society (Castells, 2001a) production no longer takes place in a simple supply chain but in a network in which ‘every detail of the product, its production process, and its marketing is organised and managed by the central hub’ (Collins, 2014b, 4). However, due to the strict separation between rules concerning international trade and labour standards, it is difficult for public actors, he states, to justify measures against such ‘central hub’s’ whose goods are produced in violation of labour standards. This explains Collins’ focus on contract law generally and consumer sales law more specifically.

Consumers have a lot of power prior to purchasing a good. More power than states in the

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8 Central hub is taken, in this paper, to refer to the central authoritative part of a transnational corporation, most likely its headquarters. For instance, Apple as a transnational corporation covers more than the headquarters in California but extends to other company locations and even their contracted production facilities but their central hub is located in California and is the entity that has, largest, control over the whole transnational corporation.
sense that consumers can boycott certain products and organizations under their freedom of expression ‘even when similar measures by governments would be prohibited’ (Collins, 2014b, 9). Collins seems to extend the logic of consumer boycott to the interpretation of the contract law remedies available to consumers when the purchased good does not meet their reasonable expectations. The issue is then, in Collins’ words,

‘suppose a consumer acquires a mobile phone, but discovers shortly afterwards that it had almost certainly been manufactured using child labour, indentured labour, or working conditions that violated international labour standards, human rights, and local labour laws? Is there any remedy for the consumer who now feels that her ethical principles have been compromised?’ (Collins, 2014a, 8)9

The measures Collins has in mind concern the interpretation of the ‘reasonable expectations’ of consumers with regard to the quality of the purchased goods. If the expectations a consumer can reasonably have of a product are not met, the contract between buyer and seller can be voided. Two steps need to be taken before this approach might work and a contract of sale of a good produced in violation of human rights and minimum labour standards can be voided. Firstly, it must be established that a consumer can reasonably expect that a product is produced in accordance with labour standards and human rights. Secondly, it has to be shown that this aspect is of intrinsic value to the product, and here lies one of the innovative aspects of the approach.

The first step is to interpret the TNCs code of conduct as an expectation of process. Many TNCs have established codes of conduct in which they outline their efforts to align the production of their goods with international standards and human rights. The second step is to affirm that a consumer can reasonably expect that if a product is said to be ‘ethically sourced, free from genetically modified organisms, or manufactured in a carbon neutral manner’ that this is actually the case ‘even though they relate to the process by which it was produced rather than the performance of the product itself’ (Collins, 2014b, 12). Hereby Collins maintains that the

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9 This may seem like an odd, maybe even perverse, line of argument since surely the problem in the case of products being produced under degrading circumstances is that those who produce the products have their rights violated and not that the consumer has his or hers ‘ethical standards’ breached by purchasing a consumer good. However, Collins’ line of reasoning does open a novel, and potentially fruitful, interpretation of contracts and contract law.
'performance' of a product not only concerns the technicalities the product should deliver but also extends to the 'history' of the product: the circumstances under which it was produced.

Having established this Collins argues that central hubs spend a lot of time and resources on claiming that their products are produced in ethically justifiable manners and in accordance with international standards such as human rights. If a consumer finds out, after purchasing, that the good does not possess this quality he or she 'may be able to argue that her expectation of conformity in this respect has been dashed. It should follow that the normal remedies for breach of the requirement of conformity should be available, including rejection of the goods or compensation for the reduction in value.' (Collins, 2014b, 16).

**Generalizing Collins' Approach**

The framework Collins builds can be extended as to incorporate more than labour laws and production processes. Furthermore, the approach’s intent and ability to work within existing contract law measures make it promising and worthy to assess whether and/or to what extent it can allocate human rights responsibilities to private actors justifiably and legitimately without direct involvement of the state. As such this approach offers a promising opportunity to assign to TNCs duties corresponding to human rights and hold them accountable for violations of these duties.

In this section Collins’ approach will be generalized as to incorporate more than just labour standards in the productive sector. The approach will also be interpreted in light of the initial question of this paper.

This paper’s generalization of Collins’ approach focuses on the role consumers can play in holding TNCs accountable, under sales law, for violations of human rights by appealing to violations of the TNC’s own codes of conduct. This paper will not deal with the practicalities of Collins’ approach. It assumes that Collins’ suggestions can be practically implemented through judicial or out-of-court proceedings. Furthermore it assumes that such proceedings will gain media attention and thereby put more pressure on TNCs to comply with their human rights
related duties. In the following, Collins’ approach will be generalized and interpreted in light of the initial question of this paper.

A generalization of Collin's approach could turn it into a theory of indirect responsibility for human rights violations. Indirect in the sense that TNCs are not held directly accountable for human rights violations, but consumers are enabled to engage in legal action when the expectations of process as stated in TNCs’ codes of conducts are violated. Nevertheless Collins’ approach may lead to develop a theory of responsibility of TNCs for human rights violations. Indeed, the central aim of Collins’ approach is to hold the manufacturers of goods produced under violations of human rights accountable under contract law.

If Collins’ approach is further developed so as to be transformed into a theory of responsibility for human rights violations, then such a theory can be assessed in the light of the basic criterion stated in section II of this paper. This criterion states that an assignment of human rights related duties should identify the relevant agent with no agent-directed discretion in performing that duty and that thereby human rights duties can only be perfect.

Assessing Collins’ Approach as Theory of Responsibility

It should be noted that this section takes Collins' approach as stepping stone to a theory of responsibility for human rights violations and assesses it as such. Therefore any criticism levelled against it do not necessarily constitute issues for Collins’ more minimal argument concerning international labour standards and consumer activism. Collins’ approach could be seen as promoting a private enforcement of human rights, in the sense that the initiative for this enforcement is not entrusted to public bodies, but to private actors (consumers). I will therefore hereafter refer to it as the ‘private enforcement approach’.

The private enforcement approach differs significantly from the approaches previously assessed in this paper. Both the capacity approach and the publicness approach assign human rights related duties to private actors, such as TNCs, directly by maintaining that the private actor holds a public role or public responsibility. The capacity approach entails that a certain
private actor bears human rights duties when it is the sole actor capable of having a public role in a certain context. The publicness approach straightforwardly considers TNCs as public actors in certain circumstances. In contrast to this the private enforcement approach leaves TNCs firmly in their role as private actors. The latter approach intends to indirectly hold TNCs accountable through private law measures. Thereby this approach does not require a constructivism that can consider TNCs as, partly, public actors. It is true that the private enforcement approach is of great benefit, because it enables to hold TNCs legally accountable. However, this benefit comes at a price. Failing to construct TNCs as relevant public actors consequently implies a failure to assign certain positive and perfect duties to them. In other words: Within the private enforcement approach TNCs cannot be assigned a duty to provide for human rights since they cannot be held as being the relevant public actors. Therefore the focus will be with the negative duty to avoid harming human rights and the duty to respect these rights.

Considering the criterion that the assigned human rights duty must be perfect in the sense that the duty-bearer has no discretion as to what constitutes an adequate performance of the duty, two initial concerns rise when thinking about the private enforcement approach. Firstly, through its focus on purely private, contract, terms it might create an incentive for TNCs to downscale their codes of conduct and thereby the expectations raised. Secondly the reliance on codes of conduct can furthermore lead to overly burdensome outcomes for TNCs. I will quickly consider these two concerns and, even though they can be overcome within the private and contract law framework, conclude that they point to a more fundamental issue concerning the private enforcement approach.

As with Karp's publicness-approach the private enforcement approach creates a short-term incentive for TNCs to minimize their codes of conduct. Since the approach relies on consumers holding TNCs accountable through assumed breaches of contract and the public pressure resulting from court cases, the simplest way for TNCs to avoid these cases in the future is not by acting in compliance with their existing code of conduct but to downscale their
commitment to human rights, or make them less explicit. Thereby they reduce the expectations raised and are less vulnerable for legal actions by consumers. However, since many contracts have already been entered into by consumers and TNCs can be sued according to them, this concern is not necessarily defeating since the actual standards set in the existing codes of conduct (and not the possible future lower standards) apply to these contracts.

The second issue has more weight to it since it points to an issue the private enforcement approach has with allocating human rights duties and responsibility equally. Think of the production and assembly of Apple's iPhone taking place at Foxconn's factories in China. The production process here violates several international labour law standards, and potentially also human rights. Since Apple states in its code of conduct that it respects all these standards, according to the private enforcement approach it can be held liable by consumers under sales law. However, other products which do not belong to Apple are also produced at these factories, or other factories under similar circumstances. The central hubs controlling the production of these other products might not have a code of conduct or a very minimal one. Consequently this puts Apple in position where it can be taken to court whereas these other central hubs cannot. This agent-directed discretion that exists in discharging accountability for violations of human rights not only puts an overly heavy burden on TNCs with extensive codes of conduct comparatively to TNCs with more minimal ones or none at all, but it also points to the question of whether a private approach lacking state involvement is legitimate in assigning human rights duties and holding TNCs accountable for violations of these duties.

Any approach allocating duties corresponding to human rights that fails to eliminate the agent-directed discretion in performing those duties might constitute a short-term improvement, as is the case with the private enforcement approach, but undermines the concept of human rights because it fails to equally assign the corresponding duties to relevant agents with no discretion in performing these duties. A reply to such a rigid application of a

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10 Apple's suppliers code of conduct includes 'standards in the areas of Labor and Human Rights (…)’ that apply to their suppliers’ conduct. See the Supplier Code Of Conduct: [https://www.apple.com/supplier-responsibility/pdf/Apple_Supplier_Code_of_Conduct.pdf](https://www.apple.com/supplier-responsibility/pdf/Apple_Supplier_Code_of_Conduct.pdf) (visited on 7-6-2014)
normative criterion is that it does not matter whether an agent has discretion: when an identifiable agent is responsible for violating its duty to avoid harming and that agent has ‘a direct intention that harm occurs, or [has] a suitable negligent intention that it does’ (Meckled-Garcia, 2008, p.259) a wrong is committed regardless of any agent-directed discretion and that wrong should be rectified. While it is true that these wrongs require rectification and holding agents accountable is better than impunity, the accountability of human rights related wrongs should be equal to any agent committing the wrong under the same jurisdiction.

The central task is to guarantee this equality in accountability of violators of human rights duties and responsibilities. And while the private enforcement approach successfully tackles issues relating to overcoming statism in the allocation of human rights duties and holding private actors accountable for them by focusing on private law measures and interpretations exclusively, it cannot guarantee this equal accountability. The consequence of this defect is that the inequality in accountability results in the unjustifiable situation that TNCs become the actors that factually grant human rights to the people employed in their production and supply chain. Within private law this is a perfectly legal and common situation: in any contract between private parties those parties themselves determine the rights and duties specified in the contract. But in relation to fundamental rights, as human rights are, this seems hardly justifiable because these constitute minimum rights that should be enjoyed by all individuals, and not discretionally granted to few individuals by powerful private actors.

Though the private enforcement approach seems to be the most viable and appropriate approach in holding TNCs accountable for wrongs committed through violations of their duty to avoid harming and respect human rights, it cannot consistently apply this accountability equally. As such we arrive at the conclusion that either at some point a public authority must be involved to guarantee this equal accountability or that human rights are not applicable to the conduct of TNCs. I will quickly expand these options and favour the first over the second.

In order to guarantee equal accountability TNCs should have an equal minimum human rights standard included into their codes of conduct. Only then can they be held accountable
equally within the same jurisdiction. However, in order to achieve this, TNCs must be externally forced to incorporate this standard into their code of conduct. And in the end a state or other public authority like the European Union or the World Trade Organisation (WTO) would be the relevant actor to force TNCs to do so. Thus, while the private enforcement approach to a large extent works upon initiatives of private actors, a state or institution like the EU or the WTO should force the inclusion of the same standard. In practice this would mean that, in the case of the EU, any TNC whose central hub is located within the jurisdiction of the EU can be held liable by consumers according to the private enforcement approach. In this case the involvement of the state or state-like institution is very minimal since private individuals can play a double role as (a) consumers holding a TNC accountable through consumer sales law and (b) as citizen voting or petitioning the necessary laws on the political agenda.

The second option consists of leaving behind the language of fundamental rights. Even though these rights exists, without the possibility of their legitimate application they have no practical role to play. In this case the private enforcement approach can be applied as explained by, for instance, Collins without using the language of fundamental rights but only speaking of contract terms and the content of codes of conduct which constitute rights for the contracting parties under private law. However, in translating this approach to practice one can only conclude that the potential public pressure that will result from public court proceedings will have a minimal impact. There have been numerous cases in which attention and public pressure was put on TNCs after either disastrous accidents, for instance in Bangladesh, or new insights into production processes, as with Foxconn in China. This pressure and attention have, in fact, changed very little. The harsh truth is that just public pressure is not enough to force TNCs to incorporate standards corresponding to human rights into their codes of conduct.

Thus in order for the private enforcement approach to become a theory of, indirect, human rights duties and responsibilities it needs a minimal threshold initiated and forced into TNCs’ codes of conduct by a public authority like a state or a public supranational institution. However, as stated, this is a very minimal public involvement because the public authority
involved is neither allocating the human rights duties and responsibilities nor is it holding TNCs accountable for violations of their duties to avoid harming and to respect human rights. Furthermore the consumer's role can be explained as a double one. On the one hand a consumer can, through the private enforcement approach, i.e. through legal actions, pressure TNCs towards more socially benign behavior. On the other, consumers, as voters, have the political power to vote and petition and thereby consequently pressure states and other public-institutions to create laws obliging to include a human rights threshold in codes of conduct. Therefore, the private enforcement approach amended with this minimum involvement of a public authority finds a middle way between the idealism of the capacity and publicness approach on the one hand and the practical applicability and pragmatism of the private enforcement approach on the other.

V. Conclusion

This paper has reviewed three different approaches through which scholars have attempted to justify the applicability of human rights duties and responsibilities to TNCs either directly or indirectly. It is concluded that neither of these approaches can assign duties to an agent who has no agent-directed discretion in performing the duty. The private enforcement approach as expanded from Collins' argument opens up new possible paths. The focus on consumers and public pressure in order to force TNCs towards respect for human rights, and other relevant international standards, proves to be promising. However, though minimally, in the end this approach too cannot lead to consistent and equal measures against TNCs and thereby cannot properly protect individuals' fundamental rights without the involvement of a public authority. This public authority, a state or a supranational public institutions like the EU, should force TNCs to incorporate the same minimal human rights threshold into their codes of conduct. Only in this way, the private enforcement approach would be able to justifiably hold TNCs accountable for human rights violations.
Literature


