Corporate social responsibility and human rights; An examination of the Swedish National Contact Point of the OECD and other possible alternatives.
Abstract
This thesis firstly attempts to provide a theoretical basis for how the complex cases related to corporate misbehaviour in relation to human rights respect should be handled. Secondly, it attempts to critically examine how well the Swedish National Contact Point (SNCP) functions in relation to its goals through the usage of elite interviews. Thirdly and finally it also explores the interest of concerned stakeholders in finding other non-judicial conflict management mechanisms for cases within the CSR – human rights nexus at other mediation institutions such as the Stockholm Chamber of Commerce (SCC) and/or the International Chamber of Commerce (ICC).

The thesis argues that it is possible and advisable to apply Dworkin’s idea of hard cases to the conflictual cases appearing within CSR-human rights nexus in Sweden. It directs criticism towards the usage of opaque social pressure currently applied when hard cases within the CSR-human rights nexus are to be solved. It argues that usage of such pressure both makes it hard to follow up on decisions made and makes it questionable whether victims of human rights abuses related to corporate conduct are provided with effective access to remedy.

It suggests that Dworkin’s general principles of equal respect and concern is a least common denominator for the demands placed on conflict management mechanisms within the CSR-human rights nexus by both relevant soft law instruments and respondents in the elite interviews carried out for the thesis. As a result of the interview survey the thesis draws the conclusion that the SNCP to a major extent seems to have failed in the fulfilment of its goals and the expectations placed upon it as stipulated by the OECD 2000 guidelines. What is more the SNCP seems little equipped to meet the requirements of the 2011 version of the OECD guidelines and the UN Guiding Principles unless some sincere and large scale efforts are made by the Swedish government and other concerned parties in the SNC’s regeneration. The thesis found the interest among concerned stakeholders for alternative conflict management mechanisms at the SCC and the ICC and this to be generally low. Respondents generally thought that the challenges for such private institutions to procure the confidence of both sides in a conflict would be too difficult for them to overcome.

Key words: Corporate Social Responsibility, Human Rights, UN Guiding Principles, OECD Guidelines Multinational Enterprises, non-judicial grievance mechanisms, OECD National Contact Points, Mediation, Sweden, Stockholm Chamber of Commerce
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<tbody>
<tr>
<td>CR</td>
<td>Corporate responsibility</td>
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<td>CSR</td>
<td>Corporate social responsibility</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICCPR</td>
<td>International Convention on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Convention on Economic, Social and Cultural rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILO</td>
<td>International Labour organisation</td>
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<td>ILO Tripartite declaration</td>
<td>ILO’s tripartite declaration of principles concerning multinational enterprises and social policy</td>
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<tr>
<td>INGO</td>
<td>International Non-Governmental Organisation</td>
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<td>MNC</td>
<td>Multi-National Corporation</td>
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<td>NGO</td>
<td>Non-Governmental organisation</td>
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<td>NCP</td>
<td>National Contact Point (referring to contact point under the OECD system)</td>
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<td>OECD Guidelines</td>
<td>OECD guidelines for multinational enterprises</td>
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<td>SCC</td>
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<td>Swedish National Contact point</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UN Guiding Principles</td>
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<td>UNHCR</td>
<td>UN Human Rights Council</td>
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Foreword and thanks

In all times people have had questions about what justice is, how it can be safeguarded in the best manner and how it can be re-established when breached. In all times people have also asked themselves how things, services and systems can be improved. One set of questions concerned with seemingly abstract ideas, but with very practical consequences for those affected; the other concerned with very pragmatic issues, but yet with potential consequences for theoretical analysis. This thesis, in its own limited and humble way, attempts to contribute to this age long balancing act of human reflection between theory and practice. As this is done, tribute is duly paid to some of the philosophers, scholars and practitioners who have gone ahead and who have thought much more about these issues than this writer has. Metaphorically speaking the thoughts and ideas of previous thinkers can be likened to the foot and hand holdings of a rock climber. The mountain that we are about to climb is not physical; it takes other shapes and forms. Nevertheless it is wise to pay attention to the holdings and experiences that have been identified by those who have climbed this and other metaphorical mountains before us.

Not everyone with an interest in the main topic of this thesis might however, be familiar with the philosophers and the, sometimes rather abstract, ideas that form part of the discussions to come. Nor might they be familiar with the ways philosophers communicate about these things. It is not a given that everyone with the power and influence to affect both the fulfilment of other peoples’ rights, as well as the systems potentially handling conflicts of interests as far as these rights are concerned, have the ethical theorists’ privileged time to reflect on issues related to justice, rights, democracy and the improvements thereof. If you as a reader also feel that you might have lacked this time in your life, I want to assure you that I constantly have strived to write in a way that will make you feel welcome and comfortable also in the company of the ideas of philosophers. However, please bear with me if not all references to philosophers are explained straight away. Explanations to what they stand for will be duly provided in time. If you have the time and the curiosity to discover what they might have to say on issues related to your area of practice, please do read the whole thesis. If, however, you feel that philosophical discussions on ethics and justice is not your cup of tea just right now, but that you rather would want to get to the more practice oriented issues I suggest that you concentrate your reading to chapters 1, 2, 4 and 5.

Before we begin I would also like to thank all the wise and engaged persons I have met during the work with this thesis. Regardless of whether you have represented corporations, civil society, academia, free consultants or mediation institutions; your ideas, words and openness have been essential in the working process. A big thank you also goes to Marija Stojanovich for her good team work and thought provoking input during our time together at Atlas Copco Ltd. My supervisor Dr. Per Sundman at Uppsala University is also owed a big thank you for patient bouncing of ideas and formulations during the writing of this thesis. Finally, my dear Johan, friend, companion and beloved husband, you have been a constant conversational partner in this work and you also help me to, when needed, put my thoughts away and smell the flowers of life whenever they appear!
1. Introduction

Certain areas within the fabric of society function almost as magnetic fields for philosophical, normative and jurisprudential questions concerning human rights. One area with a strong potential to act as such a magnetic field is that of SCR, or CR as more and more corporations chose to call it. That modern corporations, and especially multinationals, have large amounts of power and often financial resources surpassing those of nation states has been observed by numerous writers in many different disciplines. More and more attention is therefore naturally focused on how corporations as actors on the global and national stage behave or misbehave. At the same time corporations have not as of yet been fully recognized as subjects under international law. It is this tension between power and influence on the one hand, and lacking accountability measures to safeguard rights and duties on the other, that form the magnetic field observed above.

When I say that corporations as of yet have not been recognized as independent subjects under international law, an argument can be made that this is a changing legal fact/condition/state of affairs. As we shall see ahead the argument about a change of affairs is important for the remainder of this thesis. Some authors, such as Clapham, would say that certain responsibilities, related to human rights respect and attached to non-state actors, have been present in foundational UN documents already from the very beginning\(^1\); we have only, until very recently, forgotten the interpretations facilitating such conclusions. Whether or not the matter is one of forgetfulness is hard to say, what is clear however, is that the pressure on corporations to assume a role of responsibility for issues relating to human rights has increased drastically during the last decade. For long the relationship between states and individuals were seen as the only area of direct concern to the fulfilment or non-fulfilment of human rights. Even though the issue of corporate human rights respect still remains a field under construction there is today a growing foundation on which CR with regards to human rights can be built. Much has happened only during the last decade. One clear example of such developments is the recent “UN Guiding principles on business and human rights on the implementation of the “protect, respect, remedy framework”\(^2\) developed by Dr. John Ruggie and accepted in a resolution by the UNHCR in June 2011\(^3\).

The Guiding Principles are part of what usually is called soft law, and therefore not binding on states. In its resolution the UNHCR also allows for the UN Guiding Principles to be further improved. The status of the UN Guiding Principles in international law and politics can therefore not be seen as anything but that of strong recommendations. Nevertheless, it is a very clear and much improved articulation of the human rights aspects of SCR. It claims to put down what from now on will be the socially acceptable standards for corporate behaviour in relation to human rights. It also enlarges the circles of corporate responsibility to include both suppliers and customers.\(^4\) The way in which the most recent revision of the OECD guidelines, valid from March 2011, as well as the EU’s renewed strategy for CSR 2011-2015,

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2 A/HRC/17/31  
3 A/HRC/17/4  
4 Op. Cit. 2, see especially § 6 of the introduction to the actual framework
launched in October 2011, mirrors some of the central aspects of the framework hints that the framework’s claim is to be taken seriously.

However, considering the freshness of the UN Guiding Principles many things remain to be settled. Even if the UN Guiding Principles is clearer than any previous international guidelines on CSR and human rights, there are still much room for interpretations to be made and practices to be settled. A process to be guided by a “working group on human rights and transnational corporations and other business enterprises” created by and connected to the UNHCR. From a purely academic point of view, this ongoing process of settling interpretations and practices is a potential dream situation for researchers within human rights, ethical philosophy, international law and organizational culture. To what extent does the framework change the ethical, normative and legal expectations we have on corporations and states? To what extent will the framework really change the behaviour of corporations and states in relation to CR and human rights? What practical challenges do framework implementation present and how are they to be solved? What effects will the framework have on different sized corporations, their suppliers and customers? However, for the ordinary man and woman working for corporations, benefitting from their services, living close to their operations and, especially, for those suffering the consequences of corporate misbehaviour with regards to human rights, a more pressing and important question arises. To what extent will the UN Guiding Principles lead to justice and improved human rights for those groups and individuals who experience human rights violations due to the behaviour of corporations and states? The interest of achieving a certain increase in justice and human rights implementation must be considered as the over-arching goal of all work related to the UN Guiding Principles and the CSR-human rights nexus if the framework, and the human rights rhetoric used by both states and corporations, is to have any real significance. By the very same logic, any examination of the extent to which existing, or suggested, structures can help in the provision of justice and human rights implementation has to be of fundamental importance to all research related to this area, including the research presented in this thesis.

The idea for this thesis was born as I during the early autumn of 2011 did an internship at the headquarter of Atlas Copco Ltd and its department for communications, which also handles CSR issues. Together with project colleagues I wrestled with some of the questions asked above as we tried to see what the new UN Guiding Principles, if taken seriously, meant for a MNC. When I joined the project an idea about whether the SCC could be a viable alternative for mediation in cases of conflict between corporations and aggrieved parties had already been developed by one of my project colleagues. It is with her good memory that I now

5 The correspondence between the UN Guiding Principles and the revised OECD guidelines can e.g. be seen in §§ 2, 10, 11 and 12 of the OECD revised guidelines for multinational enterprises available on www.oecd.org last visited 2011-10-20. The EU strategy mirrors the language and demands of the UN Guiding Principles in e.g. its articulation of what corporations are demanded to do in order to take their responsibility for their impacts on society. According to the EU strategy the European Commission also aims to initiate a process of increased UN Guiding Principles implementation within the EU until 2014. For more information see chapters three and four in The European Commission, “Communication from the commission to the European Parliament, the council, the European economic and social Committee and the committee of the regions: A renewed EU strategy 2011-14 for corporate social responsibility”, Brussels, 25.10.2011, COM(2011) 681 final available at http://ec.europa.eu/enterprise/newsroom/cl_1_getdocument.cfm?doc_id=7010 last accessed 2012-05-10

6 Op. Cit. 3, §6
explore and examine this idea further. Consequently, this thesis will to a large extent revolve around a critical examination of the mediation possibilities that exist, or could exist, whenever there are conflicts between corporations and aggrieved parties in relation to failed human rights respect. Dworkin’s social justice theory will together with some extensions based on Pogge’s ideas will, together with the soft law provisions included in the UN Guiding Principles and the OECD guidelines, provide a theoretical basis for this examination. Throughout our journey it will be impossible to not also ask critical questions about the general suitability of mediation, rather than court proceedings, as the overall and general mode for conflict management in these cases.

1.1. Purpose

The questions asked in the previous passage are only a few of those that could be asked. Rather than to answer all of them this thesis will limit itself to some of their sub-aspects. Its purpose is three fold.

**Firstly**, this thesis will strive to provide a theoretical background, with its roots in legal and moral philosophy, to what here will be called the CSR-human rights nexus. In order for the reader to understand the reasoning of this theoretical framework, some contents of this nexus will have to be described. Therefore, the reader will be provided with an introduction to the most recent and major soft law developments related to CSR and human rights. The theory building in itself will mainly be based on Dworkin’s ideas about equality as a basic right. Departing Dworkin’s ideas about social justice the thesis will move on to explain why Dworkin’s thoughts on “hard cases” also are of high relevance to the CSR-human rights nexus. Further inspiration and support will be draw from legal scholars such as Clapham and Amao. The argument will be made that the CSR-human rights nexus, due to its very nature, results in many such hard cases. We need to explore possible guiding principles for the handling of these hard cases, suitable for our Swedish context and the ways in which it relates to the global problems embedded in the nexus itself. As we explore these principles we need to also critically examine those principles currently provided in dominant rhetoric. Most noticeable among such solutions is the one provided by the current Swedish government, which states that conflicts within the CSR-human rights nexus are best managed through stakeholder dialogues or non-judicial mechanisms such as mediation.

**Secondly**, this thesis will critically examine the major Swedish mechanism available outside corporations and aimed at settling conflicts between corporations and groups/individuals who perceive that human rights have not been respected; the SNCP. Its focus on mediation possibilities, rather than judicial mechanisms, is largely due to the fact the possibilities to bring cases towards corporations for failure to respect human rights in legal courts remains extremely limited in the Swedish context. The examination is done through an interview survey with respondents representing various stakeholders within the CSR-human rights nexus in Sweden. The UN Guiding Principles and the 2000 and 2011 versions of the OECD

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7 For an exploration of the way in which judicial conflict management mechanisms function in Sweden regarding similar cases please see a MA thesis currently being written by Annilie Nyberg, MA human rights Uppsala University
guidelines are used as benchmarks for how such institutions should function. The examination is carried out on a, comparatively speaking, micro level by asking a very concrete research question:

1. How well does the SNCP function in relation to its goals and the expectations placed on it by different stakeholders and in relation to existing soft law guidance?

Thirdly, this thesis will explore ideas of possible alternative mediation mechanisms for cases where corporations are accused of failing in their human rights respect. This exploration will depart from the Swedish context. It will be based on the results of the interview survey mentioned above. The following research question will be asked:

2. If the SNCP is found to not function very well, is it a viable option to use other experienced mediation institutions such as e.g. SCC or the ICC as mediation facilities?

This research question contains two sub-questions a) how could such mediation alternatives be construed to be satisfactory for both corporations and complainants; and b) what consequences would mediation, in cases concerning human rights, at such private institutions have for the state’s overall responsibility to protect human rights? In relation to this latter question it is important to discuss how such solutions relate to this thesis theoretical background, but also to deal with potential concerns about their accountability and legitimacy. Other suggestions for mediation solutions that have been made by respondents during the interview survey are also presented. Once again it is important to emphasise that underlying the more specific purpose of the thesis is an assumption that increased human rights implementation and some form of justice achievement must be the over-arching goal against which we strive. At least if our rhetoric about human rights in relation to CSR is to contain substance. Justice can be seen as many things and as a state of affairs it can be hard to establish. Quite often, however, we see access to fair and transparent procedure able to try our case when we are wronged or accused of committing a wrong, as one means to establish justice. Consequently, as this thesis goes on its exploratory route along the three-folded course provided above, critical discussions about the extent to which such fair and transparent procedures are realistically available will be relevant and important. Arguably, part of such discussions must be a balanced mixture of both idealism and pragmatism if the road towards suggested solutions is to be sustainable.

Finally it should also to be emphasised that this thesis has no higher ambitions than to be a pre-study within its field. At best it identifies some areas of further research, rather than provides perfect solutions or perfected knowledge.

1.2 Outline

This thesis takes on both a theoretical and an empirical approach. On the one hand it makes quite a theoretical exploration of the principles that can be applied in order to solve the hard cases within the CSR-human rights nexus. On the other hand it presents an empirical investigation. For the sake of structure and clarity these two approaches will be dealt with in two separate parts. The thesis will thus include one part with a clear theoretical focus
(chapters two and three) and one part with an empirical focus (chapter four). It might first seem that these two parts are rather disparate and not very well related. The ambition is however to bring these two parts together so that they can illuminate each other in the discussions of the thesis’s fifth chapter.

Let us now take a more detailed, but brief, look at what the remaining chapters will include. The remainder of the first chapter will go through such things as delimitation, definitions, methodology and research problems.

The second chapter will introduce some of the foundational contents of the CSR-human rights nexus in the form of the most recent soft-law developments within the area. Emphasis will be placed on the UN Guiding Principles and the OECD guidelines for multinational enterprises. Specific focus will be on the provisions these documents make regarding mechanisms for handling conflicts between aggrieved parties and corporations in cases where human rights respect has failed. The major changes in the OECD guidelines after the 2011 revision will be accounted for. Considering the very relative youth of the UN Guiding Principles not much has yet been done in terms of assessment. The OECD guidelines have, however, been assessed by several actors and the chapter will briefly summarize the main contents of such assessment. The chapter will also describe how the SNCP currently functions. This more technical account for different soft-law documents has deliberately been placed before the more philosophical contents of chapter three. This in order to make the reasoning in chapter three more accessible for readers lacking background knowledge in the relevant soft law mechanisms. At the very end of the first part of the second chapter short descriptions of the SCC and the ICC have been included as this thesis explores their possibility to provide non-judicial non-state grievance mechanisms in line with the requirements of the UN Guiding Principles.

The third chapter will respond to the first purpose of the thesis; exploring some of the principles available as we attempt to solve the hard cases that easily appear within the CSR-human rights nexus. As has been suggested already, the exploration will take place against a background of moral philosophy. Our departure point for such a philosophical discussion will be the perception of human rights as equally belonging to all human beings and outlined in the International Bill of Human Rights (including the UNDHR, the ICCPR and the ICESCR). Everyone who biologically fulfils the criteria of being human will here count as human, regardless of his/hers capacity to communicate conscious choices or desires. The difference in public international law between responsibilities classically given to the state and those given to corporations will be explained. Clapham will assist to remind us of the extent to which the implementation of those rights also becomes the duty of everyone, including corporations. It will be suggested that the UN Guiding Principles might change the emphasis in how such responsibilities are divided between the state and the corporate sector. This thesis will, however, argue that even if such emphasis changes there has not been any deeper changes in the classical division of responsibility between the state and the private sector. After all CSR in relation to human rights remains a largely voluntary undertaking also after the issuance of the UN Guiding Principles.
The third chapter will then move on to present arguments for why Dworkin’s ideas about hard cases can be applied on the CSR-human rights nexus. One major reason and two underpinning characteristics of conflicts within the CSR-human rights nexus will be presented as causes for why the CSR-human rights nexus is more prone towards hard cases. Namely; the voluntariness of CSR underpinned by a) the power imbalance between parties to a CSR conflict; and b) the sense in which the CSR-human rights nexus often contains conflicts between different actors’ right to property. Here we will explore to what extent Dworkin’s suggestion of equal respect and concern as a foundational principle by which hard cases should be solved can be applied also to the hard cases of the CSR-human rights nexus. The current rhetoric of voluntariness and CSR as virtuous behaviour, as well as the potential underlying principles this rhetoric presents, will be critically examined. This will be done with the help of Sundman, Sulkonnen and Mouffe.

The fourth chapter will focus on the thesis’ second and third purposes. Here the results from the interview survey will be presented and related to the more detailed research questions asked in relation to the Swedish context. The fifth chapter will provide a discussion about how the research results corresponds both to the research questions asked and to the more theoretical arguments presented in chapters two and three. Recommendations for future research will also be made. The chapter will end with a presentation of respondents’ ideas about how the current situation regarding access to remedy for aggrieved parties could be improved in Sweden.

1.3 Delimitation and definitions

There are a whole range of philosophical and jurisprudential issues this thesis will not discuss. It will not provide any lengthy discussion about whether corporations can be regarded as morally or legally responsible for actions performed as part of their operations. Backed up by Clapham, Amao, Sundman and Ruggie among others the claim will be made that corporations can, and should be, held both morally and legally responsible.

CSR is traditionally understood as an expression for corporations’ moral responsibility with regards to the environment, working conditions and human rights. I.e. their responsibility to do more than the law demands within these areas. The UN Guiding Principles refers to “all the law demands within these areas.

8 Op. Cit. 1, pp. 198-199
9 O. Amao “Corporate Social Responsibility, Human Rights and the Law; Multinational corporations in developing countries”, Routledge, 2011
11 Supra 2
13 Op. Cit. 1, p. 195 and L.G. Hassel, The responsible company creates added value for owners”, Öhrlings PricewaterhouseCoopers and Studentlitteratur, 2008, p. 19. Worth to notice is a gradual shift in the extent to which CSR is voluntary. This is exemplified by the latest EU strategy on CSR in which the EU has shifted in its definition of CSR from “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis” (p. 3) to a definition which now reads “the responsibility of enterprises for their impacts on society” (p. 6). Both the UN Guiding Principles as well as recent literature on CSR (such as the nuanced discussion regarding the classical CSR concept that is presented in chapter three of M. Jutterström and P. Norberg, “Företagsansvar - CSR som managementidé”, Studentlitteratur, 2011) now opens up the SCR concept to not only include voluntary
internationally recognized human rights” and defines these as the rights included in the international Bill of human rights and the core ILO conventions. The reference to the core ILO conventions causes working conditions to already be included in the applied human rights concept. Interpreted broadly the rights in these documents could also be seen to include a broad range of environmental issues. However, to include the whole spectrum of environmental issues connected to CSR within the umbrella of human rights might risk confused readers and a lost focus on the more specific human rights concerns of CSR. When talking about CSR this thesis will consequently limit itself to a clear human rights focus, applying the definition of internationally recognised human rights as provided in the UN Guiding Principles as its reference point. In this thesis the UN Guiding Principles will, due to its status as a UN document and its general accessibility, consistently provide the basic reference point for definitions of more technical terminology.

The term “the CSR-human rights nexus” will in this thesis refer to the whole set of discussions and rules as well as disparate praxis that states, corporations, multilateral organisations (such as the UN and the EU), INGOs and NGOs are engaged in with regards to human rights and corporate conduct. If by an institution one means a social organism that formally or informally has a set of agreed to rules and underlying assumptions defining its identity and boundaries; the nexus in itself cannot, as of yet, be identified as an institution with a global or even regional reach. Its borders are as of today too loosely demarcated in terms of what is acceptable behaviour or not in order for the nexus to be described as such a set institution either globally or regionally, maybe not even nationally. Too much of renegotiations with regards to what responsibilities different actors really have towards other actors still remain to be settled. However, the UN Guiding Principles together with the work of Dr. Ruggie and his team during the past seven years goes a long way to lay the foundation for what could become a more stable institutional setting. As we will see, the last revision of the OECD guidelines largely incorporates this basis. The OECD guidelines identity as a state-negotiated document, make them an important extension of the foundation built by the UN Guiding Principles. This thesis makes a very humble attempt to see how one might be able to build on from this in the Swedish context.

The term “soft law” is commonly used in reference to documents of great political influence that might serve as emerging evidence of international customary law, but never the less mechanisms, but also the possibility of legal structures. Considering the overall voluntariness of such legal possibilities at the level of the nation state it must, however be maintained that the whole CSR concept more or less still rests on a foundation of voluntary initiatives. Related to this discussion one could note that even though western home markets still include areas in which corporations voluntarily take upon themselves more responsibility than the law demands, the legal systems of these western home countries usually contain much stricter legislation concerning the environment, labour and human rights than those of many host countries in the global south. For Swedish and other western-based corporations the voluntariness of CSR thus largely concerns operations in host countries that have minimalistic or no legislation within CSR related areas than their home countries. While the extent of voluntariness within areas of classical concern to CSR in home countries could be seen to decrease in favour of more compulsory legislation this is not necessarily the case in the global south. This development towards increased legislation, also at regional levels such as the EU, supports by itself the argument that corporations very well can be held both legally and morally responsible as long as there are laws and functioning law enforcement to hold them accountable.
remain non-binding legal documentation within the realm of public international law. This is also the way in which the term will be used in this thesis.

Another term that needs to be defined is the term “stakeholder” in relation to corporations. In the ideal world this would be a term describing all those who have a stake in the way in which a corporation operates, from employees, shareholders, management to customers, suppliers and individuals who in any other way might be affected by the corporation’s activities. I.e. the extent in which these groups or individuals can affect the corporation does not matter, what matters is that the corporation affect them. For practical reasons this thesis is not able to account for such a broad spectrum of opinions that such an interpretation of the term “stakeholders” would mean. Here the term will be applied in a somewhat narrower manner referring to groups and individuals that have some form of possibility to affect corporations and their actions, and whose opinions corporations therefore have a direct interest in.

Justice can mean many things. There is not much space to dwell on the topic of justice here, but considering the variety of definitions associated with the concept it is necessary to at least provide a short overview and more specific delimitation of how the concept is to be used in this thesis. In the pages to come the term justice will mainly be connected to one of three different concepts. Firstly, it will be connected to the concept of social justice as a basic moral principle here defined by merging the theories of Rawls, Pogge, and Dworkin. Rawls defines social justice as something that comes into being when social values are divided in a way so as to always improve the situation of the individual or group that are found to be worst off. Pogge criticises Rawls for limiting himself to the context of the nation state. In today’s globalised world Pogge pledges for Rawls’s definition of social justice to be applied with a global scope. Dworkin also develops Rawls theory when he states that the meta-theory behind Rawls’s is equality in the sense of equal concern and respect towards each individual or right bearer as political institutions exercise their power. Our definition of social justice will thus be equal concern and respect towards each individual, and consequently also right bearer as political institutions exercise their power. Secondly, justice can be seen in more technical than philosophical terms. Most common is then to refer to retributive (justice that punishes the wrongdoer), restitutive (justice that aims to restore relations between different parties after an abuse has taken place) or redistributive (justice aimed at the redistribution of e.g. resources within a given society) justice. The main focus of this thesis will not be issues of structural injustices on a national or international level; it will consequently not discuss justice as the redistribution of physical resources. When talking about justice in this more technical manner, this thesis will therefore deal with the two forms of justice, retributive or restitutive. Whether retributive or restitutive justice is to be preferred usually depends on the details of a particular case. With regards to

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14 I have previously described the same way of merging the justice theories of these authors (with the addition of Amartya Sen’s justice concept) in relation to the CSR – human rights nexus in a similar manner to that presented here in an thesis written for Dr. Namli during the course “Rättigheter i konflikt”, which is part of the MA program in human rights at Uppsala University
15 G. Collste, “Globalisering och Global Rättvisa”, Studentlitteratur, 2004, s.75
16 Ibid. s.165
17 R. Dworkin, ”Taking Rights seriously”, DuckWorth, 2008, s.180-181
human rights breaches related to corporate behaviour one or both forms of justice could contribute to useful solutions. However, as this thesis will not deal with specific situations, but human rights breaches in its most general form, a deliberate option between the first two forms of justice lacks necessary meaning. In this thesis the term justice on its own should therefore be seen as referring to both retributive and restitutive justice. Arguably these forms of justice will only be truly achievable if also our definition of social justice is applied. Social justice as defined here should therefore always be seen as a conditional background value whenever the term “justice” is applied on its own.

Two important terms referred to in this thesis, which it might do well to define already here, are “grievance” and “grievance mechanisms”. Both of these terms are used and defined by the UN Guiding Principles and they will be used similarly here. According to the guiding principles a grievance mechanism is any “routinized, state-based or non state-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought”. 18 “Remedy” can be provided through judicial, administrative, legislative or other appropriate means and can include apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions as well as various mechanisms to prevent further harm. 19 The UN Guiding Principles’ definition of a grievance is in turn very broad. A grievance is understood as a “perceived injustice evoking an individual’s or group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice or general notions of fairness of aggrieved communities”. 20

For reasons that mainly have to do with the difficulties of translating these concepts to Swedish the term grievance was during the interviews with respondents translated to ”kränkning” and the term “grievance mechanism” to “konflikthanteringsmekanism”. An alternative translation to Swedish could have been the Swedish term “klagomålsmekanism”, but it was felt that this translation would not capture the whole range of possibilities included in the UN Guiding Principles definition of “remedy”. Neither does the term “klagomålsmekanism” rightly convey the message that the breaches against human rights to be treated in a grievance mechanism often are of a severity that causes them to be more than a complaint (klagomål). On the other hand, the term “konflikthanteringsmekanism”, in English translated back to “conflict management mechanism”, could fail to convey the fact that grievances in cases concerning business related human rights abuse many times might not be about the management of a conflict at all. Rather, once a breach has been established the case will be about granting an aggrieved party his or her rights. Most likely there will, however, be a conflict about whether there was such a breach and “konflikthanteringsmekanism” was in the end thus deemed to be the best Swedish translation. Its English retranslation “conflict management mechanism” will be used when the results of the interview survey is presented. Every time the term “conflict management mechanism” appears is should therefore be seen as

18 Op. Cit 2, § 25’s commentary
19 Ibid.
20 Ibid.
equivalent to the definition of a “grievance mechanism” provided by the UN Guiding Principles.

Keeping in mind that Dworkin himself is not a contractualist\(^\text{21}\) this thesis will nevertheless, for reasons of pure simplicity, depart from a contractual view on human rights as far as its philosophical basis goes. Here this contractual basis mainly means that human rights and their more precise implementation are seen as a result of a social reasoning process in which all should be allowed to participate.\(^\text{22}\) Consequently, it is also possible to make a reasonably well founded claim that also those not sharing a contractual view on the meta-ethics of human rights, such as e.g. Dworkin, can be included in the process of social reasoning. Thus a contract theory as a foundation for human rights philosophy could very well be the most inclusive modus operandi for a discussion about human rights and the hard cases of the CSR-human rights nexus that is of interest here. It is open enough to include also those who do not see human rights as only the result of a social contract to participate in continued conversations. At the same time, though, it does not place any demands on this thesis to provide arguments for why human rights should be anything more than the result of such a contractual process.

As far as the dealings with mediation possibilities are concerned this thesis will concentrate on viable mediation solutions for adverse human rights impacts caused by MNCs based in Sweden. It will not deal with viable mediation possibilities for adverse human rights impacts caused by small or midsized corporations operating solely in Sweden or of other nationalities operating abroad. Neither will the research for the thesis attempt to develop a complete suggestion for how the technicalities of mediation at the SCC or the ICC should look, but rather explore some different alternatives and suggestions. If found as a viable option, the drafting of a complete technical proposal for such mediation would have to be the task of lawyers at the SCC or the ICC respectively and would thus fall outside both my competence and mandate.

1.4 Methodology

1.4.1 Research methodology\(^\text{23}\)

Several methodologies have been used during the research for this thesis. Firstly, a review of relevant literature and the UN Guiding Principles has been made. This literature has covered both contracts based justice and rights theories as well as relevant CSR theory. The literature has provided a broad background as well as an overview of existing research within the area of CSR, human rights and ethics. Especially the literature directly related to CSR and human rights has enabled an estimation of the impact that the UN Guiding Principles already has had.

\(^{21}\) See Op. Cit. 17, p. 176

\(^{22}\) Those who would want this thesis to examine how such a position stands against e.g. Dworkin’s critique of Rawls and his concept of public reasoning as expressed in e.g. “Justice in Robes” will have to remain disappointed. Doing so would indeed be interesting, but is simply out of bounds in relation to our overall purpose here.

\(^{23}\) This chapter is partly an adopted version of the methodology chapter for my “Magister” thesis at Uppsala University (spring of 2011) on the right to water in the Philippines as I used semi-structured qualitative face to face interviews for data collection in relation to that thesis as well.
as well as its potential future impact. Secondly, semi-structured, qualitative face-to-face interviews have been made with seventeen respondents from six different respondent groups in Sweden. The purpose of these interviews was firstly to enable an empirical investigation of the research questions related to the SNCP. The interviews also provided an opportunity to check whether the philosophical framework developed mirrored the reflections of practitioners and their perceptions of the state of affairs. When opting for qualitative interviews as a methodology consideration was paid to the freshness of the UN Guiding Principles, the relatively limited range of the research questions for this thesis, and the fact that available literature focusing on the relevant aspects of SCR within the Swedish context is highly limited. Semi-structured interviews therefore became the most suitable manner in which to procure updated and relevant knowledge within the subject area. Considering the thesis’s third purpose, to explore possible interest in alternative mediation mechanisms, semi-structured interviews also provided a good method to collect information about how different stakeholders perceived incentives and challenges to such an alternative. Once collected, the data from the interviews were subjected to contents analysis and summarised interpretations of the interview results were made. Such an analysis facilitate a succinct understanding of the intentions of the respondents and thus also of the survey results.

A combination of purposive sampling and snowball sampling was used to select the respondents from the different respondent groups. The selection method of respondents was motivated by two factors. The first factor was the relatively limited amount of persons with experience and in depth knowledge of CSR and human rights in Sweden. The second factor was the need for personal introductions to some of the respondent networks in order to gain sufficient trust to ask questions of a sometimes quite investigative character. The combination of selection methods also worked as a potential safeguard against the risk that the researcher, throughout the interview survey, might select individuals without the presumed knowledge, expertise or interest in the relevant topics. While it might have been preferential to apply the idea of theoretical saturation used within grounded theory, the limited time for both the field research and analysis made such an approach problematic. Therefore the number of interviews was limited to a maximum of seventeen respondents. The length of the interviews was 20-75 minutes depending on the extent to which each respondent chose to develop certain themes during the interview and the possibility to book interviews in advance.

All of the respondent groups arguably constitute part of an elite if seen in relation to all those who potentially are affected by failing corporate responsibility related to human rights. Given the limitation of the thesis’s subject matter and the focus on the Swedish setting elite interviews were however deemed to be the most appropriate approach. In order to provide

25 In short purposive sampling means that certain elected individuals who are thought to have certain knowledge within an area are approached for in interviews. Snowball sampling means that persons who are interviewed are asked to suggest other potentially suitable respondents who then are connected for an interview. For more see M. Denscombe, “Good Research Guide”, Open University press, 2007, p. 17
26 Grounded theory as a form of social science empirical research means that one seeks answers through a previously non-decided number of interviews until the researcher is convinced that a level of theoretical saturation has been reached and that a certain issue has been explored to the extent reasonably possible. For more on grounded theory and theoretical satisfaction please see Ibid. p. 100.
respondents with as much confidentiality as possible all references to respondents and their opinions have been de-identified in the presentation of the interview survey. For the same reasons names of corporations or organisations that respondents represent will not be included in this thesis apart from where such references are deemed as unavoidable and as without risk of exposing sensitive opinions. Despite of this it will still be possible, for at least some potential readers to guess the identity of some respondents. This problem is hard to prevent with elite interviews unless you do many more interviews than what the time frame for this thesis has allowed. All interviews were carried out in Swedish and quotes from interviews as presented in this thesis have been translated by the researcher. All respondents were shown how the information they provided has been used in the thesis. Respondents were consequently given opportunity to comment, and if necessary, nuance their statements before thesis submission.

The first respondent group was constituted by CSR practitioners in the top management of three major MNCs operating in and from Sweden. Two that have been involved in the most recent cases dealt with by the SNCP and one that has not, but that that is familiar with the Ruggie framework and that operates within the same sector as one of the other corporations. It was deemed that this third MNC would be likely to provide a different perspective on the work of the SNCP. In an attempt to avoid the risk of letting the impressions of the two corporations that have had cases at the SNCP be coloured only by one person’s experiences, the plan was to interview more staff in these corporations than in the corporation that had not had any proceedings at the national contact point. This plan worked at the first corporation where three persons in different top management positions were interviewed. In the second corporation that had had a process in the SNCP there were, however, not enough current staff available to follow the same procedure and only one person could be interviewed.

The second group of respondents was constituted by representatives working for three different NGOs taking a specific interest in CSR. One of these organisations had indirect experience of a process at the SNCP as one of its member organisations had brought a claim to the contact point. One respondent was interviewed at each NGO. The third group of respondents consisted of three persons sitting in the SNCP itself, one representing one of the Swedish labour unions, one representing one of two Swedish commercial association represented in the SNCP and the last one representing the Swedish foreign ministry. The fourth group of respondents consisted of three different external experts on CSR and human rights, two consultants with varied and long experiences of working with CSR and human rights within both civil society and the corporate sector and one researcher in corporate ethics at the Stockholm School of Economics. These experts were included in order to get a perspective which was not so closely connected to civil society, the corporate sector or the SNCP. The fifth respondent group is constituted by one representative for the SCC. Due to time and the limited size of the project, the interview survey limited itself by not including a representative for the ICC. As the interview survey was carried out it gradually became clear that a sixth perspective needed to be included; the perspective of politicians. A sixth group of respondents consisting of two members of parliament, one from one of the parties which forms the now governing alliance of conservative parties and one from one of the opposition
parties was therefore added. Here the mix of purpose and snowball sampling worked well to provide two respondents with specific knowledge and interest in CSR issues and human rights at the same time as they could present the views of their respective political parties.

The interviews were based on pre-developed interview guides developed in line with recommendations provided by Denscombe as well as Kvale and Brinkmann.\textsuperscript{27} The guides departed from three thematic research areas, which were developed from the general purpose of this thesis, and a set of thematic background questions. These thematic areas and questions were then used as a basis for the development of operationalised interview questions more adapted to the different groups of respondents. The operational interview questions allowed for a less academic and technical language in the actual interviews and thus facilitated communication between the researcher and the respondents.\textsuperscript{28} The thematic background questions inspired by the operational interview questions had two functions. The first function was to gradually introduce the respondents to the main topic of the interview. The second function was to, already at the beginning of the interview, ensure that respondents had sufficient knowledge about CSR, the UN Guiding Principles and the SNCP to be able to provide relevant data. No interviews have been excluded from the research data because respondents were found to lack sufficient knowledge. The relevant background question, the thematic research questions and the operational interview questions are all found in appendix A.

1.4.2 Ethical considerations and the interviewer effect
Much has been written about the ethical challenges and problems related to the power balance in qualitative interviews. The interested reader is directed towards Kvale and Brinkmann’s brilliant book on this and other related topics “Den kvalitativa forskningsintervjun”. For the purposes of this thesis it suffices to say that the risk of a knowledge-based superiority on behalf of the researcher was limited by the approach of doing elite interviews with persons knowledgeable within the research area. Even though the researcher in some occasions had more knowledge about certain technical aspects of e.g. the UN Guiding Principles, and of course also knew what other informants had answered in previous interviews, active measures were taken to counterbalance this advantage. The first measure was to always explain any technical aspects that respondents admittedly were less knowledgeable about. The second measure was the application of interview confidentiality in all matters where public information clearly was not already available or when information was such that a previous respondent clearly would not have objected to it being shared.\textsuperscript{29} There is always a risk that

\textsuperscript{27} Supra 24 and 25
\textsuperscript{29} Naturally this could be a tricky balancing act throughout the research interviews as the importance of maintaining respondent confidentiality could not be overestimated. For this reason respondent confidentiality always took the first room. A concrete example of information that the researcher however did share with different respondents was e.g. that the Stockholm Chamber of commerce itself had identified a possibility to host a mediation mechanism and also had ideas about how such a mechanism could be organized. Another example of such information was that critical statements about the SNCP had been made by representatives from both civil society and the corporate sector. Generalized forms of this information were e.g. shared with representatives for the SNCP. The decision to share such information was based partly on the fact that that this criticism was in line with criticism of the OECD national contact point system available in the relevant literature.
research relying largely on human respondents will process biased, or even false, information. The approach of having six target groups with different interests was aimed to decrease this risk as the possibility to validate information increased.

During the preparation of interview guides the framework for ethical examination of qualitative research interviews developed by Kvale and Brinkmann was applied. All respondents were fully informed about the purpose of the research before they agreed to be being interviewed. Respondents were given both written and oral information about the fact that the interviews would be recorded. In all cases, interviews were booked through email which provided an opportunity to present the purpose of the research project and answer any questions before the actual interviews took place. All interview recordings, field notes and transcriptions of interviews have been stored on a password-protected computer to which only the researcher has had access. Back-up copies have been saved on folders in the researcher’s MP3 player to which no others have had access since the time they were saved. No personal security risks were associated with respondents providing information in this research project. Nevertheless, given the sometimes sensitive character of information related to how corporations and NGOs deal with CSR issues, respondent confidentiality remained an important aspect to maintain.

1.4.3 Research problems
There have been three major research problems. The first relates to the few cases processed in the SNCP. The SNCP was created in 1976, since which it has only managed four cases in total. Two of these have taken place during the first decade of the 2000s. The first took place in 2003-4 (from now on referred to as the Atlas Copco & Sandvik case) and the second in 2007-08 (from now on referred to as the Nordea Case). In both cases the corporations involved are accused of breaching human rights provisions in the OECD guidelines. It will be these cases, rather than the ones dealt with by the SNCP in the 1970s, that this thesis will refer to when relevant.

The dates of these cases present the second research problem. The fact that it was between nine to six years since these cases took place meant two things. Firstly, that the relevant experiences of respondents who actually had taken part in the proceedings at the SNCP were as old as the cases themselves. Even for the most clear minded person, nine years is a long time when asked to remember your impressions of how a certain procedure functions. In that time memories and impressions can easily be affected by other things. Secondly, there were no guarantees that it would be possible to obtain information from persons with actual experience of proceedings at the SNCP. In one of the corporations that had been involved in a process at the SNCP interviews were made with management staff that had taken part in the proceedings at the SNCP, and with those who had joined the top management in more recently. At the other corporation, however, everyone who had been involved in the actual proceedings had retired. This meant both that there was little point in interviewing more than one member of staff and that her responses were entirely dependent on the corporation’s...
institutional memory of the proceedings. With regards to the NGO sector, challenges to get hold of persons involved on the NGO side of the cases meant that establishment of contacts with NGO’s that today are well known for their work with CSR issues were prioritised instead. This decision was further motivated by the thesis third purpose and second research question i.e. assessing current interest in alternative conflict management mechanisms apart from the SNCP. As the interview survey developed it became clear that two of the respondents, one from the NGO sector and one of the external experts, had been at least indirectly involved at the NGO side of the Atlas Copco & Sandvik case. To a relatively large extent these two respondents could therefore provide opinions about how the SNCP’s management of this case was perceived by the concerned parts of the Swedish NGO community. The heavy overweight among respondents’ experiences towards a SNCP case that took place such a long time ago is arguably a major weakness regarding this thesis’ ability to draw conclusions about the SNCP’s capacity to handle cases today. The fact that the SNCP has had such few cases has also been pointed out by respondents when asked why no evaluation of the contact point’s work has been done. The results of the research done for this thesis suggest that a more complete evaluation nevertheless would be a good idea.

The third research problem relates to the generally loosely defined goals of the NCPs, and thus also the SNCP, in the 2000 version of the OECD guidelines. Before 2011, little was said in the guidelines about the manner in which issues arising before the NCPs were to be resolved. The matter has been defined more after the 2011 revision. As the interview survey was carried out, it gradually became clear that the expectations of various stakeholders on the SNCP not necessarily correspond to the aims of the NCP as articulated in the OECD 2000 guidelines. The disparity primarily lies in stakeholders’ expectations generally being higher than what the guidelines actually demanded up until 2011. At the same time the absence of any previous stakeholder assessment of the SNCP means that there is little in way of a baseline against which the conduct of the SNCP before 2011 can be measured today. This meant that it became relatively hard to answer the first research question even with the responses from respondents. As this highlights an important and somewhat problematic aspect of the OECD NCP system, i.e. that its goals before 2011 were coached in such a general manner as to do any more in depth evaluation of the system relatively impossible, the research question was never the less kept. This issue as well as possible answers to this first research question will be further mooted in chapters 4 and 5. With this background, it needs to be noted though that the assessment of the SNCP’s work before 2011 provided in this thesis can only be seen as relatively superficial.

1.5 Previous research
Research preceding this project can be divided into three different groups. The first group consists of literature focusing on ethics as well as political and legal philosophy. The amount of academic work and thought that exist within this area is almost overwhelming. For this reason only the works that have been included in the background research for this thesis will
be accounted for here. Important to mention are consequently the works done by Dworkin\textsuperscript{31}, Pogge\textsuperscript{32}, Sundman\textsuperscript{33}, Mouffe\textsuperscript{34} and Sulkonnen\textsuperscript{35}.

The second group consists of literature on CSR in general and SCR and human rights as well as the NCP system specifically. In this group, previous works are also legio, even though a large body of the general SCR literature so far is more directed towards environmental issues rather than the specifics of human rights. Important to mention within this area is of course the extensive work carried out by Dr. Ruggie during his term as UN Secretary General special representative on the issue of human rights and transnational corporations and other business enterprises; research material that covers thousands of pages available on the web-portal \url{www.humanrights-business.org}.\textsuperscript{36} For natural reasons it has not been possible to go through all of this material during the time provided for this thesis. To not even mention this large body of work would however be to neglect a large and important body of previous research done within this area. Another important body of research has been carried out by Clapham in his book “Human Rights Obligations of Non-State Actors”. Clapham argues for a broader human rights accountability than the classical assumption that human rights are the sole concern of states. A note of caution is needed with regards to this book as it after the issuance of the UN Guiding Principles is in a dire need to be updated. However, Clapham’s research still provides very relevant observations on more general aspects and also includes valuable observations regarding the NCP system. A more recent and very comprehensive attempt to deal with issues related to CSR and human rights has been made by Amao in the book “Corporate Social responsibility, Human Rights and the Law; Multinational corporations in developing countries” published in 2011. Amao’s book is an impressive attempt to deal with the CSR-human rights nexus from a legal perspective, but also to do a more thorough analysis of the philosophical underpinnings of the whole CSR rhetoric as well as provide relevant case studies. Amao’s thesis is that CSR will never be effective as a concept unless legal mechanisms are also employed at the national level.\textsuperscript{37} Noticeable is that in spite of its recent publishing date Amao’s book does not account for the new developments regarding the UN Guiding Principles and the revised OECD guidelines. With regards to the NCP system valuable reports have also been issued throughout the years by the OECD Watch, a civil society network aimed testing the OECD guidelines. OECD watch’s work has been used as a source for information about the international civil society’s views on the entire NCP system.

The third group of previous research would be that relating to SCR, human rights and the SNCP in Sweden. A small publication worth to mention is “CSR - från risk till värde: en skrift om corporate social responsibility” published by Öhrlings PriceWaterHouseCoopers and Studentlitteratur in 2008. It provides some basic observations regarding SCR and the value a good and genuine SCR strategy can bring to corporations in regards of risk

\textsuperscript{32} Pogge’s theories as presented in this thesis (see the chapter on definitions and delimitations) are based on summaries provided in \textit{Op. Cit.} 15  
\textsuperscript{33} Supra 10  
\textsuperscript{34} C. Mouffe, ”The democratic Paradox”, Verso Books, 2005  
\textsuperscript{35} P. Sulkonnen, “Reinventing the social contract” Acta Sociologica vol 50, p. 325-333  
\textsuperscript{36} Supra 2 and \url{www.humanrights-business.org}  
\textsuperscript{37} Supra 9
management and increased value creation. Another important and more recent contribution to this group of research is the work presented by Jutterström and Norberg in the book “Företagsansvar – CSR som managementidé” published in November 2011. This book provides several very useful reflections and case studies about how Swedish corporations regard SCR and how the SCR idea travels within organizations, thus constantly also being translated and transformed at various stages. The book includes brief presentations of relevant CSR standards, but apparently the authors did not have time to include references to the UN Guiding Principles or the revised OECD guidelines before it was sent to the printers. A sign of how quickly the CSR area with regards to human rights is currently developing. Apart from Jutterström’s and Norberg’s relevant contribution there seems to be relatively little literature produced focusing on CSR, human rights and the Swedish context in general, not counting various reports produced by NGO’s such as Diakonia, Amnesty International and SweFOR on specific CSR and human rights cases. As these reports often aim to provide very specific information on specific cases, rather than on SCR or the SNCP as such, they have not been deemed as relevant to this thesis. As has been mentioned previously no evaluation of the SNCP has been made previously. Important to underline is that this thesis should not be seen as an attempt to provide such an evaluation, but rather as contributing with some hopefully constructive evaluative observations.

2. CSR and human rights - background and major soft law regulations

2.2 Background to CSR and Human Rights

Before we move onto the major soft law regulations within the CSR - human rights nexus it is necessary for us to shortly explore the different responsibilities classically granted to the state and other sectors of society within international human rights law as this will help to better understand the small but yet significant shifts that have taken place within this area during the last decades.

The contents of the three documents that together constitute the international Bill of Human Rights; the UNDHR38, the ICCPR and the ICESCR, are according to public international law binding on all states in relation to their citizens, and with some exceptions also to foreigners situated within their territories. Classically, public international law did not place responsibility for the protection of human rights on any other actors than states. This previously very strict division of responsibility changed dramatically through the introduction of the International Bill of Rights which, in combination with the UN charter, opened up for the UN as a non-state actor to express opinions and recently, possibly also intervene, when it regards states to be failing in their human rights obligations.39

There are scholars who argue that this strict division of responsibility between state agents and non-state agents with regards to human rights protection now is being renegotiated even

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38 Strictly speaking the UNDHR is, due to its status as a General Assembly resolution, not seen as binding international law. The content of the UNDHR is however repeated and somewhat extended in the other two and legally binding UN Human rights conventions and by now the and its contents are usually considered to form part of customary international human rights law by itself, thus also binding on all states by power of its customary status.

further, one of those are Clapham. He means that “customary international law, international treaties and certain non-binding international instruments already create human rights responsibilities for non-state actors”.  As an example Clapham points out how the UNDHR speaks about human rights as entitled to everyone and the duty to protect them as a duty that in turns belongs to everyone. In its last paragraph the UNDHR even states that nothing in its contents “may be interpreted as implying for an State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth” within it.

The very fact that non-state actors are accused by both states and other stake holders for complicity in human rights violations is according to Clapham to be seen as another proof of this development. One example of when complicity for severe human rights violations and war crimes are ascribed to non-state actors is within the recent developments of international criminal law, having its clearest expression in the statute of the international criminal court. The final version of the statute does not allow for criminal liability to non-physical personas such as corporations, but it opens up for complicity in human rights violations carried out by individuals acting on their own or connected to other actors, regardless of whether these actors are state or non-state actors. Wolfgang Kaleck and Mariam Sage-Maaβ as well as James G. Stewart support Clapham’s thesis about an evolving trend of holding non-state actors responsible for human rights abuses. In an attempt to cure what Stewart refers to as legal amnesia, all three authors cite a number of cases after the 2nd world war where various corporations were tried, and judged, for complicity in the Nazi regime’s severe human rights violations. Kaleck and Sage-Maaβ then goes on to describe how, through the pressure of human rights organizations and other interest groups, the American Alien Torts Act came to be increasingly used to ascribe corporate accountability for human rights abuses within the US civil law system from the 1960s and onwards. A development that then has spread to other national legal systems with e.g. Germany and Switzerland following suit.

Consequently, there is quite a lot of support within some academic literature, certain bodies of international law and within the practice of at least certain states that Clapham is right. As we shall see in the remainder of chapter 2 there is now a shifting focus from the classical allocation of responsibility to protect and respect human rights solely with the state, to a framework which also includes other actors in these responsibilities.

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40 Op. Cit. 1, pp. 21, 28-29
41 Ibid. pp. 33-35
42 UNDHR, 1948, art. 30
43 Op. Cit. 1, p. 22
44 Ibid. on pages 30-31 Clapham describes how discussions about the inclusions of legal personas, such as corporations, among those actors to which complicity could be described took place during the drafting of the statute. In the end criminal responsibility was nevertheless left at the individual level but seemingly not because it was deemed an impossibility to place it also at the level of legal personas but rather because time was running out.
45 Statute of the International Criminal Court, 2000, § 25
46 Wolfgang Kaleck and Miriam Saage-Maaβ, “Corporate accountability for Human Rights Violations amounting to international crimes; the status quo and its Challenges” in JCIJ 8 (2010), 699-724
47 J. G. Stewart “The Criminal Liability of Corporate actors; A book proposal ” in JICJ 8 (2010), 313-326
48 Supra 46
2.3 The CSR- human rights nexus as defined by soft law
There are a relatively limited number of international instruments defining the responsibilities of corporations in relation to human rights. Among the most important ones usually referred to in literature are the UN Guiding Principles, the OECD guidelines and the ILO Tripartite declaration. Of these the first and the latter should be seen as soft law documents while the OECD guidelines strictly speaking form part of a multilateral and binding treaty between nation states. However, the guidelines themselves emphasise the voluntary nature of their recommendations in relation to corporations and do not include any major sanction mechanisms in relation to non-compliant signatory states. As the ILO tripartite declaration does not allow for any complaints mechanism and as complaints mechanisms are something of a major focus for this thesis the details of the declaration will not be elaborated on further here. Focus will instead be placed on the UN Guiding Principles and the OECD guidelines which, as has been stated earlier, provide an important foundation for a more stable institutionalisation of the CSR-human rights nexus.

2.4 The UN Guiding Principles
As was noted in the introduction the UN Guiding Principles is the latest and most comprehensive step in the rapid development regarding CSR and human rights. When, and if, fully implemented the guiding principles will represent a paradigm shift for how the whole CSR-human rights nexus is to be managed. The paradigm shift lies not “in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and business; integrating them into a single, logically coherent and comprehensive template.”\textsuperscript{49} The UN Guiding Principles builds on three distinct pillars; protect, respect and remedy. The guiding principles maintain that states are the final guardians of human rights, but confer responsibility on business corporations to respect human rights.\textsuperscript{50} According to the guiding principles the state and the corporate sector share a joint responsibility to provide remedy to aggrieved parties.\textsuperscript{51}

2.4.1 State responsibility to protect
The UN Guiding Principles establishes that state protection of human rights includes a responsibility to protect against abuses committed by third parties within the state’s territory and/or jurisdiction. Such third parties include business enterprises. Appropriate steps for protection include prevention, investigation, punishment and redress through effective policies, legislation, regulation and adjudication.\textsuperscript{52} More specifically this means that states should enforce and periodically assess the adequacy of laws aimed at requiring business enterprises to respect human rights; ensure that other areas of law do not constrain, but enable business respect for human rights; provide effective guidance to business enterprises on how to respect human rights throughout their operations; and encourage, or when appropriate, require corporations to communicate how they address their human rights impact.\textsuperscript{53} In addition to ensuring coherence between different bodies of law regarding corporate respect

\textsuperscript{49} Op. Cit. 2 introduction point 14
\textsuperscript{50} Ibid. §§ 1, 4 and their comments
\textsuperscript{51} Ibid. introduction and General Principles
\textsuperscript{52} Ibid. § 1
\textsuperscript{53} Ibid. § 3
for human rights, states should also ensure general policy coherence in the way that relevant governmental departments, agencies and other state-based institutions act on their respective mandates.\textsuperscript{54}

According to the second paragraph of the guiding principles states should clearly set out the expectations that “all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”.\textsuperscript{55} In the commentary text to this paragraph, the guiding principles acknowledges that states at present are not required under international law to regulate the extraterritorial activities of corporations domiciled within their territories and/or jurisdictions. The commentary does, however, go on to say that there nevertheless are strong policy reasons for home states to clearly set out the expectations that business respect human rights abroad, especially were the state itself is involved in such business.\textsuperscript{56} Several paragraphs in the guiding principles then goes on to in more detail describe the responsibilities of states whenever they themselves are the owners or customers of corporations; or whenever corporations are significantly controlled, supported or serviced by state agencies and institutions.\textsuperscript{57} A specific state responsibility to support business respect for human rights in conflict-affected areas also arises and is further detailed in the 7\textsuperscript{th} paragraph of the UN Guiding Principles.

\subsection*{2.4.2 Business responsibility to respect}
Corporations are to do what is in their power to prevent and mitigate adverse human rights impacts in all of their business relationships.\textsuperscript{58} This obligation is valid in all contexts.\textsuperscript{59} Corporations should always seek to respect and honour “the principles of internationally recognised human rights whenever faced with conflicting requirements” and “treat the risk of causing or contributing to gross human rights abuses as a legal compliance wherever they operate.”\textsuperscript{60} Corporations are, according to the guiding principles, not only responsible for the adverse human rights impacts that might be a result of their own operations or those of their suppliers, but also for those of any other “non-State or State entity directly linked to its business operations, products or services”.\textsuperscript{61} If a corporation fails to take and demonstrate measures taken to prevent, mitigate or address adverse human rights impacts that are related to their own operations or those of their business partners, it needs to be prepared to accept any reputational, legal or financial consequences.\textsuperscript{62} Most likely a major part of the paradigm shift presented by the guiding principles, as well as the biggest challenge to corporations, will lie in the relationships that corporations have with their customers. While businesses can chose and affect their suppliers to a high degree, it is a challenge for them to choose and affect their customers and still ensure profitability.

\begin{footnotes}
\item[54] Ibid. § 8
\item[55] Ibid. § 2
\item[56] Ibid. § 2 and its commentary.
\item[57] Ibid. 4-6
\item[58] Ibid. § 13
\item[59] Ibid. § 23
\item[60] Ibid. § 23
\item[61] Ibid. § 13
\item[62] Ibid. § 19 and its commentary
\end{footnotes}
The guiding principles’ requirement for business to prevent, address and mitigate adverse human rights impacts includes several duties on the operational level. The extensiveness and exact design of the required operational mechanisms is to be matched with corporative size and complexity, but also with the severity of the operations’ adverse human rights impacts.\(^{63}\) Most important of these required operational mechanisms are; the duty to conduct human rights due diligence before new business ventures, throughout existing operations and in relation to the operations of business partners\(^{64}\); the duty to internally and externally communicate their commitments and the way in which they address human rights impacts\(^{65}\); and finally the duty to provide remediation, through internal operational mechanisms or through cooperation with other forms of legitimate process, if the corporation has identified complicity in human rights breaches. Such legitimate process can be the corporation’s own operational grievance mechanism or, if this is insufficient, external judicial or non-judicial grievance mechanisms. The latter can be run by the state or by other actors.\(^{66}\) The paragraphs of the framework and their commentaries are relatively open in their formulations in this regard. The room provided for interpretation as to what cooperation with legitimate processes meant became obvious when talking with different respondents during the interview survey. This suggests that some time and contextually adapted discussions are still needed before the issues will be settled. The commentary of the guiding principles does not suggest any preferred solutions, but notes that where crimes are alleged, cooperation with judicial mechanisms will typically be required. Corporations also have to be actively involved in the remedy process in order to fulfil their duty to respect human rights.\(^{67}\) On the positive side this vagueness allows for quite some flexibility with regards to the solutions most suitable in different regional, national and local contexts. On the negative side it also allows for extensive discussions on interpretation, which might hinder actual provision of effective remedy systems while national governments, corporations, civil society stakeholders and commercial associations moot the best interpretations and solutions. Such a discursive process might, however, be needed in search for sustainable solutions.

### 2.4.3 Joint responsibility for remedy provision

As we have seen the UN Guiding Principles requires corporations to provide for, or cooperate in, remediation through legitimate process whenever they identify that they may cause or contribute to adverse human rights impacts which they either are unable to prevent or have not foreseen.\(^{68}\) Businesses are directly required by the UN Guiding Principles to provide grievance mechanisms for remedy on the operational level.\(^{69}\) States, on the other hand, are specifically required to provide effective and appropriate judicial and non-judicial grievance mechanisms as part of their duty to protect against business related human rights abuses. Not taking appropriate steps to ensure effective remedy processes for those affected by business related human rights abuses within the territory and/or jurisdiction of the state, might cause

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\(^{63}\) Ibid. §14 and its comments

\(^{64}\) Ibid. §17

\(^{65}\) Ibid. §§ 16 and 21

\(^{66}\) Ibid. §§ 22, 28-30 and their commentaries

\(^{67}\) Ibid. §§ 22, 28-30 and their commentaries

\(^{68}\) Ibid. § 22

\(^{69}\) Ibid. § 29
the state’s fulfilment of its duty to protect human rights weak or even meaningless according to the guiding principles’ 25th paragraph. Whenever business related human rights abuses occur within their territory and/or jurisdiction, states should ensure effective judicial or non-judicial mechanisms. Effective judicial mechanisms are seen as the core in ensuring access to remedy, but their ability to address human rights abuses related to business are seen as dependent on their overall impartiality, integrity and ability to accord due process. States should furthermore ensure that they do not erect barriers preventing legitimate cases from being brought to the courts in situations where judicial recourse is seen as an essential part of accessing remedy, or where no alternative sources of effective remedy is available. One such barrier is, according to the guiding principles, situations where claimants face a denial of justice in host states, but are unable to access the courts of a corporation’s home state. It is hard to see the last provision as anything else but a strong encouragement directed at home states in the western world, and elsewhere, to enable extra-territorial legal action against corporations based within their jurisdiction, but operating in jurisdiction with weak legislation and/or law enforcement regarding corporate respect for human rights.

The guiding principles further require states to facilitate access to remedy through effective non-State-based grievance mechanisms. One category of such non-state-based grievance mechanisms could be those administered either by a business enterprise on its own or together with stakeholders, by an industry association or by a multi-stakeholder group. The UN Guiding Principles requires all such non-judicial grievance mechanisms to “be legitimate, accessible, predictable, equitable, transparent, rights compatible and sources of continuous learning. Operational level grievance mechanisms are also to be based on engagement and dialogue. The establishment of operational grievance mechanisms with a global reach and fulfilling the requirements of the UN Guiding Principles constitutes a further challenge to MNCs.

The requirement that business related human rights abuses should have taken place within the territory or the jurisdiction of the state is not included in the framework’s guidelines for non-judicial grievance mechanisms. This exclusion seems to open up for the possibility of non-judicial conflict management in third states. In relation to non-judicial grievance mechanisms the guiding principles states that they should be complementary to the judicial system, effective and appropriate. State based non-judicial mechanisms may be mediation-based, adjudicative or follow any other culturally appropriate or rights compatible process as well as any mixture of these.

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70 Ibid. § 25
71 Ibid. § 26
72 Ibid.
73 Ibid. § 25-27
74 Ibid. § 28
75 Ibid. § 31
76 Out of interest it can be noted that due to legal requirements (Sarbanes and Oxley Act 2002) many US based corporations already have such grievance mechanisms in place throughout their US based operations in the form of ethical hotlines.
77 Supra 70
State-provided grievance mechanisms should form the foundation for operational level grievance mechanisms initiated by private enterprises.\textsuperscript{78} The guiding principles provides a rather broad range of examples when it comes to possible institutions that could hold such grievance mechanisms ranging from courts, national human rights institutions to NCPs and various ombudsmen and government run complaints offices. Whenever corporate operational remedy systems has failed to provide sufficient remedy for an adverse human rights impact the guiding principles suggests that collaborative initiatives, as well as international and regional human rights mechanisms, can have a supplementary function. Other then the examples provided above the guiding principles does, however, not specify in more detail what form of collaborative initiatives it has in mind. Considering the purpose of the framework’s third pillar i.e. the joint provision of access to remedy, it might not be too farfetched to think that such cooperation can also include joint initiatives between the state and the corporate sector, as well as other stakeholders, regarding remedy provision.\textsuperscript{79} As we shall see this is in fact the very nature of the SNCP.

Given the uneven resources and sometime unsafe conditions of aggrieved parties, practical answers on how grievance mechanisms on all levels can provide equal treatment of, and access to all stakeholders remain to be found.\textsuperscript{80}

\textbf{2.4.3.1 The SCC and the ICC as alternative non-judicial grievance mechanisms}

For the purposes of this thesis the SCC and the ICC have been suggested as to alternative institutions that could provide non-judicial access to remedy. Thus they will be very briefly introduced here. The SCC is a commercial business association with voluntary membership. It contains the Arbitration Institute of the SCC which was founded in 1917 and which provides arbitration and mediation in more than 40 countries globally. It has a reputation for independence and neutrality and was a trusted arbitrator in east-west commercial conflicts during the Cold War.\textsuperscript{81} On the international level the SCC cooperates with the ICC, but the two institutions are sometimes described as competitors as well.\textsuperscript{82} The ICC was founded in 1919 and hosts the International Court of Arbitration. Its aim is to promote trade and investment, open markets for goods and services as well as the free flow of capital. It has consultative status within the UN and represents a large number of corporations and business associations worldwide. Apart from arbitration and mediation in commercial conflicts it also does a great deal of advocacy work and research on behalf of the corporate sector primarily.\textsuperscript{83}

\textsuperscript{78} Ibid. and its commentary
\textsuperscript{79} Ibid.
\textsuperscript{80} An international pilot study of access to remedy was carried out from 2009-2011 by the Harvard Kennedy School, involving four private corporations within different business segments. Unfortunately the study report only covers lessons learned during the development and start up stages of different remedy mechanisms as the project time frame was too short to allow for monitoring of their implementation phases and results. For more info see Harvard Kennedy School, Corporate Responsibility Initiative, “Piloting Principles for effective Company-Stakeholder Grievance Mechanisms: A report of lessons learned”, May 2011, available at \url{www.hks.harvard.edu/m-rbg/CSRI/publications/report_46_GM_pilots.pdf} last visited 2012-06-27
\textsuperscript{81} The Stockholm Chamber of Commerce, English website \url{www.chamber.se/inenglish.aspx} last visited 2012-06-26
\textsuperscript{82} Ibid. and interview with the SCC representative
\textsuperscript{83} The ICC website \url{www.iccwbo.org} last visited 2012-06-26
2.5 The OECD guidelines for multinational enterprises

The OECD guidelines are possibly one of the most comprehensive soft law attempts to deal with the whole area of CSR. Apart from human rights and labour relations they also deal with matters related to the environment, competition, consumer relations, science and technology as well as corruption. While the guidelines explicitly mention multinational corporations as their target group, their recommendations are also to be seen as best practices for all corporations.  

Until 2011 their reach encompassed all entities within multinational corporations. After 2011 the impact of the guidelines are to affect the whole corporate supply chain as corporations are asked to seek to prevent or mitigate adverse impacts directly linked to their operations, products or services by a business relationship. The guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises and were first negotiated in 1976 between the then 24 member countries of the OECD with insight and cooperation from labour organizations, business associations and some NGOs.

Since then the number of OECD member countries has grown to 34 and the guidelines have been updated at two occasions, first in 2000 and then in 2011. Since 1976 the guidelines have also been accepted by the five non-member states Argentina, Brazil, Estonia, Latvia and Lithuania.

The guidelines are joint non-binding recommendations to multinational corporations from the member states of the OECD. Thus while the individual member states have obligations through the guidelines, which between them form a multilateral treaty, neither the guidelines nor their complaints mechanism, have any formal sanctioning force on corporations.

In difference to the 2000 guidelines, which simply underlined the guidelines’ voluntariness, the 2011 revision elaborates more explicitly on their relationship with national law. The 2011 guidelines state that their recommendations, in certain areas, goes further than national law, but that they are not intended to place corporations in situations of conflictual requirements with national law. In case of a conflict between national law and the guidelines

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88 Op. Cit 1 p. 203
89 Op. Cit. 84 OECD Ministerial meeting, Preface §1 and section 1 §1
90 Op. Cit. 84 OECD, Section I.2
91 Ibid.

29
corporations are encouraged to honour the guidelines to as far extent as possible without being in breach of national law. This can be seen as a weaker formulation than that of the UN Guiding Principles on the same topic, which as the reader might remember emphasised the importance of human rights respect in all situations regardless of legal contexts on the national level. Until 2000 it was assumed that the OECD guidelines only concerned corporate behaviour within the OECD countries. Since the 2000 revision the guidelines include an encouragement directed at corporations domiciled in the OECD member states to adhere to the guidelines wherever they operate in the world. The pre-2000 assumption of a geographical limitation to OECD countries might very well have affected the extent to which human rights concerns were not dealt with by the various OECD NCPs up until the year of 2000.

The most significant changes made to the 2011 version of the OECD guidelines for our purposes is their adaptation to the UN Guiding Principles. This adaptations concerns both the parts of the OECD guidelines that relate to human rights, as well as the introduction of the due diligence concept as an overall provision with regards to guideline requirements also in other areas. The adaptations show the extent to which the UN Guiding Principles is seen as the more authoritative of the two documents as far as CSR and human rights are concerned. Accordingly, the most reasonable conclusion is that the parts of the OECD guidelines referring to human rights from now on are to be interpreted in light of the framework. This is strikingly visible through the addition of a whole new chapter dealing only with corporate respect for human rights, almost word by word reflecting the formulations of the UN Guiding Principles. In comparison, the 2000 version’s reference to human rights was kept at a relatively general level where corporations were asked to respect the human rights of those “affected by their activities consistent with the host government’s international obligations and commitments”. The UNHDR and other human rights obligations of the governments concerned were to be of specific relevance in this regard. In the 2011 version of the OECD Guidelines the same minimum benchmark for human rights respect is applied as in the UN Guiding Principles i.e. the international Bill of human rights and the core ILO conventions.

One of the major commitments that the OECD members take upon themselves through the guidelines is to set up NCPs. The NCPs have the responsibility to inform about the guidelines. They should also function as an advisory and/or mediation mechanism when issues of interpretation arises, or in cases where”issues arise relating to implementation of the

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92 Op. Cit 84, OECD Ministerial meeting, part I, section 1 §2
94 Op. Cit 84, OECD Ministerial meeting, part I, section 1 §3 and OECD
96 Op. Cit. 84 OECD Ministerial meeting, part II and OECD
97 This conclusion was also supported by SNCP representative 1
98 Op. Cit. 84 OECD Ministerial meeting part IV and OECD
100 Ibid. part II, Commentary on general policies §4
Guidelines", e.g. when corporations are accused of guideline breaches. The NCPs are first to make an initial assessment as to whether the issue raised merits further examination and then offer their good services to help the parties involved to resolve the issue/s. Thus the NCPs have potential to correspond to the UN Guiding Principles’ requirement on states to provide non-judicial grievance mechanisms. Up until the 2000 revision of the guidelines, NGO’s were not allowed access to the complaint mechanism that the contact points constitute either as contributing or complaining parties. Since then, however, NGO’s can hand in complaints to the national contact points. The member countries also “have flexibility in organizing their NCPs, seeking the active support of social partners, including the business community, worker organizations, other non-governmental organizations, and other interested parties”. Since the 2011 revision the NCP’s should also operate in an “impartial manner while maintaining an adequate level of accountability to the adhering government”.

The prescriptions in the actual text of the guidelines regarding the organization and working routines of the NCPs have not changed significantly between the 2000 and the 2011 versions of the guidelines. According to the commentary of both versions NCPs are to “function in a visible, accessible, transparent, and accountable manner”. The leadership of the NCPs should also “be such that it retains the confidence of social partners and fosters the public profile of the Guidelines”. The major differences are firstly, a new paragraph in the 2011 revision underlining the need for member countries to provide human and financial resources for contact points. Secondly, there is a new writing stating that the contact points are to “contribute to the resolution of issues that arise relating to implementation of the guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines”. Requirements that previously were not specified in the Guidelines themselves, but only included in the comment to the guidelines. The commentary attached to the 2011 revision of the guidelines specifies these demands on NCPs even more. According to the commentary NCPs are from 2011 and onwards to provide information on the procedures that parties should follow when raising or responding to a specific instance. This includes providing advice about the information necessary to raise a case, as well as the requirements placed on parties who do raise a case. Information about the process to be followed by the NCP as well as indicative timeframes should also be clearly provided. As a general rule NCPs should strive to close cases within one year from initiation.

\[\text{References:}\]

101 Op. Cit. 84 OECD p. 81 While the texts in the 2000 and 2011 versions of the Guidelines differ slightly it is here argued that the spirit and essence of the text in the two versions of the Guidelines is the same with regards to the purpose of the NCPs.
102 Ibid.
104 Supra 101
105 Ibid. part II, Procedural Guidelines A
106 Ibid.
107 Op. Cit 84 OECD
108 Ibid.
109 Op. Cit 84 OECD Ministerial meeting, part II, section 1 § 4 and OECD
110 Op. Cit. 84, OECD Ministerial meeting, part II, Procedural Guidelines C
111 Op. Cit. 84 OECD
A whole new section has also been added to the commentary about the need for NCPs to ensure predictability in procedures and equal treatment of parties. If implemented by NCPs these changes stands for a marked shift towards more transparency and security of procedure for all involved parties than what previously has been the case. Thirdly, the 2011 version of the guidelines provide more detail on the types of statements that the national contact points can make once they have reached a decision and the minimum amount of information that these statements should include; a minimum which doesn’t stretch further than revealing the concerned issue. Statements should, however only reveal any agreements reached between parties when both parties so agree. A supervisory function to the national contact points is held by the investment committee that answers questions of clarification.

2.5.1 The Swedish National Contact point

In Sweden the NCP is run under the auspice of the department of foreign affairs. It is comprised of representatives from several different government departments, five of the major Swedish labour unions and two different commercial associations. As has already been mentioned it has had four cases since 1976; whereof two took place during the first decade of the 2000s. The first of these happened in 2003-2004 and was between the Swedish Attac movement and the NGO Friends of the Earth on the one hand and Atlas Copco Ltd and Sandvik AB on the other hand. The case was preceded by the broadcasting of a critical reportage in a well known TV-show for investigative journalism called “Uppdrag Granskning” which meant that the case became relatively well known among the general public in Sweden. In short a corporate customer of Atlas Copco Ltd and Sandvik AB was accused of environmental abuse and human rights breaches in Ghana. The main issue raised before the SNCP was to what extent Atlas Copco Ltd and Sandvik AB had failed to sufficiently encourage their customer to observe the principles of the OECD guidelines. According to the undated two page final statement made by the SNCP, neither of the Swedish corporations were found in breach of the OECD guidelines, but were nevertheless encouraged to increase knowledge about the guidelines internally and externally. While a considerable part of the statement’s focus lies on the procedures that have been applied it also states that the environmental and social problems related to the Ghanian context and mining industry are the result of such capacity failures that can be expected in a developing country and that the role of the Swedish corporations therefore only can be considered as limited.

The second case was brought against the bank Nordea by a Norwegian and an Argentinean NGO; Bellona and CEDHA (Centro de Derechos Humanos e Ambiente). The complaint was registered with both the Swedish and the Norwegian NCPs in 2006, just months after a case concerning the same situation, but against another corporation, had been registered with the Finnish NCP. The case concerned Nordea’s role as a major financier to the building of a large

\[\text{\textsuperscript{112}}\text{Ibid.}\]
\[\text{\textsuperscript{113}}\text{Supra 110 and Ibid.}\]
\[\text{\textsuperscript{114}}\text{The Swedish Government’s website }\text{www.regeringen.se/sb/d/5467/a/14556}\text{ last accessed 2012-05-10}\]
\[\text{\textsuperscript{115}}\text{Interview with corporate representative 2 and civil society representative 2}\]
\[\text{\textsuperscript{116}}\text{SNCP; “Uttalande från den Nationella kontaktpunkten för OECD:s riktlinjer för multinationella företag med anledning av inkomna anmälningar rörande Atlas Copco och Sandvik”, undated, available at }\text{www.regeringen.se/content/1/c6/01/45/56/8badbf6c.pdf}\text{ last visited 2012-06-03}\]
pulp mill along the Uruguay river close to the border between Argentina and Uruguay. According to the complainants the building of the mill lead to severe environmental and human rights breaches in the local area around the mill and consequently to breaches against the OECD guidelines, as well as other internationally binding environmental and human rights conventions. The case was dealt with by the Swedish and the Norwegian NCP’s in cooperation but negotiations and meetings were hosted by the SNCP. Simultaneously to the treatment of these cases within the NCP system there was also a related case going on at the ICJ between Argentina and Uruguay concerning an alleged breach of the River Uruguay Treaty. According to the, again undated, four page final statement by the Swedish and the Norwegian NCPs it was found that the OECD guidelines was applicable to the financial sector, but that Nordea had not been in breach of the guidelines. The statement spends considerable time in describing the case’s background as well as the process applied in deciding the case but is relatively thin on reasons and rational for the decision. With regards to the then still ongoing case at the ICJ the SNCP statement notes the case and makes the observation that the ICJ in a preliminary ruling from 2006 had found that “Argentina had not been able to present sufficient evidence to show that the pulp mill would represent an immediate or irreversible threat to the environment”. The SNCP final statement does not say anything about to what extent it would be advisable to await the ICJ’s final judgment before further financing of the pulp mill took place.

According to staff at the Swedish foreign ministry, the SNCP has no set budget for its operations, but all parties represented in the contact point are asked to contribute with staff time to meetings and proceedings. When a case appears all parties represented in the contact point are asked to contribute with the financial resources needed for its resolution. The contact point can also ask for assistance either from Swedish embassies abroad or from other parts of the OECD system e.g. with regards to information gathering. Apart from the relatively general instructions for how cases are to be solved provided in the OECD guidelines themselves, there are no set internal procedures for the SNCP to follow if a case comes up.

117 “CEDHA and Bellona vs. Nordea case registration” available at http://oecdwatch.org/cases/Case_123 last visited 2012-06-03
118 According to OECD Watch’s website the final NCP statement was delivered on the 1 January 2008; there is however no date on either the English or Swedish version of the document itself. Noticeable in today’s world of internet communications is also that no information about the case is to be found on the website of the Swedish NCP, where on the other hand the final statement of the NCP regarding the Atlas Copco and Sandvik case is available.
119 According to the same statement the Finnish NCP had also cleared the corporation against which a claim had been made related to the same situation from all accusations regarding breaches against the guidelines.
120 “Swedish National Contact point statement CEDHA vs. Nordea” undated, available at http://oecdwatch.org/cases/Case_123 last visited 2012-06-03
121 The final judgment in the ICJ case was issued in 2010. In it Uruguay is found guilty of procedural breaches against the River Uruguay Treaty. In line with its 2006 preliminary ruling the court did however clear Uruguay from the charge that it also was guilty of a breach against the treaty’s substantial components. According to the court’s judgment Argentina had failed to prove that any increases in the river’s, already substantial, pollution level was attributable to the pulp mills. See “Pulp Mills on the River Uruguay (Argentina v. Uruguay) Summary of the Judgment of 20 April 2010” available at www.icj-cij.org/docket/files/135/15895.pdf last visited 2012-06-03
Rather one tries to find the best way to go about things for each specific case and draw from experiences of other NCPs.\textsuperscript{122}

\subsection*{2.5.2 Previous assessments of the OECD NCP system}

Much has been written in assessment of the NCP system. The OECD Watch network has for example taken upon itself to be civil society’s monitoring organ of the NCP system. Considering that the system has potential to be the major international monitoring mechanism for adherence to a substantial set of soft law relating to CSR this surveynance of its functionality from both civil society and academics is natural. On the positive side the NCP system’s potential to handle very complex and globalised cases due to its wide geographic scope and accessibility to NGO’s has been highlighted by both Clapham and Amao.\textsuperscript{123} According to Clapham this means that multinational corporations based in the OECD’s member countries are vulnerable to complaints wherever they operate.\textsuperscript{124} Most of what has been written in ways of assessment of the NCP system is however, highly critical. OECD Watch points towards the relatively low number of cases in the ten years between 2000 and 2010 as an indicator of low confidence in the system.\textsuperscript{125} Clapham and Amao both point out that the logic behind the OECD guidelines, as well as the NCP system, is to ensure a levelling of the playing field for OECD based corporations wherever they operate in countries where the legal system offers opportunity to avoid certain basic guarantees in relation to CSR.\textsuperscript{126} Some very common criticisms of the contact point system are that it is marked by intransparency, systematic incoherence and non-participative processes, that it has no sanctioning possibilities towards corporations found to be in breach of the guidelines and that governments regularly fail to follow up and monitor to what extent statements provided by the NCPs are implemented by corporations or not.\textsuperscript{127}

\section*{3. The CSR – Human Rights nexus and “Hard Cases”}

\subsection*{3.1 Dworkin, “hard cases” and CSR}

The term “hard case” is here borrowed from the well known American judge and moral philosopher Dworkin. According to Dworkin hard cases are cases in which our rule systems and law books are of insufficient help in determining how a conflict between rights and/or interests should be solved. Hard cases challenge decision makers with influence over right holders to explore the underlying moral and political principles motivating why certain decisions should be taken. Hard cases ask these decision makers to consider and, transparently as well as coherently, argue for the principles that they regard as fundamental for their decisions. Arguably, situations where there is a legal vacuum constitute such hard cases. Dworkin himself underlines the unacceptability of a situation in which right holders are said to be without rights only because there is no clear procedure through which they can claim their rights.\textsuperscript{128} This underlines an important aspect of Dworkin’s position, namely that he.

\begin{itemize}
\item \textsuperscript{122} Interview with SNCP representative 1
\item \textsuperscript{123} Op. Cit 1, p. 204 and Op. Cit 9 p. 35
\item \textsuperscript{124} Op. Cit 1, p. 207
\item \textsuperscript{125} Op. Cit 103, p. 9
\item \textsuperscript{126} Supra 123
\item \textsuperscript{128} Op. Cit. 17, p. 81
\end{itemize}
himself is not a fully fledged contractarian. Rather he argues that all right holders have an inherent right to be treated with equal concern and respect, regardless of whether it is a principle socially agreed upon. For Dworkin this inherent right to be treated with equal concern and respect is the very foundation upon which any ideas about a social contract can ever be built. These individual rights of each human being are consequently not negotiable for Dworkin.129

In the American context of a common law system there is a possibility for judges to step in and fill the gaps left by the legislative; or as Dworkin puts it, for the courts to become deputy legislators.130 The American common law setting in which Dworkin writes poses a challenge with regards to how this concept of hard cases is to be transferred to the context of the Swedish civil law system. We will return to this challenge and to how it might be solved later in this chapter, but first let us look at Dworkin’s suggestion for how these hard cases are to be solved.

In an extension of the political philosopher Rawl’s idea about how persons situated behind a veil of ignorance negotiates the basic principles of a social contract, Dworkin goes on to define his own basic principles which he sees as conditional for such negotiations to take place at all. As has been stated above Dworkin holds these most fundamental principles to be equal respect and concern.131 According to Dworkin these basic principles should direct the decision making of all political institutions when they deal with matters affecting those whose lives they have power to impact.132 Such political institutions also have a duty to clearly account for the general principles they apply when dealing with hard cases according to Dworkin so as to ensure that their decisions are coherent with the underlying principles for their decision making.133 Being an American judge he primarily writes about the consequences this has for the courts. This might lead some to object that Dworkin’s usage of the term “hard case” is in fact only applicable to court proceedings, and more specifically only to American court proceedings. It is, however, interesting to note that when Dworkin writes about hard cases he refers to court judgements as political decisions and speaks interchangeably about judges and political decision makers as those taking these decisions.134 Thus the problem this thesis will have to deal with is not so much that hard cases are only applicable to the decision making of the courts; but rather the different ways in which the courts are seen within the Swedish and the American context. That courts are not political institutions is a deeply ingrained perception within the Swedish system, even if maybe not always the most accurate.135 Rather than portray Swedish courts as political institutions though, the argument here will be that Dworkin’s own referral to political institutions and political decision makers opens up for an inclusion of many more arenas than courts; whether they be Swedish or American. In fact the concept of political institutions could be seen to

129 Ibid. pp. 176, 181-182
130 Ibid. p. 82-83
131 Ibid. p.180-186
132 Ibid. p.180-181
133 Ibid. p. 81-130
134 Ibid.
135 The Swedish system with politically appointed and relatively powerful jurors (nämndemän) is one reason to question the complete political impartiality of Swedish courts.
include all those arenas in which power and authority are exercised on behalf of the state, also when such power has been delegated to non-state institutions. By using metaphorical reasoning one could also imagine that in contexts where the state lacks power, is failed or simply abstains from exercising its power, such arenas could also be considered to include non-state institutions that have stepped in as gap-fillers. If Dworkin’s argument of equal respect and concern as basic rights would also be taken as the basic principles of our social contract, and if the idea is that those principles have been reached behind a veil of ignorance; then there is nothing stating that the government always has to be the enforcing party of those principles. In fact their enforcement would then become everyone’s duty. Consequently, it then also becomes a duty to consider these principles when decisions are taken in other fora than courts, and especially when there are no set rules or laws to direct the decision makers.

This thesis therefore suggests that any institution exercising influence and power over right holders, whether it is a court or a mediation institute like a NCP within the OECD system, can be included in what Dworkin refers to as political institutions. Applying Dworkin’s requirements they should consequently attempt to clearly account for the basic principles they apply when deciding on hard cases; i.e. those cases in which the law books or formal rule systems does not provide guidance on what a correct decision ought to be. These requirements of coherence and transparency should not be too hard to accept as a generally applicable rule. By using the metaphorical thinking described previously it could also be argued that gap-filling institutions, even when run by non-state actors have a similar responsibility, at least if they want to claim a role as upholders of rights. From this it follows that the same duty to transparently and coherently account for the principles used in decision making would also apply to any private mediation institute, such as e.g. the ICC or the SCC, who might take upon themselves to solve hard cases.

3.1.1 Arguments for why the CSR-Human rights nexus contains hard cases

We have now been presented with arguments for why all political institutions can encounter hard cases and thus also have a duty to account for the basic principles applied in solving them. Our next step must be to look into why the CSR-human rights nexus can be seen as hosting a high number of such hard cases. The first argument is that the relative voluntariness of CSR in itself causes issues related to CSR and human rights to enter the realm of hard cases in the sense that there are no formal guidelines for decision makers to follow. As has been shown in chapter two the regulations we have at hand are voluntary undertakings open for relatively broad interpretations. The considerable lack of legislative frameworks to guide decision makers at various levels inside and outside Swedish government functions and corporations, creates a situation where decision has to be taken based on principles. Even if there is no legal guidance for how these decision are to be taken, decisions still have to be taken if we are not to end up in a situation where right holders will be said to be without not

136 A conclusion that is very much in line with Clapham’s argument presented previously; namely that human rights according to the UNHDR both belongs to everyone and contains duties for everyone.

137 I have previously presented the major arguments for why the CSR-human rights case can be seen as a hard case presented here in a PM written for Professor Elena Namli in the course “Rättigheter i Konflikt” which forms part of the MA programme in human rights at Uppsala University. In this chapter I develop these ideas further.
only legal rights but also moral rights. Following Dworkin, the principles guiding these decisions should a) be accounted for transparently and coherently; and b), if we agree with Dworkin, preferably be equal respect and concern towards all concerned parties. Contributing to the necessity of such transparency and coherent argumentation for underlying principles when dealing with cases within the CSR-human rights nexus are two common characteristics of the disputes within this setting. The first characteristic is the imbalance in power of parties to a CSR conflict. This is especially relevant in contexts, such as the Swedish, where the only dispute settlement mechanism available is negotiations. In most dispute settlements where negotiation is used, it is successful because the parties have similar strength and power. In conflicts where groups and individuals have had their rights violated due to the failure of a corporation to respect human rights, and to such an extent that an external negotiator has to be involved, such equality is seldom the case. In ordinary circumstances mediation is usually used in order to avoid litigation; the threat of litigation can then even out the playing field if the parties are of unequal strength and power. But where no possibilities for litigation exist due to legal vacuums, such levelling of the playing field is impossible, the parties remain unevenly powerful. The second characteristic is the sense in which the CSR-human rights nexus implies a conflict between different actor’s human rights, but also often a conflict between different actors’ right to property. In cases where different human rights stand against each other there might be guidance on how decisions are to be taken in the reasoning of international courts and tribunals or in the writings of committees to relevant human rights conventions. In cases where a corporation’s shareholders’ right to property stands against the right to property of aggrieved individuals or groups the issue becomes harder to settle and consequently also more vulnerable to power imbalances.

3.1.2 Challenges to the description of the CSR-human rights nexus as a hard case

As has already been mentioned there might be objections to the way in which the CSR-Human rights nexus here is depicted as realm which by its very nature includes an increased potential for hard cases in the Dworkian sense. One challenge could be the differences between the American common law setting from which Dworkin writes and the related difficulties to transfer his ideas to a Swedish setting. Another challenge could be that the problematic aspects contained in the voluntariness of the CSR-human rights nexus relates to globalization and relations between right holders that crosses national borders. Dworkin seems to write mainly from within a national context, rather than for an international one. Let us deal with these two challenges one at a time.

With regards to the transferability of Dworkin’s terminology of hard cases to the Swedish civil law system it is true that Swedish courts or government institutions are not usually seen as political institutions. The belief in the possibility and need of these institutions to be neutral and distanced from the dilemmas of political decision making is strong in the Swedish context. The, at least formal, argument against a transfer of Dworkin’s hard cases concept to the Swedish setting could thus be that there is no way for Swedish institutions to become deputy legislators in the sense in which Dworkin speaks of American courts. This would mean that we in Sweden are bound to end up with a situation in which no law to regulate a

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138 Interview with external expert 1
procedure also mean that the rights of rights holders are moral rather than legal; voluntary to respect rather than obligatory. And, to be honest, quite often also in a situation where no law to regulate a procedure means no enforceable rights at all. When faced with hard cases public institutions are often quick to point out that they can only follow the law; not make any moral judgments of their own. The question is, however, if hesitancy from the side of public institutions to deal with hard cases, is the same as there not being any hard cases? Maybe the problem is not so much that the concept of hard cases is difficult to transfer to the Swedish context, but rather that the responsibility to solve hard cases lies with different actors in the Swedish context?

What seems clear is that in the Swedish context we have a situation today where right holders, in cases where corporations have failed to respect human rights outside the borders of Sweden, have no legally established procedure to secure their rights. This situation will remain until the Swedish legislative chooses to change it. That the Swedish legislative so far has chosen to not legislate the CSR-human rights nexus, but leave it at a voluntary level does not mean, however, that the responsibility to solve the conflicts which appear is left with no-one. Rather the responsibility ends up with established non-legal conflict solution mechanisms at best; or as a matter for negotiation between corporations and their most influential stakeholders through the usage of different means of pressure exhortation, such as media campaigns, at the worst. The worst because this latter form of conflict management actually seldom results in recognition of, and remedy provision to, the actual right holders involved. Violated right holders are also often too weak in relation to faulty corporations to enter into direct negotiations of their own. A formal conflict mechanism, whether judicial or non-judicial, could at least potentially grant those who have had their rights violated sincere recognition, remedy possibilities and some guarantees for non-repetition in the future. So the hard case remains to be solved even if by a different actor than the courts. If human rights are to be respected, even at the moral level, it is in this setting even more important that those responsible for finding solutions to the hard cases these conflicts present, transparently and coherently account for their basic principles.

So, what do we do then with the fact that the CSR-human rights nexus stretches across national borders, while Dworkin seems to describe hard cases as mainly a concern within a national context? Let us once again look at Dworkin’s fundamental principles of equal respect and concern and his argument that it is unacceptable to say that a right holder lacks rights only because there is no procedure to establish these rights. If these two aspects of Dworkin’s argument are taken seriously, also on a contractual basis, then they have to be taken seriously for all human beings, not only those situated within the limits of a certain national territory. That human rights belong to everyone regardless of whether the legislation within a certain territory grants them or not is a basic tenant of the entire human rights system; without this basic tenant the human rights system would collapse. Consequently, the fact that the CSR-human rights nexus is global, rather than national, does not remove the problematic aspects that in a severe way opens it up to hard cases in Dworkian terms. Nor does it remove the need

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139 For further thinking about how the ideas of Rawls can be expanded from the national to the global level please see the writings of Pogge and other cosmopolitarians.
for decision makers with the power to affect right holders to be transparent and consistent with regards to the basic principles they apply in their decision making.

3.2 Current rhetorical attempts to solve the hard cases of the CSR-human rights nexus

Before concluding that Dworkin’s principles of equal respect and concern is the best principles to solve the hard cases within the CSR-human rights nexus, it is necessary to critically investigate to what extent the current CSR rhetoric provides any principles that can be used in providing solutions.

With a few exceptions, mentioned previously, emphasis within national legal system is on the voluntary aspects of CSR. Even if the EU now has moved away from a definition of CSR that explicitly refers to it as a voluntary undertaking by corporations, it has not yet moved to a legally binding framework. As we have seen above the two major regulative documents related to CSR also underscore the voluntary nature of CSR; the first due to its nature as soft law and the second through explicit reference. The UN Guiding Principles might change the emphasis in how the responsibility for human rights is divided between the state and the corporate sector. It does nothing however, to take away the classical division of responsibility for human rights between the state and the private sector. After all CSR in relation to human rights remains a largely voluntary undertaking; for both states and corporations also after the issuance of the UN Guiding Principles. Since 2009 the Swedish government has appointed a special ambassador at the foreign ministry for issues related to CSR tasked with assisting corporations in CSR related issues and providing policy input.\(^\text{140}\) However, the main message from the current Swedish government is that CSR should be business driven, not state driven. In this regard there is little difference from the view taken by previous governments.

At the same time however, ever since the 1970s the social pressure on states and corporations to act in a manner that increases the corporate world’s responsibility in relation to CSR has steadily increased. Both the UN Guiding Principles and the OECD guidelines testify to this. The Swedish government’s emphasis on CSR as a business driven endeavour is at the same time matched with an open expectation that Swedish business is to act in accordance with CSR principles. The interest that media campaigns against corporations raises and the general ease with which the general public, as well as major investors, demonstrate their discontent with corporations that fail to act in accordance with these expectations is another example of such social pressure. During the last year we have seen a number of media cases only in Sweden in which CSR issues related to human rights have figured. Large multinational corporations such as Telia Sonera, Stora Enso, Lundin Petroleum, and IKEA have all received their fair share of public criticism. Behind a nationally focused media scandal involving human rights breeches within the sector of care for the elders were risk capital ventures based abroad such as British 3i, Swedish Triton and American KKR.\(^\text{141}\) In almost all of these cases the allegations have lead to action from both investors and politicians. One might consequently say that we in the western parts of the world, including Sweden, more or less

\(^{140}\) [www.regeringen.se/sb/d/11410/a/119498](http://www.regeringen.se/sb/d/11410/a/119498) last visited 2012-05-26

\(^{141}\) Dagens Nyheter, ”Caremas ökade vinster hamnar i skatteparadis”, published 2011-11-09, last visited 2012-05-24
outrspokenly are asking corporations to voluntarily become virtuous citizens. This definitely marks a paradigm shift from Milton Friedman’s statement that “corporations’ social responsibility is to maximize profit”.\(^{142}\) Based on the above it could be argued that the political and social debate on CSR and human rights has adopted rhetoric similar to that of an ethics of virtue, i.e. corporations are by the rest of society encouraged to adopt certain practices and virtues that are in line with more highly held social ideals. The depth in which this approach to CSR really corresponds to the roots of an ethics of virtue as developed by e.g. Macintyre has, however, been criticised by Sundman who claims that the rhetoric lacks enough substance.\(^{143}\)

Amao takes a different view on the issue and agree with those who claim that corporations, as the state and the individual, form a part of the social contract. Thus an “implicit social agreement also exist(s) between business and society. It is to this implicit social agreement that we can look to identify the duties and rights of business vis-à-vis society. The contract is to be considered an evolving document”.\(^{144}\) Amao then quotes Wilson who states that

> Corporations operate under the terms of two charters: a former written legal charter; and an unwritten, but critically important, social charter...It is this unwritten charter of societal expectations that determines the values to which the corporation must adhere and sets the terms under which the public grants legitimacy to the corporation.\(^{145}\)

Similar observations about a renegotiation of the social contract with regards to corporate conduct and CSR within the Swedish context are made by Jutterström and Norberg.\(^{146}\)

The above casts new light on the concept of voluntariness within CSR and broadens it to include more than what we normally would understand as purely voluntary undertakings, i.e. an act which it is entirely up to a specific actor to choose or abstain from performing. Given the informal social pressure involved, CSR can then rather include a whole range of aspects related to stakeholder pressure. The highest forms of pressure might take the form of actual legal measures, while the lowest forms are voluntary in the way we usually understand the word.

In relation to the ongoing renegotiation of the social contract a warning has been issued by the Finnish sociologist Sulkonnen that arguably is of much relevance also to the CSR-human rights nexus. Sulkonnen claims that we in western societies today emphasise individual freedom of choice and the absence of state regulation to the degree that the prince with whom the social contract of Hobbes and Locke once was to be negotiated with now is absent.\(^{147}\) It can be argued that the social contract that Amao and Wilson accounts for is different than the classical Hobbsian and Lockian account reflected in Sulkonnen’s criticism. In Amao and

\(^{144}\) Op. Cit. 9, p. 98  
\(^{146}\) Op. Cit. 12, p. 48  
\(^{147}\) Op. Cit. 35
Wilson’s account the different parties to the social contract seem to negotiate on relatively equal footings, not suffering from the status difference that appears when ordinary people negotiate with a prince. The same perception of equality between the parties of the contract can be seen in Dworkin’s writings on a social contract as a departure point for the exploration of his own rights-theory. Arguably it is also this more equality based contractual approach that this thesis takes. This approach is however not without its critics and words of warning comes from Mouffe who criticises deliberative liberalism and the idea that all can be involved in the same social reasoning process for ignoring the political and legitimate conflicts that have to arise in order to keep democracy alive. What she refers to as antagonism needed for the democratic paradox to function. Mouffe concludes that this lack of tension has allowed MNCs to become extraterritorial powers beyond the reach of political power. In this context she writes

“...there is of course neither enemy nor adversary. Everybody is part of the ‘people’. The interest of the rich transnational corporations can be happily reconciled with those of the unemployed, single mothers and the disabled. Social cohesion is to be secured not through equality, solidarity and an effective exercise of citizenship but through strong families and shared moral values and recognition of duties.”

Both Mouffe and Sulkonnen underlines what in this thesis is seen as the risks with the current rhetoric applied in relation to the CSR–human rights nexus, at least as far as Sweden is concerned. Namely, that relatively opaque social pressure, rather than coherent and transparent accountability for the basic principles applied by decision makers is both the base line and the method against and through which right holders’ access to remedy is to be measured and provided. Such opaqueness not only makes it difficult to ensure that right holders are granted both their rights or their due access to remedy, it also makes it difficult to follow up on decisions taken. This thesis agrees with this criticism of social pressure as the only modus operandi by which decision makers are to act and be judged. However, if Dworkin’s basic principles of equal concern and respect are taken as the foundational principle of our social contract and Wilson’s unwritten social charter binding not only corporations but all agents with potential to influence the lives of right holders, the risks that Sulkonnen and Mouffe warns us of have a much higher chance of being avoided. Thus, it is here argued that an awareness of these risks together with a stipulation in our hypothetical social contract aimed at securing the treatment of all human beings with equal concern and respect, and the transparent and coherent accounting of decisions affecting right holders, enables a continued contractual basis for current and future discussions on human rights and hard case solutions, where also those not convinced by such a basis, can be invited and included in the social reasoning process. A discussion where the very equality in respect

148 Op. Cit. 34, p. 121
149 The mooting of the strengths and weaknesses of such a contract theory in comparison to a rights based theory certainly deserves more space than what this thesis can afford. As such a discussion is not the main purpose here and as the choice between a rights based theory such as Dworkin’s and a contractually based theory easily can become a question of whether the hen or the egg came first as long as one does not involve more ambitious
and concern by decision makers would be the threshold against which actions and decisions are measured, rather than the social opaqueness described and criticised by Mouffe.

Arguably, the UN Guiding Principles and its demands for remedy provision through grievance mechanisms that are legitimate, accessible, predictable, equitable, transparent and rights compatible as well as sources of continuous learning challenges such opaque social pressure as our only enforcement method for corporate respect in relation to SCR. Indeed, it is argued here that these demands very well could go hand in hand with Dworkin’s basic principles for the resolution of hard cases; i.e. equal respect and concern for all right holders. Two basic principles that, however, remain hard to adhere to if the above demands of the UN guiding principles are not met.

4. Results of the interview survey
This chapter presents the results of the interview survey. As the survey took the form of semi-structured interviews what is presented here should be seen as what it is, a qualitative description of these specific respondent’s thoughts and opinions rather than as attempts to present statistically verifiable data. When deemed as helpful in the presentation of data tables including quantitative measures are used. Specific reference to individual interviews will be made when less than four persons have expressed a certain opinion referred to in the text.

4.1 Perceived pressure groups and general knowledge of relevant soft law
All respondents had very good knowledge of CSR issues in the broad sense. In order to probe what relevance political decision makers and the SNCP have when it comes to influencing CSR behaviour among corporations all respondents were asked what group or groups in society motivated corporations to work with CSR. Answers to this question also provided input on respondents’ perception of the social dynamics related to CSR. While there was some disagreement about which pressure group that had most impact on corporate behaviour, the respondents were more or less in agreement about which the general pressure groups are. Among important pressure groups they mentioned NGOs, media, investors, international organisations (such as the UN, the EU and the OECD), consumers/the general public/society, corporate staff and politicians. The more general pressures of globalisation and internet induced transparency were also mentioned as motivating factors.

Noticeable is that when it comes to the role of politicians affecting corporate behaviour, the respondent group was quite divided in the extent to which it thought politicians played an active role. Nine respondents expressed clear or indirect disappointment with what they felt was passivity from the side of politicians regarding CSR. Of course such passivity can also be an active strategy sending the message that CSR should be corporately owned and corporately driven; something that was mentioned by certain respondents. Most of the respondents critical towards the passive stance currently taken by politicians also recognised that politicians can have an impact. Two respondents particularly emphasised the existence of political will to increase corporate behaviour in line with CSR standards. Examples provided of how such

 meta-physical convictions in the discussion this brief exploration of the matter will have to suffice unless we are to lose track of where this specific thesis is going.

150 Op. Cit. 2
political will was expressed by the current government was the appointment of a CSR ambassador at the foreign ministry and the work being carried out at the unit for Global Responsibility at the same ministry. Two other respondents problematised the general opinion of consumers or the general public as an active pressure group focused on improving CSR. One emphasised that consumers are not an active group in themselves, but through the way in which media portrays CSR issues corporations and other actors get a perception of consumer being an active pressure group. According to this opinion, the power to exert pressure on corporations rather lies with the media. The other emphasised that consumers and the general public often have clashing and competing interests leading politicians to be caught in a balancing act between the different currents of popular opinion. As an example he referred to the current debate on Swedish arms exports where different and competing voices about the extent to which human rights criteria should be taken into consideration are heard.

When asked more specific questions about CSR and human rights the knowledge levels varied slightly, ranging from those who just had started to consider these links to those who had several years of experience working with them. The respondent’s knowledge of the UN Guiding Principles, the functioning of the SNCP as well as their opinions about the latter are summed up in tables 1 and 2 below. Worth to clarify with regards to table 2 is a reference to what best can be described as an attitude expressed by four respondents. This attitude perceived the SNCP as in no way perfect, but in spite of all its imperfections the best available solution. In table 2 this view is summarised under the headline “not perfect but best”. The different assessments made regarding the SNCP will be developed more thoroughly in subchapter 4.3 below.

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<td>Corporations</td>
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<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Civil society</td>
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<td>1</td>
<td>1</td>
</tr>
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<td>SNCP rep.</td>
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</tr>
<tr>
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Table 1

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151 Interviews with politician 1 and SNCP representative 1,
152 Interview with external expert 2
153 Interview with civil society representative 1
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<th>Negative View</th>
<th>Not perfect but best</th>
<th>Neutral view</th>
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<tr>
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<td><strong>4</strong></td>
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Table 2

### 4.2 Preferred conditions for non-judicial conflict resolution

Respondent’s preferred conditions for non-judicial conflict resolution mechanisms, such as mediation, were all relatively consistent. Three core conditions mentioned by most respondents were:

- A reasonable degree of openness and transparency vis-à-vis parties to a case but also towards the general public (10 respondents);
- Clear rules and procedures about the process and case admission (9 respondents);
- Accessible for all potential parties to a case (8 respondents)

Another important factor emphasised by six respondents was that a non-judicial mechanism for conflict resolution had to have at least a basic understanding of the context in which a case was situated and the complex character of cases involving alleged corporate responsibility for human rights breeches. In relation to this, two respondents with much previous experience from mediation emphasised the need for the actual mediators to have enough knowledge and competence in order to gain the trust and confidence of both parties. Thus any mediation instance’s starting point for election of mediators should be the individual parties to each case. Legitimacy, trustworthiness, impartiality and institutionalised values and procedures aimed at safeguarding the integrity of the parties and the process were other conditions mentioned by several respondents.

Six respondents specifically mentioned the possibility for a non-judicial conflict management mechanism, such as a mediation function, to impose punitive sanctions on corporations as imperative to its raison d’être. Four respondents here problematised the extent to which non-judicial conflict management mechanisms without the back up of a legal system and the possibility of court procedures ever can have the power to impose sanctions. The way in which the continued emphasis on voluntariness and non-judicial conflict management mechanisms in the UN Guiding Principles, as well as in political rhetoric, predisposes power relations towards corporations rather than towards complainants was touched upon by at least

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154 Interview with SCC representative and corporate representative 1
five respondents. The question of how it is even possible to only provide mediation in a situation where actors are accused of, and might be proven to have, abused human rights in often severe ways was also raised. One concrete suggestion was therefore to have a dual system where accusations of more severe human rights breaches would be managed within the legal system and less severe cases could be referred to mediation or other forms of non-judicial conflict management.155

Respondents identified several challenges for any mediation mechanism to be able to fulfil these conditions. The most commonly mentioned related to:

- protection of complainants from potential repercussions as well as safety and security risks during and after processing of cases;
- Accessibility for all potential parties considering the global reach of potential cases and the uneven resource base of corporate actors in relation to potential complainants;
- Securing sufficient resources.

4.3 Perceived consequences of problems within conflict management mechanisms

Not all interview situations provided room to ask respondents what consequences they perceived as associated with mal-functioning conflict management mechanisms. In some interview situations respondents’ answers had lead the interview in other directions. In other instances respondents who had not had any own experience of conflict management related to corporate behaviour and human rights abstained from answering the question. The thirteen respondents that did provide an answer were asked to consider possible consequences for both a corporate party and a complainant. Respondents were here given a very broad definition of what “mal-functioning” could mean, ranging from taking biased decisions to lacking in competence, professionalism, efficiency or what they themselves perceived as a relevant interpretation of the term. Consequently these respondents’ thoughts on consequences of mal-functioning mechanisms often stood in direct opposite relation to their preferred core characteristics for conflict management mechanisms. Respondent’s who did answer the question came from all respondent groups.

Perceived negative consequences of mal-functioning conflict management systems mentioned were:

- Actors will abstain from using them;156
- The mechanism will lack in status and legitimacy;157
- Rumours about the mechanism will spread quickly;158
- Complainants and right holders will not get the remedy they are entitled to;159
- Complainants will be afraid to use the mechanism;160

155 Supra 152
156 Interviews with SNCP representative 3, external expert 1 and civil society representative 2
157 Interviews with corporate representative 4, SCC representative and SNCP representative 2
158 Interviews with SCC representative and corporate representative 5
159 Interviews with SNCP representative 2 and civil society representative 2
160 Interviews with civil society representative 2 and corporate representative 4
- Corporations will not take CSR issues and human rights respect seriously;\textsuperscript{161}
- Misbehaving corporations will benefit;\textsuperscript{162}
- Corporations that want to deal with issues raised in a serious manner will have problems to do so in a structured and efficient way;\textsuperscript{163}
- It will be easy to create bad press and bad will for corporations without sufficient substance.\textsuperscript{164}

As can be seen from the above, mal-functioning conflict mechanisms were perceived as providing negative effects for both corporations and complainants. Related to human rights the most negative aspect of the list above is perhaps the challenges it raises for increased human rights implementation and respect.

\textbf{4.4 Responsibility to provide functioning conflict management mechanisms}

Thirteen respondents thought that the responsibility to provide functioning conflict management mechanisms belonged to the government. The most common argument given to support this was that it is the state that has signed the OECD guidelines and therefore is responsible to implement what the guidelines proscribe regarding conflict management mechanisms. Another argument was that it is the state that is the signatory of human rights conventions and therefore also the one who has the responsibility to ensure that actors within its control abides by those conventions. Many of these respondents emphasised that the state’s direct involvement in conflict management mechanisms provided these mechanisms with impartiality. On the other hand, one respondent saw the state’s direct involvement in non-judicial conflict management mechanisms as a direct problem in relation to their independence and the separation of political power from decision making regarding remedy provision to right holders.\textsuperscript{165} Respondents who were probed about the possible role of corporations in the UN Guiding Principles’ provisions regarding cooperative initiatives (mentioned in chapter 2.2.3) tended to argue for, or agree with, a government focused interpretation. In other words an interpretation where corporations were required to cooperate with existing conflict management mechanisms provided by the government, rather than an interpretation where corporations together with the government were obliged to provide external access to remedy.

Four respondents preferred solutions to be found on an international level either through improving international law so that it did not contain the legal vacuums regarding CSR that it now does, or through establishing international mediation through the UN, the ICC or similar supranational organisations. One of these four respondents provided an interesting interpretation of this issue. According to her, the major problem regarding SCR is the legal vacuum that exists both on the international and the national level. In order to secure the rights of abused right holders legislation is needed, rather than non-judicial mechanisms which are not binding on corporations and that the corporate sector has no commitment to.

\textsuperscript{161} Interview with politician 1
\textsuperscript{162} Supra 152
\textsuperscript{163} Interview with corporate representative 3
\textsuperscript{164} Interview with SNCP representative 3
\textsuperscript{165} Supra 138
She therefore thought that as far as legislation is concerned the responsibility to improve it lies with the nation state. In the mean time she thought that non-judicial mechanisms can play a certain role to fill this legal vacuum. The responsibility to provide non-judicial mechanisms should in that case not lie with the state, but had to be a voluntary undertaking by the corporate sector to which it commits due to its own interest. She said:

“if we talk about ...non-judicial mechanisms then it is hard to reach any other answer than the corporations [being responsible]...the alternative, as I see it, is that the state sharpens its legislation and increase the law’s extraterritorial capacity so that it becomes possible to process cases here in Sweden, sharp cases in court...that is the state’s responsibility, and I would be happy to see it taken to a larger extent. But if one instead chooses to go for mediation then it has to be corporately driven [on a voluntary basis]....one could argue that they have a moral responsibility for this....It becomes very strange if the state has a role in mediation initiatives that are needed because the state does not create [the needed] law...something that would not be needed if the laws were better”.166

The wish for stricter laws and the possibility to initiate court procedures rather than to process cases through mediation was shared by six other respondents. Nine respondents wanted at least a clarification of applicable rules regarding CSR and human rights, five of these respondents did however also belong to the group who wished more possibilities to bring cases of alleged corporate breeches against human rights to court.

4.5 Assessments made of the SNCP and its relevance

The knowledge and views of respondents regarding the SNCP has already been accounted for in a quantitative way. In table 2 it is possible to see how assessments of the SNCP correspond to knowledge about the SNCP as well as to respondent group. Considering our purposes it is worthwhile to dwell a bit longer on this matter. First it was clear that those respondents that had no previous encounters or knowledge about the SNCP also did not have any direct opinion about the way in which it functioned. Most interesting to note here is perhaps that neither of the members of parliament interviewed knew how the SNCP functioned, this in spite of it being a government hosted mechanism. In the same way it is interesting to note that two out of three civil society representatives did not know how the SNCP functioned. One of those did, however, represent an organisation that currently was preparing cases for the NCP in the UK; thus she was aware of the NCP system as a possibility for conflict management with regards to CSR cases even if not knowledgeable about the detailed operations of the SNCP. 167 Knowledge about the SNCP among respondents representing the corporate sector was common, but should not necessarily be seen as indicative of what the situation looks like in general as two out of three corporations chosen to be represented in this interview survey had had previous dealings with the SNCP.

166 Interview with external expert 3
167 Interview with civil society representative 3
With regards to assessments made of the SNCP among those who had knowledge about it one respondent stands out with a positive opinion. This person had not herself had any direct contact with the SNCP, but the corporation she represented had been involved in the latter of the cases managed by the SNCP. As she had not heard any negative criticism of the SNCP from her predecessors in the corporation she assumed that the process had been smooth and worked well. She probably mirrored some of the general expectations on the SNCP when she said:

“If a bad decision is made attention is usually drawn to it from several directions so if it was not an effective decision making process, or efficient. Well yes, one has to put faith in that a national contact point for the OECD has competence. Otherwise it becomes very hard to operate, if one departed from the view that they didn’t know their job.”

From this positive and trusting point of view, assessments then ranged to the already noticed “not perfect but the best we have”- attitude, to general observations about the SNCP’s irrelevance, and finally to very critical assessments. Four out of five negative assessments were connected to the first case ever to be dealt with at the SNCP involving NGOs as a part. The one directly critical assessment that did not relate to this case was more based on an observation about the SNCP’s irrelevance as a place for mediation of conflicts related to CSR issues. This respondent noticed that during her time as a consultant within CSR issues she had never heard any corporation refer to the SNCP as a possible arena where complaints could be mediated.

The impression of the SNCP as not being relevant for mediation related to corporate breeches of human rights, or other parts of the OECD guidelines, was backed up by several other respondents; including one of those that did not have any knowledge of the SNCP. This civil society representative stated that he had never thought about it as an option until he was told about it during the interview. Feeling that they lacked formal fora where conflicts related to corporate behaviour and human rights abuses could be processed effectively and without paying head tribute to the corporate sector, the NGO he represented felt obliged to use name and shame tactics through media campaigns. It was felt that such campaigns gave quicker and more certain results with regards to changing corporate behaviour than engaging in procedures at formal mechanisms for conflict management. Through the preparations of well researched reports it was possible to enter into a dialogue with corporations at the pre-launching stage of the reports. If corporations then changed their behaviour without the report needing to be released that usually provided for the best process. In this way a strategic advantage was gained on corporations accused of breeches as civil society got to choose their own arenas instead of being pulled into long proceedings at judicial or non-judicial conflict management mechanism without either clear procedures or clear outcomes. When probed this respondent problematised the name and shame tactic. While the tactic provides a quick way to make corporations change their behaviour, it does not guarantee that abused right holders are

168 Interview with corporate representative 5
169 Supra 166
granted remedy. He also observed that the tactic only works in cases where one can suspects much media attention; while in fact the number of cases with victims of corporate breeches of human rights is much larger than what media interest can absorb. In the absence of quick and reliable conflict management mechanisms to which corporations actually are committed, and whose decisions they are bound to follow, he thought that the name and shame tactic nevertheless remained the fastest way to get the worst corporations to change their minds.  

Name and shame tactics were also problematised by a respondent at the corporate side. He pointed at the risk that media campaigns collapse opportunities for constructive dialogue. According to him, once media campaigns have started matters are likely to be handled by people who are external communication experts, rather than by those in charge of sustainability and CSR. The perception of name and shame tactics as a quicker way to achieve results was nevertheless confirmed also by four other respondents. Arguably this preference of the media as a playing field for the resolution of conflicts related to SCR and human rights breeches says something about the status of the SNCP and its perceived lack of relevance. The following quote from one respondent when asked whether it was symptomatic of the SNCP’s bad condition that civil society rather uses media campaigns capture this quite well; “Mhmmm, because it also says something about the status of a SNCP statement if it, by all stakeholders is perceived as so low that one doesn’t even care”. To counterbalance this image, one should note that another respondent said that the option of raising an issue at the SNCP sometimes is brought up by the labour unions in their negotiations with corporations. The way in which the SNCP is referred to as irrelevant by the respondents above could have something to do with both the critical opinions expressed by those who still thought it was the best thing we have; and those who were just outright negative.

In the end of the day all the expressed criticism of the SNCP can be related to two things; the SNCP’s lack of resources and the lack of political will to equip it properly. In order for us to end this subchapter on a somewhat positive note, let us start by summarizing the most critical voices first and then move on to those who saw the SNCP’s imperfections, but still thought it the best solution available. First it should be noted that the most critical views regarding the SNCP relates to experiences gained during the SNCP’s very first case involving NGOs. Thus they date back about nine years in time. The criticism of the SNCP as expressed in the interviews made can be summed up as follows: the SNCP lacks competence, efficiency and professionalism. Respondents from both the NGO and the corporate sector stated that the SNCP at the time had been generally confused in relation to what to do and how to handle the case. Neither the NGO nor the corporate parties had felt that they came to a negotiation mechanism, but rather that the decision about who was wrong or right already had been taken. In both cases the perception was that the SNCP was predisposed favorably towards the other side. According to respondents the SNCP rather investigated the issue than mediated between the concerned parties. Data collected during the interviews reveal that respondents from both the corporate and the NGO side felt that the behavior of the SNCP throughout the process

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170 Supra 153
171 Interview with corporate representative 4
172 Supra 138
173 Interview with SNCP representative 2
174 Interviews with corporate representative 2, external expert 1, civil society representative 2
acted against their interests.\textsuperscript{175} From the NGO side memories of frustration resurfaced about the close relations between the unions represented in the SNCP and the corporations against whom the case was brought. The unions represented in the SNCP had at the time of the case been perceived as protecting the interests of their members employed at the corporations, rather than the interests of the complainants. Data collected in interviews with the corporate side did suggest that the corporations had found the approach of union representatives helpful.\textsuperscript{176} Without answers from more respondents involved in the actual case it is however impossible to say to what extent such helpfulness only represented a general service mindedness or actual partiality. What is clear from the interview survey is however, that both sides involved in this case perceived the SNCP as partial and predisposed against them. It is consequently clear that the SNCP must have failed in securing the trust of the parties.

Among these critical voices there was recognition of the fact that the low capacity of the SNCP probably was due to the very low amount of cases it had had. That it simply had not been able to build sufficient experience in order to handle as complicated cases as allegations of corporate human rights breeches involve. This did, however, also mean that none of these parties thought that the SNCP had improved by now. One respondent acknowledged that the best way of improving the SNCP’s capacity probably was to continuously bring cases to it in order to force it to improve. But at the same time she said that the bad experiences from this first case, which in general just had been a really bad process for all involved parties, had made concerned parts of civil society reluctant to approach the SNCP again. When asked about why civil society does not raise more issues at the SNCP she responded “I think that on our behalf it is somewhat of a bad experience that has lead to [civil society not using the SNCP] and then of course, I mean it becomes a vicious circle, you don’t think that [a case] will be managed professionally and in a good manner and then it isn’t”.\textsuperscript{177}

The lack of experience on behalf of the SNCP to handle cases and the negative consequences it brought by preventing it from learning was confirmed by at least one representative of the SNCP.\textsuperscript{178} At the same time SNCP representatives also emphasized the collected knowhow within the entire network of SNCP’s and embassies that the SNCP has access to and that provide support to the SNCP in case management.\textsuperscript{179} These SNCP representatives were otherwise primarily of the view that the SNCP, while it has its imperfections, is the best system available. They primarily thought of the SNCP as a good solution because of the way in which the different parties of the labour market was represented in it and the impartiality this provided. The ownership and status that the state representatives in the SNCP provided was by them seen as another guarantor for its impartiality. This view was shared by one corporate respondent.\textsuperscript{180} Another argument brought forward by the SNCP representatives for why the SNCP is the best solution at hand is the problems that would arise if parallel systems were created. After all the state is obliged to provide for an SNCP and to then create other

\textsuperscript{175} Interviews with corporate representative 2 and civil society representative 2
\textsuperscript{176} Interview with corporate representative 2
\textsuperscript{177} Interview with civil society representative 2
\textsuperscript{178} Supra 163
\textsuperscript{179} Interview with SNCP representative 1 and 3
\textsuperscript{180} Supra 171
alternative mediation solutions aside of the SNCP would include a too big risk of diluting the applicable rule system. With regards to judicial solutions there was no joint stance taken among the SNCP representatives as to whether that was to be preferred to a non-judicial mechanism such as the SNCP. Two of the SNCP representatives emphasized the complicated nature of cases brought to it and that allocation of responsibility in these cases seldom is very clear cut, which might mean that mediation is a better solution than court proceedings. All representatives of the SNCP were in agreement that one of the biggest challenge for the SNCP, and for all similar mediation mechanisms, was related to resources. This was in turn related to different prioritizations made by the different actors represented in the SNCP. Directly related to the challenge of available resources was the SNCP’s low capacity to share information about itself and the OECD guidelines to its target groups as well as its ability to manage cases. Two of the representatives emphasized the large resources needed in order to investigate even one case. They were also directly concerned about the SNCP’s capacity to handle several cases continuously or simultaneously due to the lack of resources. The data collected during the interviews with the SNCP representatives also revealed a certain concern that part of the reason for why external information about the SNCP was not prioritized more was a doubt about its actual capacity to manage an influx of cases.

To summarize the above assessments of the SNCP there are some positive voices to be heard but they are not many. Without more concerted efforts at marketing itself as a legitimate mechanism for conflict management it is not very strange that it is perceived as irrelevant by a number of actors. What is more disconcerting, however, is the indication that marketing and equipping itself as such a mechanism might not even be within its current reach considering the resources and political will at hand.

4.6 Viability of alternative mediation solution at the Stockholm Chamber of Commerce

A general lack of knowledge about the SCC and how its mediation services function made many respondents a bit hesitant towards expressing an opinion about the viability of mediation at the SCC. The answers provided were therefore coached in relatively general terms. Out of the seventeen respondents, eight thought that a mediation alternative at the SCC was a viable option while seven thought it was not. The remaining two respondents did not express any opinion. As was seen in subchapter 4.4 there was a general view among respondents that the state is the actor with the biggest responsibility to provide conflict management mechanisms. While not all respondents explicitly said so, a plausible interpretation of the entirety of most respondents’ answers is therefore that a SCC option also must be backed up by the state. Arguments for the SCC as an option was that it was perceived to have a good international track record regarding mediation, that it already has relevant structures and processes in place to provide good mediation services and that it would be relatively easy for it to attract relevant expertise regarding human rights. Another reason brought forward was also that the SCC, due to its size, is relatively flexible and operates faster

181 Interviews with SNCP representative 2 and 3
182 Interview with SNCP representative 1 and 2
183 Supra 181
than a bigger institute such as the ICC. The most concrete suggestion for how a mediation mechanism related to corporate responsibility and human rights at the SCC could be developed was provided by the SCC itself.

According to this suggestion the exact provisions of any mechanism set up at the SCC would have to be agreed upon between the funding actors. The desired amount of transparency as well as conditions for case admission would be part of such an agreement. According the SCC there was no need for parties to a conflict to have business relations in order to be able to mediate. What was more important was that the parties; when the conflict arose decided to solve the conflict through mediation. Concerns that alleged victims of corporate human rights breaches would not be able to bring cases at a SCC hosted mechanism were therefore seen as unfounded. With regards to financing the SCC suggested that, if one could not get the mechanism financed from other sources; a solution could be a joint corporate endeavour where several corporations financed the mediation mechanism through similar structures as in an insurance fund. In that manner they would commit to something already before they themselves were drawn into a case, at the same time as they would know they would get professional mediation in case they needed.\textsuperscript{184} The question of how a SCC alternative would be financed was often asked by other respondents. When told the general contents of the above idea the general arguments presented against it was the difficulty in achieving sustainability,\textsuperscript{185} as well as the problematic aspects of having an alternative only financed by the corporate sector.\textsuperscript{186}

Respondents who were critical towards the SCC as a viable option usually questioned its ability to live up to preferred conditions for a conflict management mechanism. Most respondents mentioned the SCC’s ability to be perceived as legitimate, impartial and trustworthy by all stakeholders as particularly challenging. The SCC was by the critical respondents in general perceived as being too close to the corporate sector to provide a credible impartial alternative. Respondents were also asked whether they thought it would be beneficial to allow for competition between a mediation solution at the SCC and the SNCP. Four respondents thought such competition might lead to improved services, while seven respondents refuted the idea. A concern that competing mediation mechanisms would not lead to increased access to remedy for complainants, but rather to a diffusion of applicable systems sums up the arguments presented against competition.

Considering the generally low level of knowledge regarding arbitration and mediation institutes within the respondent group very few respondents had an opinion as to whether the ICC would provide a better option for mediation than the SCC. Among those who did have an opinion a clear division appeared between those for and against. Five respondents thought that the ICC potentially would be a more suitable actor to provide mediation mainly due to its global reach. Three respondents regarded ICC involvement in matters related to human rights and corporate conduct as directly problematic. The tension was perceived as related to the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{184} Interview with SCC representative
\item \textsuperscript{185} Interview with SNCP representative 3, external expert 3 and corporate representative 4
\item \textsuperscript{186} Supra 173
\end{itemize}
\end{footnotesize}
ICC’s history of adopting a very critical attitude towards demands of corporate responsibility in relation to human rights.\footnote{For more background on this critical attitude from the ICC see pp. 40-44 in \textit{Op. Cit.} 9}

\textbf{4.7 Other conflict management mechanisms suggested by respondents}

Apart from utilizing already existing mediation institutions such as either the SCC or the ICC, as explored by this thesis, respondents came with four different relatively concrete ideas for possible forms of conflict management related to alleged human rights breaches by corporations. Two of these we have already encountered in previous sub chapters. In chapter 4.2 we were presented with the idea of having a dual system where more severe allegations of human rights abuse would be treated in the courts and less severe ones at mediation institutions. The idea is similar to that applied in many truth and justice commissions in post-conflict reconciliation phases. In chapter 4.5 we were presented with the perceived pros and cons of the name and shame tactic that many regarded as the most effective approach to take in the absence of functioning formal mechanisms for conflict management.

The third suggestion that came from at least two different respondents was that the 2012 revision of the OECD guidelines should be taken as an opportunity to restructure the SNCP.\footnote{Interview with SNCP representative 1 and civil society representative 2} As was described in chapter 2.3 the revised version of the guidelines provides more substantial requirements regarding NCP management and processing routines. Many of these respond to the criteria that respondents mentioned as desirable in a non-judicial conflict management mechanism. At least one respondent articulated wishes that such a restructuring of the SNCP also should increase its representation to include NGOs to counteract experiences of too close relations between unions and corporations.\footnote{Supra 177} The idea to include a representative from civil society in the SNCP was also brought up by three other respondents who had heard that there was such a wish from the NGO sector, but who themselves belonged to other respondent groups.\footnote{Interviews with SNCP representative 1, SNCP representative 3 and corporate representative 4} A challenge that would have to be countered before such an extension can be made is how to elect a representative that is seen as legitimate by both civil society and other involved actors. A general concern expressed by one respondent from the corporate sector was also how to avoid that the inclusion of an NGO in the SNCP does not become what he called “too campaign like”.\footnote{Supra 171} This concern could possibly be described as an effect of the often (maybe overly?) polarized positions of corporations and NGOs regarding SCR issues.

Fourthly, two respondents argued for finding more local solutions. One concrete example provided was the establishment of local committees consisting of representatives from relevant stakeholders where contagious issues were monitored and negotiated on a continuous basis. This was seen as a good way of handling the complexity of not only human rights issues, but also other CSR issues, in a context where poverty and high corruption risks created intricate layers of dependency and made allocation of responsibilities hard to establish.\footnote{Interview with corporate representative 2} Another respondent thought that, as long as we talk about non-judicial mechanisms, local
corporately driven initiatives that also involve other stakeholders will function better than non-binding recommendations on the international level. The main argument was that corporations will be more committed to that which they themselves invest in through both finances and reputation than to guidelines or principles they have not even signed themselves. Such local initiatives would also be closer to all concerned stakeholders and thus potentially more accessible and knowledgeable about the local context.°

5. Concluding discussions

This chapter faces the challenging task of bringing the theoretical and the empirical parts of this thesis together. As counteractive as it might seem this will be done by first presenting a discussion solely focused on the results of the empirical interview survey presented in chapter four. Such a focused discussion is important for us to be able to answer the research questions asked in order to critically examine available Swedish non-judicial grievance mechanisms as stipulated in the second and third purpose of this thesis.

Once we have drawn conclusions with regards to these questions it will be easier for us to see linkages between the empirical findings and the theoretical framework provided in this thesis. The ensuing discussion on these linkages will then circle around the following issues:

- Can the SNCP cases of the 2000s be considered hard cases in the way that this thesis has used the term?
- If these cases can be considered as hard cases is it then reasonable to demand that an institution like the SNCP, with the power to affect the lives of right holders, should (have) account(ed) for their decisions with transparency and coherency?
- If the answer to the above question is “yes”, then the next question to discuss, with input from the findings of the interview survey and the published statements of the SNCP becomes did they?

Once these issues have been discussed suggestions for future areas of research will be made before a final conclusion is provided in chapter 6.

5.1 Discussion of results from interview survey

This subchapter will mainly attempt a brief comparison between the goals and requirements for NCPs as listed in the OECD guidelines and the results from the interview survey. The objective of such a comparison is to more clearly respond to the thesis’ second objective of providing a critically examination of the conflict management mechanism for cases involving corporate breaches of human rights abuses available in Sweden. The thesis third objective, to investigate interest in an alternative mediation mechanism at the SCC or the ICC, is deemed to have been explored sufficiently in subchapters 4.6 and 4.7 above.

As has already been pointed out in relation to research problems, NCP objectives were relatively general before the 2011 revision of the OECD guidelines. Nevertheless, some standards were provided already in the 2000 version of the OECD guidelines. Considering that all of the SNCP’s cases have taken place under the auspice of the 2000 guidelines it is

° Supra 166
these standards that the results of the interview survey will have to be measured against. In
addition to drawing conclusions about the SNCP’s ability to live up to the demands of the
2000 guidelines, the comparison might also give us an inkling as to how fit the SNCP is to
meet the demands of the 2011 OECD guidelines and the UN General Principles. A question
that if we look forward is as interesting as those about past functionality.

There are two key phrases from the 2000 OECD guidelines to be remembered as we do this
comparison. The first states that the NCP’s should “function in a visible, accessible,
transparent, and accountable manner”. The second phrase states that the leadership of the
NCPs should “be such that it retains the confidence of social partners and fosters the public
profile of the Guidelines”.

In our continued discussion we also need to remember that
NCP’s according to both versions of the guidelines are to function in order to as both advisory
and/or mediatory bodies when issues of guideline interpretation or implementation arise.

A structured and simplified overview of the goals and requirements regarding NCPs as
provided in both the 2000 and the 2011 version of the guidelines are found in table 3. For the
sake of reference the requirements that have been added or clarified since the 2011 revision of
the guidelines are also included in the right hand column of the table.

<table>
<thead>
<tr>
<th>Included in both 2000 and 2011 versions of the OECD guidelines</th>
<th>2011 version of the guidelines only</th>
</tr>
</thead>
<tbody>
<tr>
<td>Visible</td>
<td>Provided with human and financial resources</td>
</tr>
<tr>
<td>Accessible</td>
<td>Statement guidance</td>
</tr>
<tr>
<td>Transparent</td>
<td>Impartial (previously only in commentary now in actual guidelines)</td>
</tr>
<tr>
<td>Accountable</td>
<td>Predictable, including timeframe and requirements (previously in comment)</td>
</tr>
<tr>
<td>Retain the confidence of social partners</td>
<td>Equitable (previously in comment)</td>
</tr>
<tr>
<td>Foster the public profile of the Guidelines</td>
<td>Guidelines compatible (previously in comment)</td>
</tr>
<tr>
<td></td>
<td>One year closure of cases (in commentary to 2012 version)</td>
</tr>
</tbody>
</table>

Table 3

Now, even with this structured overview of the goals and requirements of NCPs it can be
argued that their formulations are too vague to enable any independent monitoring of the
extent to which NCPs really fulfil their goals. Considering that there are no official set of
indicators against which e.g. NCP visibility, accessibility, transparency or accountability is to
be measured any evaluation will be bound to become more or less subjective. This problem
has not been solved with the 2011 revision of the guidelines, even if the revision arguably
includes more specific demands. Keeping this subjectivity in mind, together with the

194 Op. Cit. 84 OECD
195 Ibid.
196 Supra 101
relatively small amount of respondents, the results from the interview survey provided above seem to suggest that the SNCP’s ability to live up to almost all of the objectives and requirements set in the 2000 version of the guidelines has been relatively poor. Furthermore, if one is to judge by the results of the interview survey and considering that the requirements of the 2011 version, not only are more specific but also mirror the requirements of the UN Guiding Principles, it seems as if the SNCP’s current ability to live up to the provisions of these more recent documents is questionable.

As a matter of fact, the results of the interview survey suggest that the ability for complainants to seek access to remedy through non-judicial conflict management mechanisms in Sweden is considerably limited. Even if the most critical assessments of the SNCP dates back nine years, that very first case have had a major impact on how the SNCP is perceived by different stakeholders, especially within civil society. Subchapters 4.1 show a surprisingly low awareness of the SNCP among relevant actors otherwise involved in awareness raising and advocacy work regarding CSR and human rights such as concerned politicians and civil society representatives.

Even more alarming is the extent to which the SNCP is regarded as irrelevant to cases dealing with CSR and human rights by several respondents, causing name and shame tactics to be the preferable strategy for conflict resolution. This finding, together with the concerned comments from SNCP representatives regarding available resources for information sharing and case management at the SNCP itself, raises serious questions about the extent to which the SNCP can be said to be visible and accessible. The harshest criticism directed against the SNCP by respondents from all sides did, however, concern a perception of it as partial, rather than impartial and egalitarian. Noticeably, impartiality was only mentioned as a NCP requirement in the commentary to the 2000 version of the guidelines. Even so, impartiality must arguably be seen as a basic requirement for an institution tasked with mediation. Even if the condition up until 2000 was only included in the commentary to the guidelines it is feasible to suspect that the requirement as such is not less important in order for an NCP to operate successfully. Accusations of partiality must therefore be seen as a very severe critique of a mechanism tasked with the provision of mediation and advice in disagreements concerning, among other things, CSR and human rights.

While respondents not directly criticised the SNCP for a lack of transparency it was noticeable during the research that information about relevant cases was often hard to find on the SNCP’s website. Instead the OECD Watch’s website provided a more useful source of information. None of the published decisions, either at the SNCP or the OECD website, were dated. Versions in statements in other languages than Swedish were only available through the website of OECD watch. Even with the Swedish principle of public access to official records it is highly remarkable that the SNCP itself, as a Swedish governmentally hosted institution, does not ensure website publication of its own decisions. As statements from a public institution it is also remarkable that published documents are not dated or provided in languages spoken in the countries from which complaints have originated.
Finally, it is hard to see how the low confidence in the SNCP portrayed in the interview survey can be seen as anything but a failure in maintaining the confidence of the SNCP’s social partners. The only available alternative would be an interpretation of the phrase referring to those partners who are already represented in the SNCP itself. This would however suggest a more than slightly biased interpretation of whose confidence it is that should be maintained. The positive opinion expressed by the one corporate respondent quoted in chapter 4.5 raises hopes that the situation might have changed to the better after this first case. The respondent’s positive perspective is however hard to verify without corresponding voices from civil society organisation involved in the second SNCP case.

As was observed in subchapter 1.4.4 on research problems, the interview survey also suggest that respondent’s expectations on what a good mediation or non-judicial conflict management mechanism should live up to are higher than the demands specified in the 2000 version of the OECD guidelines. Indeed respondents’ expectations rather live up to the requirements included in the 2012 revision of the guidelines, or the UN guiding principles for that matter. If supported by enough political will and provision of sufficient resources, the revision of the OECD guidelines and their more precise proscriptions for NCP’s provides a possibility to improve the situation as far as the SNCP is concerned. Severe efforts to re-establish legitimacy and trust among all stakeholder groups will most likely have to be made in that case. Based on the results of the interview survey it seems unlikely that mediation opportunities at the SCC or the ICC on their own will reach sufficient levels of trust from all concerned stakeholders to be a viable option. It might however be useful to seek constructive synergy effects between the experience that these institutions have in mediation and a future hopefully better equipped SNCP.

Respondents’ perception of the negative effects of malfunctioning non-judicial conflict management mechanisms and the way in which these effects can be seen as inversely related to desired core characteristics of such mechanisms, raises a legitimate question. To what extent does a non-judicial conflict management mechanism, e.g. one aimed at providing both advise and mediation, that do not have what respondents regard as necessary core characteristics live up to a mediation mechanism’s raison d’être, however generally defined? Are there certain underlying and general principles that need to be applied whenever the capacity of a mediation and advisory body is assessed? Regardless of how formal requirements are formulated?

5.2 The SNCP’s hard cases

The questions asked in the previous sub-chapter echoes of the discussion held in chapter three regarding how hard cases should be solved. But before we answer these questions we must first ask ourselves whether the NCPs actually encounter hard cases. To answer this question there are two conditions we need to establish. The first is whether NCPs are institutions that potentially can end up in situations where they have to decide on hard cases. The second is whether the rule system that NCP’s have to relate to are such that they risk to present them with hard cases? I.e. are these rule systems vague enough to force NCP’s to make their own decisions based on underlying principles rather than explicit rules? As we go on in this
discussion it comes without saying that the SNCP is part of the body of NCPs and thus anything said on NCPs from now on also concerns the SNCP.

Through their double mandate to both provide advice and mediate in conflicts regarding the interpretation and implementation of the OECD guidelines all NCP’s end up in a tricky situation even without the complexity that their cases present. They are asked both to provide advice and mediate, consequently they can never be entirely neutral, never entirely focus only on how a conflict between two or more parties can best be solved. NCP’s must also take a stance for certain forms of interpretation and implementation of the OECD guidelines, without taking such a stance they would not be able to provide the advice they are mandated to provide. This means that at some point NCP’s must take decisions, they must take decisions on whether a certain interpretation or implementation of the guidelines is correct or not. They must take decisions that have a real deal of potential to affect the lives of right holders, not only within their own national territory but also abroad. Even if the guidelines are only voluntary to follow for corporations it is a somewhat trumped up excuse to say that this means NCPs do not have potential to, through their decisions, influence the lives of right holders. After all the guidelines remain binding on the OECD member states and unless we have given up all hope about the possibility to enforce internationally binding treaties that ought to count for something. Thus in line with the argument made in chapter three NCPs are political institutions who might end up in the situation where they have to make a decision regarding a hard case.

What then about the rule system that NCPs have to apply, the OECD guidelines? Here we will limit ourselves to the 2000 version of the guidelines as it is the version most relevant to the results of our interview survey. What guidance did the 2000 version of the guidelines actually give for how to decide cases related to human rights? As pointed out in chapter two, this guidance was generally vague in the 2000 version. In short it was stipulated that corporations were to respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments and that specific regard should be given to e.g. the UNHDR. Arguably this is not much to go by for an NCP that is to make a decision which is to influence right holders both on the corporate side and the claimant side. As was also shown in chapter two the two cases that did appear at the SNCP during the 2000s were both of them very complex, one so complex that it went parallel to an ICJ case which went on for more than five years. Even with the support of the institutional memories from other NCPs it seems unlikely that the involved SNCP members in these two cases did not feel that they would have to take certain decisions about how the guidelines were to be interpreted and implemented on their own. Arguably then, both of these two cases represented what Dworkin and this thesis refer to as hard cases. Cases where there are no precise rules in the relevant rule systems to be applied, cases that must have forced SNCP members to consider what the underlying moral principles for their decision were. Of course, without being there this is only a stipulation, but it seems highly unreasonable that this was not the case. Such a stipulation is also further strengthened by the testimony of respondents in the SNCP about the complexity of SNCP cases presented in chapter four. So to answer the first question asked in

the beginning of chapter five; yes, the SNCP cases of the 2000s were both hard cases in the sense that the term has been applied throughout this thesis. What is more, even with the improvement of the 2011 guidelines the new guideline text is still general enough to face the SNCP with more hard cases yet to come.

The next question to ask ourselves is then whether it is reasonable to demand, like Dworkin does, that the rationality behind decisions taken in hard cases should be accounted for coherently and transparently also by NCPs? Going by the results of the interview survey the answer is yes, but with due consideration given for the safety and security of those affected. To provide coherent and transparent accounts for decisions in a case concerning CR and human rights without risking the safety and security of individuals can in itself demand a certain extent of moral scrutiny and wisdom, but should not be impossible. In fact, as the interview responses also suggest, the future legitimacy of an institution like a NCP in the eyes of various stakeholders probably rise and fall with its ability to do just that. With regards to the two statements issued by the SNCP at the end of their cases it is here argued that their efforts to coherently and transparently account for the reasons behind their decisions were relatively meagre. As was pointed out in chapter two both statements place more emphasis on presenting the procedure for case management than on reasons and rationale for the decision taken. The result is bound to be that the “loosing” side in what is supposed to be a mediated process easily might feel that the final decision has been taken without any more in depth reasons provided for why certain conclusions were made. Such a state of affairs might once again risk the future legitimacy of the SNCP in the eyes of concerned stakeholders, possibly because it does not provide these stakeholders with confirmation that they are treated with equal concern and respect.

Consequently it seems as if Dworkin’s demand that the decision in hard cases should be coherently and transparently accounted for has quite some relevance also in relation to the dealings of NCPs. The same seems to be valid for his suggestion that the underlying principle by which all decision should be taken is that of equal concern and respect. Given the results of the interview survey these two words does indeed seem to also form a very essential part of the raison d’être of any mediation institution, regardless of what its formal rule system stipulates. Arguably, these ideas of Dworkin also go very well hand in hand with the 2011 revision of the guidelines and the demands of the UN general principles which causes us to conclude that there is no reason for why they should not be seen as a lest common denominator for how the hard cases in the CSR – human rights nexus should be solved.

Finally, it might still be argued that to only adopt Dworkin’s principles into the social contract is a too naive suggestion. The continuation of such an argument could be that if one thinks that decision makers should treat all right holders with equal respect and concern only because it is desirable to do so, then one has not sufficiently listened to the warnings of Mouffe and Sulkonnen. In answer to this accusation I would like to say that it is possible that we here are stuck in the tension between realism and idealism. The belief in the possibility of a social contract in which everyone negotiates on equal terms, and thus also the general principles according to how hard cases are to be solved, becomes idealism’s shining beacon for us to follow. The responses in the interview survey reflect the desirability of such a state
of affairs very strongly. Sulkonnen and Mouffe’s warnings about an absent prince and a failure to recognise the needed antagonism in order to keep the democratic paradox alive does however reflect the harsh realism of the situation; namely that we all negotiate on differentiated terms. This was also reflected in the disappointment many respondents felt and the tactics they apply when formal mechanisms for conflict management within the CSR-human rights nexus does not seem to work.

Arguably the reality of our situation should not disillusion us so that we give up on Dworkin’s principles. Rather the reality we face should provide us with an even larger incentive to apply them. Exactly because all of us are not on equal footing when hard cases within the CSR-human rights nexus needs to be settled we need transparent and coherent reasoning from all those with potential and power to take decisions affecting right holders. There is no other way to safeguard a minimum level of equality and respect towards each stakeholder, the very thing that form the foundation of our human rights conventions. That we have a system and a government which seemingly, not only have abdicated from their responsibility to equip the only available non-judicial grievance mechanism, but also consistently seems to hand over responsibility for decision making in the CSR-human rights nexus’ hard cases to other actors is of great concern. If the UN Guiding Principles are to be implemented in the Swedish context it will therefore be of great importance that pressure for such implementation is not only targeted at the corporations, but in equal measure at the government and its institutions.

To hand over responsibility to private mediation institutions such as the SCC and the ICC would arguably be a step in the opposite direction unless it is coupled also with other accountability measures, checks and balances to ensure that both the state and the corporate sphere takes their responsibility to contribute to hard case solutions within the CSR-human rights nexus. To regenerate the SNCP so that it actually can live up to its purpose and the requirements placed on it then seems to be the more pragmatic solution.

5.3 Recommendations for future research

This thesis has arguably only scratched the surface of the CSR-human rights nexus and access to remedy in the Swedish context. A regeneration of the SNCP, as suggested at the end of chapter four, should preferably be preceded by a more thorough evaluation and stakeholder analysis than this thesis has been able to provide. The alternatives for remedy provision suggested by respondents in chapter four also provide interesting and important areas for future research, some of them related to a restructuring of the SNCP. The idea about a dual system consisting of court proceedings for more severe human rights breaches related to corporations and mediation alternatives for the less severe is of great interest. Research about lessons learned from other similar structures as well as the effects of then necessary legislation on Swedish business as well as victims of abuses would be of great importance to follow up on that idea. The pros and cons of finding more local solutions for remedy provision are also well worth to investigate further. Finally, the extent to which name and shame tactics applied in the absence of functioning grievance mechanisms actually provides victims with access to remedy also needs to be examined in a more critical manner than what currently is done. At least if our goal is more far reaching than to not stop those human rights
abuses that draws the general public’s attention but also includes remedy provision to all affected.

6. Conclusion

This thesis has argued that it is possible to apply Dworkin’s idea of hard cases to the CSR-human rights nexus also in Sweden. The thesis has suggested that Dworkin’s general principles of equal respect and concern is a least common denominator for the demands placed on conflict management mechanisms within the CSR-human rights nexus by both relevant soft law instruments and respondents in the elite interviews carried out for the thesis. Thus it has provided a theoretical framework in line with its first purpose.

With regards to its second purpose this thesis has, through the interview survey, drawn the conclusion that the SNCP to a major extent seems to have failed in the fulfilment of its goals and the expectations placed upon it as stipulated by the OECD 2000 guidelines. What is more the SNCP seems little equipped to meet the requirements of the 2011 version of the OECD guidelines and the UN Guiding Principles unless some sincere and large scale efforts are made by the Swedish government and other concerned parties in the SNCP to refurnish it.

Thirdly, the thesis has explored the interest among concerned stakeholders for alternative conflict management mechanisms at the SCC and the ICC and found this to be generally low. Respondents generally thought that the challenges for such private institutions to procure the confidence of both sides in a conflict would be too difficult for them to overcome. The thesis has also criticised the usage of opaque social pressure, rather than transparent accountability for the basic principles, currently applied when hard cases within the CSR-human rights nexus are to be solved. It has argued that this usage both makes it hard to follow up on decisions made and that it is questionable whether it provides victims of human rights abuses related to corporate conduct with effective access to remedy. Instead it has suggested the adoption of Dworkin’s basic principles of equal respect and concern as well as the coherent and transparent accounting of reasons for decisions taken as an alternative solution.

In the discussions of chapter five it was also observed that an unconditional handing over of responsibility to solve the hard cases within the CSR-human rights nexus to such private institutions such as the ICC and the SCC would decrease available accountability towards decisions makers in these hard cases even more.
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**Interviews**
Apart from the above 17 recorded qualitative face to face and telephone elite interviews have been carried out with respondents representing:

- 3 Multinational corporations operating in and outside Sweden (5 persons)
- 3 Civil Society Organisations (3 persons)
- The SNCP (3 persons)
- External experts (3 persons)
- Politicians (2 persons)
### Appendix A
Tematiska och operativa intervjufrågor till företagsrepresentanter (samt grund även för andra respondentgrupper)

<table>
<thead>
<tr>
<th>Tematiska forskningsfrågor</th>
<th>Operationaliserade intervjufrågor</th>
<th>Operationaliserade intervjufrågor OECD: kontaktpunkt</th>
<th>Operationaliserade intervjufrågor politiker</th>
<th>Kommentarer/ resultat av kodanalys</th>
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<tr>
<td><strong>1. Inledande bakgrundsfrågor</strong></td>
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<td>3. Vad består &quot;åsikterna&quot;/kritiken mot OECD och andra system för konfliktshantering gällande bristande företagsrespekt mot mänskliga rättigheter?</td>
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<td>b) Har ni som företag varit i kontakt med något av dessa</td>
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<td>a) Vilka styrkor och svagheter tycker du att den svenska kontaktpunkten har?</td>
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<td>b) Vilka utmaningar möter ni i ert arbete med den svenska kontaktpunkten?</td>
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<td>c) Hur finansieras kontaktpunkten?</td>
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<td>a) Vilka externa Svenska konfliktshanteringsmekanismer känner du till idag då det gäller bristande företagsrespekt mot mänskliga rättigheter?</td>
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<td>c) Om ja, hur tyckte du då att processen fungerade? Vad fungerade bra och vad fungerade dåligt? Varför? Vad skulle kunna ha fungerat bättre?</td>
<td>c) Om ja, hur tyckte du då att processen fungerade? Vad fungerade bra och vad fungerade dåligt? Varför? Vad skulle kunna ha fungerat bättre?</td>
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<td>d) Om ditt företag självt inte har varit i kontakt med något sådant medlingsalternativ, har du hört något om andra företag som har varit det?</td>
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<td>f) Om ni som företag måste använda något av de konflikthanteringssystem som finns, vilka konsekvenser får det då om ett sådant system fungerar dåligt?</td>
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<td>c) Hur uppfattar du att den Svenska kontaktpunkten ses av olika intressenter i Sverige?</td>
<td>c) Hur uppfattar du att den Svenska kontaktpunkten ses av olika intressenter i Sverige?</td>
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<td>f) Har det gjorts någon utvärdering av den svenska kontaktpunkten?</td>
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<td>g) Vilka konsekvenser får det om ett sådant här medlingsystem fungerar eller anses fungera dåligt?</td>
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<td>h) Vad skulle man kunna göra bättre?</td>
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<td>i) Vem/vilka anser du har det största ansvaret för att förbättra existerande mekaniser eller tillhandahålla bättre sådana?</td>
<td>i) Vem/vilka anser du har det största ansvaret för att förbättra existerande mekaniser eller tillhandahålla bättre sådana?</td>
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b) Vilka krav skulle du se vara viktiga för ett sådant alternativ att uppfylla för att det ska vara av mer intresse än de medlingssystem som finns idag?  
b) Vilka utmaningar eller hinder skulle du se med att skapa en sådan medlingsfunktion vid Stockholms handelskammare, både utifrån ditt företags perspektiv men också utifrån perspektivet av klagomålsförande parter | a) Ett förslag som jag med den här uppsatsen undersöker är möjligheten att utveckla en ny alternativ medlingsfunktion för den här typen av konflikter vid Stockholms handelskammare som är en helt privat institution. Utifrån ditt perspektiv, skulle ett sådant alternativ vara av intresse?  
b) Vilka utmaningar eller hinder skulle du se med att skapa en sådan medlingsfunktion vid Stockholms handelskammare, både utifrån ditt företags perspektiv men också utifrån perspektivet av klagomålsförande parter | a) Ett förslag som jag med den här uppsatsen undersöker är möjligheten att utveckla en ny alternativ medlingsfunktion för den här typen av konflikter vid Stockholms handelskammare som är en helt privat institution. Utifrån ditt perspektiv, skulle ett sådant alternativ vara av intresse?  
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medlingsfunktion vid Stockholms handelskammare, både utifrån ditt företags perspektiv men också utifrån perspektivet av klagomälsförande parter utomlands?

c) Har du några koncreta idéer om hur man skulle kunna övervinna sådana utmaningar?

d) Skulle du helst se ett helt nytt alternativ till ickejuridisk medling eller ökad konkurrens mellan existerande medlingsmekanismer och ett nytt alternativ?

e) Stockholmskammare har en stor konkurrent i internationella handelskammaren som har större internationell räckvidd och också tar sig an en större bredd av tvister. Ser du några direkta för och nackdelar med att förlägga en sådan här medlingsfunktion vid Stockholms handelskammare än vid den internationella handelskammaren?

utomlands?

d) Tror du att det skulle vara konstruktivt att skapa konkurrens mellan den Svenska kontaktpunkten och ett helt nytt alternativ till ickejuridisk medling?

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| 5. Rättsteoretiska frågeställningar angående ett helt privat medlingsalternativ eventuellt uppbackad av näringslivet | a) Utifrån ett större samhällsperspektiv, ser du några särskilda för eller nackdelar med att privata aktörer skulle vara de som framförallt står bakom en sådan medlingsmekanism? Att det inte inordnas under staten och därmed inte heller under t.ex. offentlighetsprincipen?  
   b) Tycker du att det är viktigt att den här typen av medlingsalternativ kan granskas inom ramen för det demokratiska systemet? Varför?  
   c) Hur skulle sådan granskning kunna ta sitt uttryck givet hur sådana här konflikter tenderar att vara mycket känsliga för ett företagsrykte? | a) Utifrån ett större samhällsperspektiv, ser du några särskilda för eller nackdelar med att privata aktörer skulle vara de som framförallt står bakom en sådan medlingsmekanism? Att det inte inordnas under staten och därmed inte heller under t.ex. offentlighetsprincipen?  
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   Jämför kritik som riktats mot andra helt privata medlingsystem av t.ex. Clapham |