

**Corporate Accountability For Human Rights Violations: Road To
a Binding Instrument on Business and Human Rights**

By

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DECLARATION

I confirm that this thesis is my own work, that it has not been submitted in substantially the same form for the award of a higher degree elsewhere, and that all quotations have been distinguished and the sources of identification specifically acknowledged.

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THESIS ABSTRACT

The international community has awoken to the reality that large transnational corporations (TNCs) do not only control more resources than a good number of states. They wield enormous influence in the corporate world which greatly impacts on local cultures and initiatives. Many of these TNCs, who operate in developing states, engage in activities which frequently result in human rights abuses. Several states rely on the resources extracted by these large corporations as the main stay of their economies. Consequently, they lack the economic capacity and political will to effectively regulate the activities of the TNCs, leaving these entities to perpetrate human rights abuses in the local communities with impunity. Major international regulatory initiatives, such as the UN Guiding Principles, ILO declaration, and the OECD Guidelines have been adopted to fill in the regulatory gaps. As is analysed and detailed in this thesis, these initiatives have however proven ineffective. They have been criticized as being mere political commitments which lack the necessary legal binding force to ensure their implementation and enforcement. Following several calls from civil society, the Human Rights Council at its 26th session in July 2014, established an open-ended intergovernmental working group (OEIGWG) to elaborate on an international legally binding instrument on business and human rights to ensure that the activities of TNCs are effectively regulated. In July 2018, the OEIGWG published a zero draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The Zero Draft contains proposals for what could later be the provisions of the much-anticipated instrument that could fill in the regulatory gaps left by current business and human rights instruments and ensure corporate accountability for human rights abuse. Following an in-depth discussion on states' obligations to protect against human rights violations committed by business enterprises, the main thrust of this thesis is to examine the proposals on the content, scope and implementation for the binding instrument as contained in

the current zero draft. This will be done in order to determine whether it holds any potential for the improvement of the current human rights regulatory system in relation to the activities of transnational corporations.

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CHAPTER 1

INTRODUCTION

1.1. General overview of the research

Questions relating to the accountability of transnational corporate entities for their harmful activities arose from the 1980's which witnessed a progressive elimination of barriers to trade and investment and a growing mobility of capital across national boundaries.¹ Sectors like production, manufacturing, and finance moved beyond the exclusive confines of states and became increasingly dominated by corporations who were the major drivers of this development.² In order to take advantage of this process of economic globalisation, many developing states embraced foreign direct investment (FDI) as a necessary initiative for expanding their economies.³ Consequently, the corporate entities, whose parent companies are usually based in developed states such as the US, Canada and countries in the EU, moved to set up operations across state boundaries, often through subsidiaries. This led to an expansion of the size and influence of the transnational corporate entities internationally.⁴ Presently, over half of the world's one hundred largest economies are corporate entities who have relatively more power than the governments of the states in which they operate.⁵ They now directly and indirectly influence negotiations over issues ranging from trade to national and international economic policy.⁶ Their role in the globalised world has become too important to be ignored.

¹ Justice M Wilcox 'Foreword' in M. Jones and P. Kriesler eds., *Globalization, Human Rights and Civil Society* (Prospect Media 1998) 6.

² *ibid*

³ Scott Jerbi 'Business and Human Rights at the UN: What Might Happen Next?' (2009) 31 *Human Rights Quarterly* 299, 303.

⁴ David Kinley and Junko Nolan 'Trading and Aiding Human Rights: Corporations in the Global Economy' (2007) 25 *Nordic Journal of human rights Law* 4, 358.

⁵ As at September 2016, the world's top 100 economies consisted of 31 countries and 69 corporations – see, Duncan Green, 'The worlds to 100 economies: 31 countries; 69 corporations' (*worldbank.org*, 9 October 2016) <<https://blogs.worldbank.org/publicsphere/world-s-top-100-economies-31-countries-69-corporations>> accessed 15 April 2019.

⁶ *ibid*

The impact of the activities of transnational corporate entities has strong bearings on human rights. Through the commercial activity driven by corporate entities, jobs and wages are made available, goods and services are provided, which enable states to provide further goods and services for individuals. This positively influences a wide range of human rights including the rights to food, health, education, work, shelter and the freedom of movement.⁷

However, the economic power and influence of transnational corporate entities has worked like a double-edged sword. They have also recorded serious negative impacts on human rights in the pursuit of corporate investments in the states where they operate.⁸ The antecedents of Shell in Nigeria's Niger Delta, Texaco in Ecuador, and Union Carbide in India - incidents which resulted in mass deprivation of the entire range of human rights- are all testaments to the scope and scale of human rights harm that transnational corporate entities are capable of causing.⁹ The threat that these corporate entities pose to the enjoyment of human rights have been considered to be greater than that coming from some states.¹⁰

Irrespective of their positions of strong economic and political advantage, no corporate entity operates outside a formal obligation to respect the laws of the states where they operate. However, human rights law has always focused on the state, because the state was seen as the only entity that was capable of greatly impacting the human rights of individuals. Thus, the state was given the primary obligation to protect, respect and fulfil human rights.¹¹ Nevertheless, the human rights obligation to protect as contained in the various human rights instruments, has been interpreted to entail the states' duty to prevent third parties, including transnational corporate entities from engaging in conduct that impacts negatively on human

⁷ *ibid*

⁸ Amnesty International, 'Corporations' (*Amnesty International.org*) <<https://www.amnesty.org/en/what-we-do/corporate-accountability/>> accessed 15 April 2019.

⁹ A detailed discussion of the specific instances of human rights abuses by transnational corporate entities will be undertaken in the various chapters of this thesis.

¹⁰ Dinah Shelton, 'Protecting Human Rights in a Globalized World' (2002) 25 *Boston College International and Comparative Law Review* 2, 279-280.

¹¹ UNHCHR, 'Report by the Special Representative of the United Nations Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' (Report No. III, June 2007).

rights.¹² Yet, at the time of drafting, these human rights instruments did not contemplate the emergence of powerful corporate entities that will rival the states' influence on the human rights of individuals. Consequently, they do not adequately address the peculiarities of the corporate entities' unique transnational character.

Most transnational corporate entities carry out their operations in resource rich developing states, who lack the political will to effectively regulate corporate activities so as not to discourage corporate investments.¹³ Even in the rare situations where the host states are willing to regulate corporate activities, many of them are be incapable of initiating the necessary legal procedures, as they lack the financial resources and functioning, non-corrupt court systems, which are necessary to conduct effective investigations.¹⁴

As a result of the relative imbalance of power coupled with the dependence of developing states on the presence of transnational corporate entities, victims of human rights abuses turn to the developed states, who are home to about 90 percent of the parent companies of the transnational corporate entities.¹⁵ These countries are known to have better domestic regulatory structures.¹⁶ Some home states like the US, the UK, Canada and Australia have actually made attempts at using their domestic legislation to ensure that their transnational corporate entities are held accountable for the actions of their foreign subsidiaries.¹⁷ However, these regulatory efforts have been unsuccessful. At present the protection of human rights is an obligation that states undertake with respect to the activities of persons located within their territories. There is currently no express provision in any human rights instrument that

¹² *ibid*

¹³ Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and Home State Advantage* (London, Routledge 2014), Chapter 4.

¹⁴ *ibid*

¹⁵ Marion Weschka, 'Human rights and multinational enterprises: how can multinational enterprises be held responsible for human rights violations committed abroad?' 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3, 629.

¹⁶ *ibid*.

¹⁷ See chapter 3, sections 3.3.1 and 3.3.2.

mandates states to extend the obligation to protect extraterritorially.¹⁸ Home states fear that an individual extension of the obligation to protect to the activities of the foreign subsidiaries of their corporate nationals would place them at a competitive disadvantage in relation to other states who may not see the need to extend their regulations to regulate their TNCs activities.¹⁹

Beyond this, the corporate form itself also poses regulatory challenges. Legally speaking, the parent company located in the home state is considered separate and distinct from its subsidiaries and other corporate affiliates, even where they may actually be subject to uniform control.²⁰ Accordingly, the subsidiaries which operate in the developing states are considered to be independent from their parent companies as separate corporate bodies, and are subject to the national legal order of the host state. Thus, any attempt by the home state to extend its regulations over the activity of a foreign subsidiary may be considered as an interference on the sovereignty of the host state.²¹ As there is no obligation on home states to extend human rights protection extraterritorially, they are usually reluctant to do so in order not to infringe on the sovereignty of the host states.²² Another related challenge is the doctrine of *forum non conveniens*, which presents the courts of a state with the ‘discretion to decline to hear a case when there exists a foreign court more appropriately suited to hear the matter’.²³

Following the challenges confronting host state and home state human rights regulation, attempts have been made to establish an international framework that specifically addresses the problems with regulating the activities of corporate entities as they affect human rights. A number of voluntary initiatives on corporate social responsibility have been established in this regard. Most of these initiatives are based on a set of principles, including human rights and/or

¹⁸ International law recognises the right, but not the obligation of states to exercise extraterritorial jurisdiction over their nationals committing wrongs abroad.

¹⁹ Sarah Joseph, ‘Taming the Leviathans: Multinational Enterprises and Human Rights’ (1999) 46 *Netherlands International Law Review* 2, 184.

²⁰ Weschka (n15), 629-630.

²¹ *ibid*

²² *ibid*

²³ Joseph (n19), 178.

labour rights, that participating companies and states voluntarily commit to respect in their operations and within their spheres of influence. The structure of these initiatives varies. This thesis will focus on six of the most prominent of these initiatives- the UN Draft Code of Conduct for Transnational Corporations, the ILO tripartite obligations, the OECD Guidelines on Multinational Enterprises, the UN Global Compact, the UN Draft Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises, and the UN Guiding Principles on Business and Human Rights.²⁴

These initiatives have however been criticised as being too ‘soft’ because they lack any power to sanction companies when they fail to respect the principles and standards that the initiatives establish. Human rights activists have insisted that instead of focusing on voluntary soft law initiatives, a regulatory framework, which prescribes formal obligations, liabilities and sanctions, should be established. Such a framework was previously attempted with the proposed establishment of the UN Draft Norms on Transnational Corporations.²⁵ The Norms sought to place direct international human rights obligations on transnational corporate entities comparable to those of states. However, the Norms never saw the light of day as they were unable to garner enough support for its establishment.

Out of all the current regulatory initiatives, the UN Guiding Principles is said to have gained wide support amongst states and corporate entities, who have included them in their

²⁴ UN Draft Code on Transnational Corporations (12 June 1990) UN Doc. E/1990/94; OECD, Guidelines for Multinational Enterprises, 15 ILM 969 (1976) annex to the OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, ILM, vol. 15 967. The OECD periodically reviews and updates its guidelines. For the 2000 and 2011 reviews see, the OECD Declaration on International Investment and Multinational Enterprises 2000, reprinted in 2001, ILM, vol. 40, 237, and updated as, OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011. <<https://www.oecd.org/corporate/mne/48004323.pdf>> accessed 28 August 2017; ILO, ‘Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy’ (March 1971), <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/multi/documents/publication/wcms_094386.pdf> accessed 30 August 2017; UN Global Compact, ‘Ten Principles of the UN Global Compact’ available at <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> (accessed 20 September 2017); Human Rights Council, The Guiding Principles on Business and Human Rights (UNGPs): Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (21 March 2011) UN Doc. A/HRC/17/31.

²⁵ UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4.Sub.2/2003/12/Rev.2 (30 August 2003).

internal policies. The Guidelines build on the ‘Protect, Respect and Remedy’ framework established by former Special Representative to the UN Secretary General, Professor John Ruggie.²⁶ The Framework requires that states take steps to prevent human rights abuse by corporate entities; and places a responsibility to respect human rights on corporate entities.²⁷ This responsibility entails a requirement that they undertake human rights due diligence in their business relationships. The remedy aspect provides for greater access by victims to effective remedy. Yet there is a disconnect between the responsibility to respect human rights and the access of victims to effective remedy. This is because the responsibility to respect is framed in the form of an expectation and is not binding on corporate entities. Thus, if the corporate entities fail to execute their responsibility to respect by undertaking human rights due diligence in their business relationships, victims of any resulting abuse are left without a legal basis for holding corporate entities accountable.

It is with this background that renewed calls were made for an international instrument to regulate, in international human rights law, the activities of corporate entities- this time, with provisions on binding consequences for corporate entities who fail to observe human rights standards in their operations. In response to these calls, the Human Rights Council at its 26th session, established an open ended intergovernmental working group on business and human rights (OEIGWG) to come up with a binding instrument to regulate in international human rights law, the activities of transnational corporations.²⁸ The first and second sessions of the IGWG were dedicated to deliberations on the scope and content of the future instrument.²⁹ The third session focused on discussions on the Elements Document that was released by the IGWG.³⁰ In

²⁶UNGPs, (n 24).

²⁷ *ibid*, principle 11.

²⁸ UN Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights 25 June 2014 A/HRC/26/L.22/Rev.1, para 1.

²⁹ *ibid*, paragraph 2.

³⁰ *Ibid*, paragraph 3.

July 2018, a zero draft of the binding instrument was published.³¹ This thesis is primarily focused on examining the proposals in the zero draft with a view to determining its potentials and deficiencies in light of the current regulatory gaps relating to the accountability of transnational corporate entities for human rights abuses. It begins by examining the early frameworks for human rights protection and then goes on to examine the debates surrounding the accountability of transnational corporate entities for human rights abuses, and leading up to the publication of the zero draft of the future binding instrument.

1.2. Research questions

Following the overview of the issues surrounding the current human rights regulatory framework for transnational corporate entities, this thesis will focus on examining the following questions:

- What does the states' obligation to protect entail, particularly in respect of transnational corporate entities?
- What is the scope of the obligation to protect?
- What are the factors that militate against the states willingness and capacity to implement their obligation to protect?
- How has the international community responded to challenges involved with both host state and home state regulation?
- What are the major elements of the current international regulatory initiatives and what difficulties do they present in relation to the regulation of corporate activities and their impact on human rights?

³¹ Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business entities (Zero Draft), 16 July 2018 <<https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>> accessed 1 May 2019.

- Does the zero draft of the binding instrument in its current form present any potential for the future binding instrument to remedy the current gaps in ensuring the accountability of transnational corporate entities for human rights abuses resulting from their activities?

1.3. Terminology

This thesis focuses on the activities of transnational corporate entities that engage in business activities transnationally. These entities have been defined using different combinations of terms. Authors have opted to focus on terms like ‘transnational corporations’, ‘multinational enterprises’ and ‘multinational corporations’.³² In the same vein, international organisations, including the UN and the Organisation for Economic Development (OECD), which have addressed issues relating to these class of entities have adopted their own terminologies, each adducing reasons for why their choices are better than other alternatives.³³ However, the differences in terminologies are not overwhelmingly apparent as they are all used to capture the ability of these corporate entities to act across national borders in the international community. Legally speaking, there is no prescribed definition for these entities, thus attempting to provide a standard definition may result in inaccuracy.³⁴ Rather than focus on the semantics, this thesis focuses on corporate entities that operate transnationally, owning, managing, or controlling other corporations in two or more states. The key element is the control exercised by the corporate entity over operations exercised outside the territorial

³² According to C. W. Jenks, the variances in the definition of transnational corporate entities attests to the fact that ‘it has no coherent existence as a legal entity; it is a political and economic fact which expresses itself in a bewildering variety of legal forms and devices’. C. Wilfred Jenks, ‘Multinational Entities in the Law of Nations’ in Wolfgang Friedman, Louis Henkin and Oliver Lissitzyn (eds) *Essays in Honor of Philip C. Jessup* (Columbia University Press, 1972), 80; cited in Melba Kapesa, ‘Business and Human Rights: The Future of Corporate Accountability for Human Rights Violations in the Extractive Sector’ (DPhil thesis, Monash University 2012), 7.

³³ UN human rights documents on the subject adopt the term ‘transnational corporations’, see the Guiding Principles on Transnational Corporations and other business enterprises, *ibid* (n 24) and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, *ibid* (n 25). The OECD adopts the term ‘multinational enterprises’ - OECD Guidelines, *ibid* (n 24).

³⁴ Peter T. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2007), 144.

boundaries of the state in which it is established.³⁵ However, for ease of reference this thesis adopts the term ‘transnational corporations’ (TNCs), especially as this is what is used in the zero draft of the binding instrument, which is the main subject for consideration in this thesis. However, other terminologies used by other international organisations or industry frameworks may be reflected in this work. Except otherwise stated, the stated definition applies when these other terminologies are used.

1.4. Research Methodology

As previously stated, this research concerns the examination of the current international human rights law framework in relation to the regulation of the activities of transnational corporations. Thus, the doctrinal approach is the research method adopted in this thesis. The doctrinal approach is defined as providing ‘a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law.’³⁶ This approach serves three main goals: description, prescription and justification.³⁷ Hence, it will be applied to in describe the current international human rights regulatory framework in relation to TNC activities, identify the major regulatory gaps in this regard, and prescribe prospects for reform or amendment while providing legal justification for such prescriptions.

In describing the existing law on the regulation of TNCs, the thesis will explore a range of primary and secondary data. It will examine the relevant provisions several UN international human rights treaties as well as the various regional human rights treaties. It will also consider relevant case law and decisions from the international Court of Justice, regional human rights

³⁵ Control can be through ownership of shares, control of board of directors, or through management of operations and affairs. - Phillip I. Bloomberg, ‘The Increasing Recognition of Enterprise Principles in Determining parent and Subsidiary Corporation Liabilities’ (1996) 28 *Connecticut Law Review* 295, 298 and accompanying footnote.

³⁶ Jan M. Smits, ‘What is legal doctrine: on the aims and methods of legal-dogmatic research’ (2015) Maastricht European Private Law Institute Working Paper 2015/06, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088> accessed 1 May 2019.

³⁷ *ibid*, 8.

courts and commissions. The General Comments and Communications of the various treaty bodies will also be considered as these bodies are charged with the interpretation of their treaty provisions. It will also consider reports from UN special rapporteurs, and the various human rights bodies/commissions and civil society organisations on the subject. The study will also involve a critical analysis of the work of scholars in the area of business and human rights sphere and related fields in order to capture the main debates surrounding the regulation of TNCs. The analyses of these documents and instruments will provide a proper understanding of the current international human rights' regulatory framework regarding the activities of TNCs and will help expose its challenges.

The study is also facilitated by the authors personal observation of the OEIGWG sessions in Geneva and information gathered from interaction with delegates and principal stakeholders at the sessions. Based on the information gathered from the primary and secondary sources and the personal observation and interactions in the OEIGWG sessions, the thesis will go on to make some prescriptions as to the underlying considerations that could guide the relevant decision makers on how and why the current regulatory framework should be strengthened.

1.5. Thesis structure

Chapter 2 of the thesis provides an overview of the early domestic human rights frameworks and discusses the common themes and how they came to bear on the international Bill of Rights (the Universal Declaration of human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This discussion provides insight as to why the current human rights regulatory framework is state centric. The chapter goes on to argue that despite the state centric nature of the current human rights framework, TNCs do not operate in a regulatory vacuum.

The chapter engages with the UN core human rights instruments, regional human rights instruments, together with relevant documents from the various treaty bodies, courts and commissions. Based on the examination of these documents, the chapter argues that although the international human rights law framework did not contemplate the emergence of large influential transnational corporate entities the current framework for human rights protection mandates states to protect individuals from the harmful activities of third parties, which necessarily include transnational corporate entities. The chapter then goes on to examine the nature and content of the obligation to protect as well as its scope of application. It argues that there is at least a theoretical case for the extension of the obligation to protect extraterritorially.

Chapter 3 discusses the key challenges that affect the states' execution of its obligation to protect. It argues that because the states where TNCs execute their operations are usually developing states, they may lack the willingness and/or capacity to effectively and efficiently regulate the activities of the TNC. The chapter provides an examination of case studies where this twin problem prevented victims of human rights abuses from obtaining redress for human rights harm resulting from TNC conduct. It discusses some of the failed attempts by home states to extraterritorially regulate the activities of TNCs. It specifically addresses the challenges presented by the of the separate legal personality of the TNC and its subsidiaries and other corporate affiliates, the issue of *forum non conveniens* and the challenges presented by principle of sovereignty and non-intervention. The chapter concludes by stressing the need for an international framework that will address these difficulties and adequately address the extraterritorial application of the obligation to protect.

Chapter 4 provides a general overview of the current voluntary international regulatory initiatives that have been established to fill in the protection gaps in the business and human

rights sphere. The regulatory gaps and inadequacies in their application are identified and summarised. The chapter argues that although these instruments are insufficient as they address limited categories of human rights and lack any binding force of sanctions to ensure corporate accountability, they put the issue of business and human rights squarely on the international agenda and provide a basis for the development of an instrument that could address current regulatory gaps.

Chapter 5 introduces the call by civil society, human rights activists and states to strengthen current regulatory initiatives by providing a binding instrument on TNCs and human rights. The chapter focuses on the events following the Human Rights Council Resolution 26/9 and the resulting zero draft published by the Intergovernmental Working Group on TNCs and OBE's in its fourth session. The key focus of this chapter is to examine in particular, the proposals in the zero draft in its current form, in order to determine whether the future binding instrument will in fact adequately address the current regulatory issues related to ensuring the accountability of TNCs for their activities that affect human rights, and remove the obstacles victims face in securing access to justice.

Chapter 6 will present the findings of the study and conclude.

CHAPTER 2

TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS ABUSE: THE STATES' OBLIGATION TO PROTECT

2.1 Introduction

It is now clear that states are no longer the only actors that can adversely affect the human rights enjoyment of individuals. In spite of this, current international human rights law instruments still focus on the state as the primary holder of human rights obligations.¹ Accordingly, states have the primary obligation to ensure that individuals are not prevented from enjoying their human rights, whether by the acts or omissions of the state itself, or by any other actor. Focusing particularly on transnational corporations, this chapter is concerned with establishing the basis and extent of the state's obligation to protect the human rights of individuals that are threatened or affected by corporate activities. It begins by looking at the early expressions in domestic frameworks, of principles pertaining to the protection of the human person, and then goes on to establish how those basic notions were incorporated into an international standard for the protection of human rights as is recognised today. Following the operational structure of TNCs, the chapter then proceeds to examine the basis and extent of the obligations of the host and home States of TNCs, consecutively, as they relate to the protection of individuals from the activities of these corporate entities that result in human rights abuse.

2.2 The idea of human rights protection

Early normative frameworks embodying human rights standards developed at a time when international business was less prominent and international economic interdependence was far

¹ Surya Deva, 'Human Rights Violations by Multinational Corporations in International Law: Where from here?' (2003-2004) 19 *Connecticut Journal of International Law* 1, 1.

less important.² Rather, they were linked to early domestic codifications of individual rights, which found expression in compacts that were signed between rulers and sections of the community.³ Prominent examples include the Magna Carta of 1215⁴ and the English Bill of Rights of 1689⁵ which contained concessions that were obtained against the sovereign by feudal barons and men of affluence for themselves alone. Nevertheless, they were very significant.⁶ They each constituted provisions that are considered as the starting point for the limitation of the absolute power of the state.⁷ But by the 1700's, a stronger push towards the recognition of the rights of individuals began to materialise. The American Declaration of independence expressed for the first time, the 'inalienable rights of men.'⁸ This fundamental notion was adopted and elaborated in the Virginia Declaration which proclaimed that by nature 'all men are equally free and possess certain inherent rights, of which they enter into society.'⁹ In expressing these natural inalienable rights of men, the Virginia Declaration included several liberties to be protected from State interference. They include, the freedom from cruel or unusual punishment,¹⁰ freedom of the press,¹¹ and the provision that no one should be deprived or divested of their liberty except as permitted by law.¹² The American Declarations served as a model for the French Declaration which swept away the notions of the absolute power of the State and replaced it by defining the natural rights of men as 'liberty, property, security, and

² Daniel Aguirre, 'Multinational Corporations and the Realisation of Economic and Social Rights' (2004) 35 *California Western International Law Journal* 53, 58.

³ Nihal Jayawickrama, *The Judicial Application of human rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002), 14.

⁴ The Magna Carta (The Great Charter) 1215 <<http://constitution.org/eng/magnacar.pdf>> accessed 13 May 2016.

⁵ Bill of Rights 1689 <http://www.constitution.org/eng/eng_bor.htm> accessed 1 March 2017.

⁶ *ibid* (n 3), 15.

⁷ *ibid*. The Magna Carta and the English Bill of rights strengthened the fundamental idea that the power of the state should be limited for the sake of the individuals within it.

⁸ The American Declaration of Independence, July 4 1776, <<https://www.archives.gov/founding-docs/declaration-transcript>> accessed 19 March 2017.

⁹ Virginia Declaration of Rights 12 June 1776, <http://www.constitution.org/bcp/virg_dor.htm> accessed 19 March 2017.

¹⁰ *ibid*, para 9.

¹¹ *ibid*, para 12.

¹² *ibid*, para 11.

the rights to resist oppression' by the State.¹³ Similar to the American Declarations, the French Declaration proclaimed the 'natural, inalienable and sacred rights of man', which has formed a major recurring theme in present human rights law framework.¹⁴

The rights contained in the English, American and French documents were mostly libertarian in character.¹⁵ They dealt primarily with the freedom of the individual from the state's interference. In modern parlance, such rights are called 'civil and political rights' because they focus on the relationship between the individual and the state.¹⁶ Several other states adopted the Declarations as models for bills of rights in their various constitutions.¹⁷

However, civil and political rights are not the only rights which were recognised under early domestic frameworks. A variety of social, economic and cultural rights were also recognised as subject to protection.¹⁸ These rights evolved in the late 19th century with the social reform in Europe.¹⁹ Economic, social and cultural rights are concerned with the creation of economic and social conditions by the state which allow every individual to develop their maximum potential.²⁰ They are considered as rights which require state intervention to provide for work, health, and social security of individuals.²¹ The early domestic codifications of economic, social and cultural rights could be traced to the constitutions of the Soviet Union, Mexico and Germany in the early part of the twentieth century.²²

¹³ Declaration of the Rights of Man and Citizen, 26 August 1789, <<http://www.refworld.org/docid/3ae6b52410.html>> accessed 19 March 2017.

¹⁴ *ibid*

¹⁵ Scott Davidson, *Human Rights* (Open University Press, 1993), 7.

¹⁶ *ibid*

¹⁷ According to Lauterpacht, the constitutions of Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), Liberia (1847), Sardinia (1848), Denmark (1849), Prussia (1850), Switzerland (1847), Germany (1918), Russia (1918), Turkey (1928), China (1931), Afghanistan (1931), Siam (1932) and Japan (1946)- Hersch Lauterpacht, *International Law and Human Rights* (Archon Books, 1968), 89-90.

¹⁸ Rhona K. M Smith, *Textbook on International Human Rights* (5th edn, Oxford University Press 2016), 45.

¹⁹ Asbjorn Eide, 'Economic and Social Rights', in Janusz Symonides (ed), *Human Rights: Concepts and Standards* (UNESCO Publishing 2000), 113; Darwood Mzikenge and Chirwa, Lilian Chewi, *The Protection of Economic, Social and Cultural Rights in Africa* (Cambridge University Press 2016), 36.

²⁰ Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3rd edn, Oxford University Press 2007), 269-270.

²¹ Smith (n 18).

²² Thomas Murray, 'Socio-Economic Rights Versus Social Revolution? Constitution making in Germany, Mexico and Ireland, 1917-1923' (2015) 24 *Social and Legal Studies Journal* 4, 487-508.

2.2.1 The International Framework for the Protection of Human Rights

Although the early domestic frameworks for the protection of human rights took root in early European and American expressions, a closer analysis of the activities of these states at the time, shows that they contradicted the notions of human rights that they famously expressed.²³ While Britain and France pursued policies of imperialism and colonialism, the US invaded indigenous peoples' lands and practiced slavery.²⁴ All these were contrary to the human rights ideals expressed in the early Bills, Constitutions and Declarations.

At the time, international law regarded states as its only subjects.²⁵ Individuals as citizens of the state were subject to the complete authority of their government and other states in general, had no right to intervene to protect them when they were maltreated.²⁶ It was not until after the Second World War that states gave serious consideration to the contradiction between human rights ideals and the way in which they treated individuals and residents within their territories and the territories over which they had belligerent control.²⁷ The war and the events that preceded it in Germany and in the territories under German occupation, resulted in the perpetration of unprecedented atrocities. Millions of citizens were brutalised and many more were killed by the lawfully instituted government.²⁸ This shocked the conscience of the international community of states and triggered the commitment to establish a set of superior universal standards to which all national laws were required to conform.²⁹

²³ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2016), 8.

²⁴ *ibid.*

²⁵ Malcom N. Shaw, *International Law* (7th edn, Cambridge University 2014), 143; Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005), 71-72.

²⁶ Kerri Woods, *Human Rights* (Palgrave Macmillan 2014) 37; Thomas Buergenthal, 'International Law and the Holocaust' Joseph and Rebecca Meyerhoff Annual Lecture, 28 December 2003 at <<https://www.ushmm.org/m/pdfs/20050428-buergenthal.pdf>> accessed 1 March 2017.

²⁷ *ibid.*

²⁸ BBC World Service, 'Background to the Universal Declaration of Human Rights' at http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/treaties_universal.shtml (accessed 2 March 2017).

²⁹ Cassese (n 25), 71.

States committed themselves to the establishment of the United Nations, which set as one of its primary objectives, the protection and respect of the human rights of individuals without distinction or discrimination.³⁰ In furtherance of this objective, the UN Commission on Human Rights was established and given the mandate of responding to specific issues related to human rights by elaborating on human rights standards.³¹ In 1948, the Commission completed its first task: the creation of the Universal Declaration of Human Rights, which was adopted by the UN General Assembly.³² Drawing from different constitutional and domestic human rights legislation of states, the UDHR urges member states to promote a number of civil, political, economic, social and cultural human rights. It described these rights as part of the foundation of freedom, justice and peace in the world.³³ Notably, the early human rights instruments mark the overall tenor and language of the UDHR. In the first recital, the UDHR refers to its overall objective to ensure the ‘inherent dignity’ and the ‘equal and inalienable rights of all human beings,’ phrases that were also reflected in the American and French Declarations.³⁴

The thirty Articles of the Declaration outlined various provisions that set a common standard for all people and all nations. However, on its own, it does not create legal obligations for states. In its preamble, the Declaration describes itself as a ‘common standard’ toward which every individual and every organ of the society shall strive.³⁵ Eleanor Roosevelt, who

³⁰ Charter of the United Nations (24 October 1945) 1 UNTS XVI, article 1. 3.

³¹ The United Nations commission on Human Rights was a functional Commission within the overall framework of the United Nations from April 1946 until it was replaced by the United Nation Human Rights Council on 15 March 2006 <<http://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx>> accessed 1st March April 2017.

³² Universal Declaration of Human Rights, 10 December 1948, 217 A (III). The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly (UNGA), meeting in Paris, on 10 December 1948. Out of the 58 members at the time, 48 voted in favour, 8 members abstained: Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia, while 2-member states, Honduras and Yemen, were absent. Today almost all states (192 in total) in the entire international community are member states of the UNGA. See <http://www.un.org/en/member-states/>> accessed 1 March 2017.

³³ *ibid*, preamble to the UDHR.

³⁴ *ibid*; these notions were also reflected in the US Declaration of Independence and the French Declaration on the Rights of Man and Citizen, see (n 8) and (n 13) respectively.

³⁵ *ibid*, preamble to the UDHR.

was the presiding chair in the drafting process of the UDHR drew special attention to this point when she presented the document to the General Assembly for its final vote:

In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty, it is not an international agreement. It is not and does not purport to be a statement of law or legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples and all nations.³⁶

In response to this exhortation, the UN Human Rights Commission proceeded to draft an international binding document. However, different views were expressed about the form of the document with the Soviet Union and its allies preferring to view the document as one fundamentally about economic and social rights, while the US and its allies continued to view civil and political rights as the essential human rights. In a bid to break the deadlock, two treaties were created: The International Covenant on Civil and Political Rights (ICCPR)³⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁸

The ICCPR essentially concerns the rights contained in Articles 3 to 21 of the UDHR, which includes such rights as, the right to life,³⁹ the prohibition of torture and inhuman or

³⁶ Statement by Mrs D. Roosevelt on the Adoption of the Universal Declaration of Human Rights, Delivered on the 9th of December 1948, Paris, France. <<http://www.americanrhetoric.com/speeches/PDFFiles/Eleanor%20Roosvelt%20-%20Human%20Rights%20Declaration%20Adoption.pdf>> accessed 7 April 2017. It is argued that most of the Declaration's provisions have attained the status of customary international law because states regard it as a common standard of achievement for all peoples and all nations. Though there is uncertainty in relation to the exact provisions of The Declaration that have become customary international law.

³⁷ International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

³⁸ International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

³⁹ UDHR (n 32), article 3 ; ICCPR (n 37), article 6.

degrading treatment,⁴⁰ prohibition of arbitrary arrest or detention,⁴¹ freedom of assembly and association and the freedom of expression.⁴² It established the Human Rights Committee ('HRC'), a body of independent experts who monitor the implementation of the ICCPR through its consideration of state reports, individual complaints and inter-state complaints, and its preparation of General Comments and general discussions on topics addressed in the ICCPR.⁴³ The HRC uses the General Comments and general discussions on the ICCPR to clarify the scope and meaning of the ICCPR's articles.⁴⁴ Although their comments and discussions do not have binding formal character, they help elucidate to state parties the obligations they assumed by acceding to the ICCPR. Much of the discussion in proceeding sections will be based on the General Comments of the HRC.

The ICESCR, on the other hand codifies the provisions of Articles 22 to 27 of the UDHR. These rights include, labour rights,⁴⁵ the right to an adequate standard of living which includes the right to food and implies the right to water,⁴⁶ the right to physical and mental health,⁴⁷ and the right to a rich cultural life.⁴⁸ The Committee on Economic, Social and Cultural Rights (CESCR), a body of independent experts, monitors the compliance of states parties to the ICESCR.⁴⁹ Apart from receiving periodic reports from states parties regarding compliance with the ICESCR, the CESCR may also consider inter-state complaints and complaints by individuals.⁵⁰ It addresses such reports through concluding observations and interprets state

⁴⁰ UDHR *ibid*, article 5 ; ICCPR *ibid*, article 7.

⁴¹ UDHR *ibid*, article 9 ; ICCPR *ibid*, article 10

⁴² UDHR *ibid*, articles 19 and 20 ; ICCPR *ibid*, articles 19 and 21.

⁴³ See articles 28-43 ICCPR (n 37).

⁴⁴ International Justice Resource Centre, 'Human Rights Committee' <<http://www.ijrcenter.org/un-treaty-bodies/human-rights-committee/>> accessed 20 April 2017.

⁴⁵ UDHR (n 32), article 23; ICESCR (n 38), article 6

⁴⁶ UDHR *ibid*, article 25; ICESCR *ibid*, article 11.

⁴⁷ UDHR *ibid*; Article 12; ICESCR *ibid*, article 12.

⁴⁸ UDHR *ibid*, article 27 ; ICESCR *ibid*, article 15.

⁴⁹ Economic and Social Council ('ECOSOC') Resolution 1985/17 of May 1985. The CESCR was set up to carry out the monitoring functions assigned to the UN Economic and Social Council (ECOSOC) in Part IV of the ICESCR.

⁵⁰ See UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights resolution, adopted by the General Assembly, 5 March 2009, Articles 2 and 10, A/RES/63/117 <<http://www.refworld.org/docid/49c226dd0.html>> accessed 20 April 2017.

obligations under the ICESCR through general comments.⁵¹ Like the HRC general comments and general discussions on states obligations under the ICCPR, the CESCRs general comments and concluding observations will form a major part in the interpretation of states obligations under the ICESCR in the following sections.

Together with the Universal Declaration, the ICCPR and the ICESCR are commonly referred to as the International Bill of rights.⁵² Both covenants expand on the provisions of the UDHR and serve as the main legal binding instruments of world-wide application.⁵³ The UDHR, the ICCPR and the ICESCR inspired regional organisations to set up their own systems for the protection of human rights. The Council of Europe established the ‘Convention for the Protection of Human Rights and Fundamental Freedoms’, which is the official name of what is now commonly referred to as the ‘European Convention on Human Rights’ (‘ECHR’).⁵⁴ The ECHR and its Protocols are focused mainly on civil and political rights.⁵⁵ Recognising the lack of recognition of ESCR, the Council of Europe adopted the European Social Charter which contains a catalogue of economic, social and cultural rights.⁵⁶ The power to interpret and apply the provisions contained in the ECHR are conferred on the European Court of Human Rights (‘ECtHR’), while compliance with the European Social Charter is monitored by the European Committee of Social Rights.⁵⁷ As will be demonstrated in subsequent paragraphs, several of the ECtHR decisions have been applied in explaining the general obligations of States under human rights law.

⁵¹ The UN, Office of the High Commissioner, ‘Committee on Economic, Social and Cultural Rights’ <<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>> accessed 20 April 2017.

⁵² Mashood A. Boderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Routledge 2016), 11.

⁵³ As of April 2019, the ICCPR has 172 states parties and 6 signatories without ratification; while the ICESCR has 169 state parties and 4 signatories without ratification- See the United Nations Human Rights Office of the High Commissioner, ‘Status of Ratification Interactive Dashboard’, <<http://indicators.ohchr.org/>> accessed 4 April 2019.

⁵⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, (ECHR) as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS.

⁵⁵ Olivier De Schutter, *International Human rights law* (Cambridge University Press 2010), 20 - 22.

⁵⁶ European Social Charter, 18 October 1961, ETS 35.

⁵⁷ Articles 19- 36 ECHR, *ibid* (n 54) and Articles 24 and 25 of the European Social Charter, *ibid*.

The Organisation of American States (OAS) established the Inter-American Commission of Human Rights, which drafted the American Convention on Human Rights (ACHR) that is now considered as the most important human rights instrument in the Inter-American System.⁵⁸ The ACHR established the Inter-American Court of Human Rights. Both the Court and the Commission have produced decisions that are of lasting significance to international human rights law.⁵⁹ The Organisation of African Unity which is the predecessor to the African Union, like its European and American counterparts established the African Charter on Human and Peoples rights (ACHPR).⁶⁰ The Charter contains civil and political rights, as well as economic, social and cultural rights.⁶¹ The African Charter established the African Commission of Human Rights which is mandated to interpret the Charter's human rights provisions and provide guidance to States Parties on compliance with the ACHPR.⁶² To complement the role of the ACHPR, the African Court of Human and Peoples rights was subsequently created through a Protocol to the African Charter.⁶³

Several other international conventions on human rights have been introduced by the UN and ratified by states. The major ones to be considered in the course of this discussion include; the Convention on the Elimination of all forms of Racial Discrimination (CERD),⁶⁴

⁵⁸ American Convention on Human Rights, 'Pact of San Jose, Costa Rica (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; De Schutter, (n 55), 27.

⁵⁹ *ibid*, article 33.

⁶⁰ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 I.L.M. 58.

⁶¹ The Right to Food is conspicuously absent in the Charter provisions but is usually implied from the provision of the right to life under Article 4. The ACHPR also contains certain collective rights which include; rights to self-determination, to dispose freely dispose of natural resources, and the right to a satisfactory environment favourable to development. (See Articles 21 and 24 ACHPR). The new set of rights as recognised in the African Charter are increasingly gaining prominence, for example, the UN General Assembly has adopted a Declaration on the Right to Development. -See UN General Assembly, Declaration on the Right to Development: resolution adopted by the General Assembly, 4 December 1986, A/RES/41/128.

⁶² See ACHPR (n 60), articles 30-45. References will be made to the decisions of the African Commission in interpreting certain State obligations under the Charter.

⁶³ Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, (adopted 10 June 1998, entered into force 25 January 2004), article 1 <http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf> accessed 5 May 2019.

⁶⁴ International Convention on the Elimination of All forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

Convention on the Elimination of all forms of Discrimination against Women (CEDAW),⁶⁵ Convention against Torture and all Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁶⁶ Convention on the Rights of A Child (CRC),⁶⁷ Convention on the Rights of Persons with Disabilities (CRPD)⁶⁸ and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)⁶⁹ Although these conventions relate to subject specific areas, they all embody the standards of economic, social and cultural rights, as well as civil and political rights as enshrined in the ICCPR and the ICESCR.

2.2.2 The interdependence of ESCR and CPR

The United Nations consistently stresses that economic, social and cultural rights and civil and political rights as recognised in the various international human rights instruments are ‘universal, inalienable and interdependent rights’ that ‘the international community must treat them in a fair and equal manner on the same footing, and with the same emphasis.’⁷⁰

Despite this pronouncement, in practice, the commitment of states to economic, social and cultural rights does not measure up to their efforts in the field of civil and political rights. The UN Committee of Economic, Social and Cultural rights in a statement at the Vienna World Conference of 1993, aptly captured the situation when it stated that

The shocking reality...that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural

⁶⁵ Convention on the Elimination of All forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

⁶⁶ Convention against Torture and all Other Cruel, Inhuman or Degrading Treatment or Punishment adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁶⁷ Convention on the Rights of a Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁶⁸ Convention on the Rights of Persons with Disabilities, UNGA Res 61/106 (24 January 2007) UN Doc A/RES/61/106.

⁶⁹ International Convention for the Protection of All Persons from Enforced Disappearance, UNGA Res 61/177 (20 December 2006) UN Doc ARES61/177.

⁷⁰ Vienna Declaration and Programme of Action (12 July 1993) A/CONF.157/23.

rights which, if they occurred in relation to civil and political rights would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights...statistical indicators of the extent of deprivation, or breaches, of economic, social and cultural rights have been cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue. Such muted responses are facilitated by a reluctance to characterise the problems that exist at gross and massive denials of economic, social and cultural rights.⁷¹

This statement that was made over two decades ago, still captures the challenges experienced today. Economic, social and cultural rights have habitually taken a back seat to civil and political rights. Several States lose sight of the fact that the failure to respect and to provide for the realisation of ESCR often initiates a chain of events that cause problems with civil and political rights.⁷² One example that demonstrates this connection is the well-known crisis that resulted from the activities of Shell and the Nigerian government in Ogoni land in the mid-nineties: the effects of the crisis is still felt to this day.⁷³

The Ogoni people, who are mostly farmers and anglers, depend on their land and rivers for survival. The region also happens to be rich with vast deposits of petroleum resources.

⁷¹ UN Committee on Economic, Social and Cultural Rights, 'Report on the Seventeenth Session' (23 November – 11 December 1992) UN Doc E/1993/22, paragraphs 5 and 7.

⁷² Daniel Aguirre, 'Multinational Corporations and the Realisation of Economic, Social and Cultural Rights' (2004) 35 *California Western Journal of International Law* 1, 9.

⁷³ Egbe Ojong Tandu, Mary Tandu and Abeki Okoro, 'The Role of the Nigerian State in the Socio-Political Conflict in the Niger Delta Region of Nigeria' (2017) 6 *International Journal of Human and Social Science Invention* 47, 48.

Shell, the largest oil producing transnational corporate entity in the country engaged in exploration activities for decades in the region. In the course of its operations, large amounts of oil spills occurred. This led to severe air and water pollution and contamination of arable land and serious health complications on the local population. Shell's failure to enact measures to remedy the situation resulted in the violation of the people's right to an adequate standard of living including the rights to food, health,⁷⁴ and water, the right to work,⁷⁵ and the right to a general satisfactory environment favourable to the peoples development.⁷⁶ The first set of rights are enshrined in the ICESCR, while the second group of rights are recognised under the African Charter, both of which Nigeria has ratified.⁷⁷ These deprivations brought about deplorable social conditions, which should not have been the case considering the amount of profit that was being made through the extraction of resources from the community's land.⁷⁸ The failure of the Nigerian government to secure the peoples ESCR led to further human rights infringement, this time, they were civil and political in nature.

In response to the infringements, the local community came together and formed the movement for the emancipation of the Ogoni people ('MOSOP'), a group which protested the unfavourable conditions in which the people lived.⁷⁹ Rather than seek measures to improve the peoples poor living conditions, the Nigerian government had the nine leaders of MOSOP arrested for specious crimes, depriving them of their right to personal security,⁸⁰ freedom from

⁷⁴ Article 11 ICESCR.

⁷⁵ Article 6 ICESCR.

⁷⁶ ACHPR *ibid*, article 24.

⁷⁷ Nigeria ratified the African Charter on June 22 1986, and has also enacted its provisions as part of its domestic law <<http://www.achpr.org/instruments/achpr/ratification/?s=deposited>> accessed 27 April 2017. Nigeria has also ratified the ICESCR, 29 July 1993, see 'Lists depicting Nigeria's status of ratification of UN Human Rights Instruments' <http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/NG/NHRC_NGA_UPR_S4_2009anx_RatifiedHumanRightsInstruments.pdf> accessed 27 April 2017.

⁷⁸ In violation of their right to freely dispose of wealth and natural resources. See Article 21 of the ACHPR (n 60), above.

⁷⁹ ICCPR (n 37), article 19.

⁸⁰ *ibid*, article 9.

torture,⁸¹ freedom from arbitrary arrests,⁸² and fair trials.⁸³ Eventually, a tribunal that did not meet international standards, convicted the MOSOP leaders, and issued death sentences, which were carried out almost immediately.⁸⁴ The defendants' lawyers, who were themselves; human rights activists, abandoned the case before it ended stating that the verdict was preordained and that there was no justice before such a body.⁸⁵ This was a gross violation of the right to life as contained in the ICCPR, which only permits the death penalty pursuant to a final judgement rendered by a competent court.⁸⁶

The events that unfolded in Ogoni land demonstrate how the failure to address ESCR may culminate in violations of CPR. If the Nigerian government had paid attention to the plight of the Ogoni people when their economic, social and cultural rights were being undermined by Shell, there would have certainly been no grounds for the protests and the resulting civil and political human rights violations would have been avoided. As will become apparent throughout the course of this study, the recognition of the interconnectedness of CPR and ESCR has not subsided in the 20-25 years since the Ogoni crises. Indeed, the importance of this recognition has increased with the complexity of international interaction ushered in by globalisation, as well as the ever-increasing influence on both sets of rights by the main drivers of the globalisation process- TNCs.⁸⁷

⁸¹ *ibid*, article 7

⁸² *ibid*, article 9

⁸³ *ibid*, article 14

⁸⁴ Sigrun Skogly, 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria' (1997) 15 *Netherlands Quarterly Human Rights* 47, 58.

⁸⁵ *ibid*

⁸⁶ ICCPR (n 37), article 6 (2) ; ACHPR, (n 60), article 4.

⁸⁷ Cedric Ryngaert, 'Jurisdiction: Towards a Reasonableness Test' in Malcom Langford, Wouter Vandenhoe, Martin Scheinin, Willem Genutgten (eds) *Global Justice, Statue Duties: the extraterritorial scope of economic, social and cultural rights in international law* (Cambridge University Press 2013), 192.

2.3 States' obligations under international human rights law

In a major move to demonstrate the indivisibility and interconnectedness of CPR and ESCR, this time in relation to the nature of their obligations, Henry Shue introduced the idea of a tripartite typology of State human rights obligations. He spoke of obligations 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'.⁸⁸ Shue stated that this division of the State obligations does not mean that 'for every right there is a single correlative duty...instead...for every basic right and many other rights as well, there are three types of duties, all of which must be performed if the basic rights are to be fully honoured.'⁸⁹ Thus, for each right stated in the ICCPR, ICESCR and other relevant international human rights law instruments, States must necessarily perform all their obligations.

However, it is Asbjørn Eide, former Special Rapporteur to the UN Sub-Commission on Human Rights, who has become known as the originator of the tripartite terminology as it is known today. He introduced a slightly different version of the tripartite typology of obligations. Eide argued that 'we cannot make a neat distinction between... civil and political rights on the one hand and economic, social and cultural rights on the other.'⁹⁰ Rather, he suggested that State obligations be examined at three levels beginning from the predominantly cost-free passive obligation to respect, to the gradually more active obligations to protect and to fulfil.

The obligation to 'respect' requires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds to satisfy basic need.

⁸⁸ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, (2nd edn, Princeton University Press 1996), 51.

⁸⁹ *ibid*, 52

⁹⁰ Asbjørn Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Application' (1989) 10 *Human Rights Law Review* 1, 36.

The obligation to ‘protect’ requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual-including the prevention of infringements of his or her material resources.

The obligation to ‘fulfil’ requires the State to take all necessary measures to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts.⁹¹

This tripartite terminology connects the two sets of rights by demonstrating that compliance with each and every human right, whether economic, social, cultural, civil or political, could require various measures from (passive) non-interference to (active) ensuring of the satisfaction of individual needs, all depending on the circumstances of each case.⁹²

2.3.1 The Obligation to Protect

Because the ‘obligation to protect’ deals with the obligation of the State vis-à-vis acts of third parties in favour of individuals, this work will focus on it in the interpretation of the States’ obligations with regards to human rights abuses by TNCs. An examination of the relevant treaties and human rights jurisprudence confirms that the obligation to protect extends to the protection against harmful TNC activities. Under the various human rights documents, TNCs are referred to in different ways, including ‘third parties’,⁹³ ‘private actors’,⁹⁴ ‘private

⁹¹ *ibid*, 37.

⁹² Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5 *Human Rights Law Review* 1, 86.

⁹³ UNCESCR ‘General Comment no. 18: The Right to Work (Article 6 of the Covenant)’ (6 February 2006) UN Doc E/C.12/GC18, para 35.

⁹⁴ UNHRC ‘General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women) (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10, para 20.

entities’,⁹⁵ ‘legal persons’,⁹⁶ and ‘private agencies’.⁹⁷ Unless stated otherwise, the treaty bodies’ use of these terms implies that states must take action against abuse by a broad range of actors including TNCs.⁹⁸ One good example in this respect is the HRC General Comment No. 31 on the nature of the general legal obligation imposed on states parties to the ICCPR. The HRC stated that,

the positive obligation on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by **private persons or entities** that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.⁹⁹

Other general comments from the HRC also implicitly refer to TNCs by confirming the states’ duty to protect against private action and abuses by ‘private agencies’, ‘legal persons’ and ‘private bodies’¹⁰⁰ The CESCR has been more explicit. In its General Comment no 18 relating to the right to work, the committee stated that

violations of the obligation to protect follow from the failure of states parties to take all necessary measures to safeguard persons within their jurisdictions from infringement of the right to work by third parties.

⁹⁵ UNHRC, ‘General Comment No.31: The nature of the general legal obligation imposed on States Parties to the covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 8.

⁹⁶ UNHRC ‘General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation’, (8 April 1988) UN Doc HRI/GEN/1/Rev.9 at 142, para 1.

⁹⁷ UNHRC General Comment No. 31 (n 95), para 31.

⁹⁸ OHCHR, ‘Report of the Special Representative of the Secretary-General on the Issue of human rights and transnational corporations and other business enterprises’ (5 February 2007) UN Doc A/HRC/4/35/Add.1, para 26.

⁹⁹ UNHRC, General Comment No. 31 (n 95), para 8 (emphasis added).

¹⁰⁰ Regarding the states’ duties concerning acts by natural or legal persons and private individuals or bodies, see UNHRC, ‘General Comment No. 16 (n 96), paragraphs 1 and 10; regarding acts by private persons or bodies see UNHRC, ‘General Comment No. 18: Non-discrimination’ (10 November 1989) UN Doc HRI/GEN/1/Rev.6 at 146, para 9; regarding acts by private agencies in all fields, the private sector and private practices see UNHRC, General Comment 28 (n 94), paras 4, 20 and 31.

They include omissions such as the failure to regulate the activities of individuals, groups or **corporations** so as to prevent them from violating the right to work of others...¹⁰¹

Again, in clarifying the obligation of the state to protect interference with the right to water, the CESCR stressed that third parties included corporations.¹⁰² In fact, every CESCR general comment since general comment No. 12 on the right to adequate food contains, usually explicitly, the obligation to protect against violations of ICESCR resulting from the activities of corporate entities.¹⁰³ In 2017, the CESCR published General Comment No. 24, which is specifically centred on state obligations under the ICESCR in the context of business activities.¹⁰⁴ Commenting on the obligation to protect under the ICESCR, the Committee stated that ‘the obligation to protect means that state parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities.’¹⁰⁵

The Committees of various subject specific Conventions such as the CEDAW,¹⁰⁶ CRC¹⁰⁷ and CRPD¹⁰⁸ also specifically mention the imperative on states to carry out their obligation to protect with respect to the activities of their TNCs.

¹⁰¹ UNCESCR ‘General Comment No. 18: The Right to Work (Art. 6 of the Covenant)’ (6 February 2006) UN Doc E/C.12/GC/18, para 35.

¹⁰² UNCESCR ‘General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant)’ (20 January 2003) UN Doc E/C.12/2002/11, para 23. See also, UNCESCR ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)’ (11 August 2000) UN Doc E/C.12/2000/4, para 35.

¹⁰³ OHCHR, ‘Report on transnational corporations and human rights’ (n 99), para 19; UNCESCR ‘General Comment No. 12, The Right to Adequate Food (Article 11)’ (12 May 1999) UN Doc. E/C.12/1999/5, para 15.

¹⁰⁴ UNCESCR ‘General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (10 August 2017) UN Doc. E/C.12/GC/24.

¹⁰⁵ *ibid*, para 14.

¹⁰⁶ ‘State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake...all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise’; CEDAW, (n 65), article 2 (e).

¹⁰⁷ UN Committee on the Rights of the Child, ‘Concluding Observations, Australia’ (19 June 2012) CRC/C/AUS/CO/4, para 27 and 28(a).

¹⁰⁸ UN Committee on the Rights of Persons with Disabilities ‘Views Adopted by the Committee at its 9th Session 15 to 19 April 2013’ (23 April 2013) UN Doc CRPD/C/9/D/1/2010, para 9.4.

2.3.1.1 What does the obligation to protect entail?

Human rights treaties require State parties to take positive measures to protect human rights by adopting certain conduct with the view to prevent, punish, investigate or redress the harm caused by acts of private persons or entities.¹⁰⁹ According to the monitoring bodies of the human rights treaties, whenever the obligation to protect arises, it would rest upon a due diligence standard. The HRC explained that, a State can be found in breach of its obligations under Article 2 of the ICCPR when ‘permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities’.¹¹⁰ According to the Committee on the Elimination of Discrimination Against Women, ‘under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’.¹¹¹

Thus, the due diligence standard in protecting human rights would require that where there are indications that an individual is at risk of having his/her rights violated, or where a situation exists, which gives rise to such a risk, preventive measures must be taken in order to ensure to the fullest extent possible, that these risks do not materialize.¹¹² Where such violations are taking place, States must intervene to put an end to the violation.¹¹³ However, if the measures adopted fail, and violations occur, state authorities may not remain passive. They are under an obligation to provide effective remedies to the individual whose rights have been

¹⁰⁹ See Article 2 (1) ICCPR (n 37); Article 2(1) ICESCR (n 38); Article 2 CEDAW (n 65); Article 2(1) CAT (n 66); Article 2(2) CRC (n 67); Article 4(1) CRPD (n 68).

¹¹⁰ UNHRC General Comment No. 31 (n 95), para 8.

¹¹¹ UN Committee on the Elimination of Discrimination against Women ‘General Recommendation No.19: Violence against Women’ (1992) UN Doc. A/47/38, para 9.

¹¹² Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010), 365. See also Convention Against Torture (n 66), article 2(2).

¹¹³ OHCHR, ‘Report of the Office of the United Nations High Commissioner for Human Rights on The Role of Prevention in the Promotion and Protection of Human Rights’ (16 July 2015) UN Doc A/HRC/30/20, para 10.

violated, in order to ensure that he/she will be compensated, and that the wrong doer will be sanctioned through civil, administrative or criminal penalties in order to deter future violations.¹¹⁴

Following this interpretation, the obligation to protect would create a ‘quasi-horizontal’ effect, which imposes a duty on the State to adopt, for the benefit of individuals under its jurisdiction, the necessary positive measures for prevention and prohibition of human rights against third parties, including TNCs.¹¹⁵ This varies from the traditional vertical dimension of the protection, which allows individuals to bring claims directly against the State for human rights violations that can be directly attributable to the State. Instead, the quasi-horizontal effect of the obligation to protect would permit individuals to bring an action against the State for its failure to demonstrate due diligence by reasonably preventing and/or punishing behaviour committed by third parties even though such acts committed by the third parties are not directly attributable to the State. The quasi-horizontal effect is indirect, therefore, it would not extend to the point where a legal claim against a third party can be brought on the basis of an abuse of international human rights.¹¹⁶

However, although the views of the different human rights committees, established under the various treaties represent authoritative interpretations of individual human rights, or, of the nature of human rights obligations, they are not legally binding.¹¹⁷ Nevertheless, they have highly authoritative character, which is justified by their adoption and application in human rights courts. The due diligence standard is no exception. It has been endorsed by the Inter-American Court of Human Rights and the ECtHR. In *Velasquez Rodriguez v Honduras*,

¹¹⁴ *ibid*

¹¹⁵ Vassils P. Tzevelekos, ‘In Search of Alternative Solutions: Can the State of Origin be Held Internationally Responsible for Investors Human Rights Abuses that are not Attributable to it?’ (2010) 35 *Brook Journal of International Law* 155, 185-186.

¹¹⁶ UNHRC General Comment no. 31 (n 95), para 8.

¹¹⁷ See section 2.2.1.

the Inter-American Court of Human Rights held that as a consequence of the States obligation to protect the rights enshrined in the ACHR,

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility because of lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹¹⁸

The ECtHR has also adopted the due diligence standard, although it was late in naming it as such. Nonetheless, the court often takes as a starting point, the elements of positive preventive measures against potential third party harm. In *Kilic v Turkey*, although the ECtHR did not use the term ‘due diligence’ it decided that Article 2 of the ECHR on the right to life embodies an obligation on State parties to ‘take positive operational measures to protect an individual or individuals whose life is at risk from the acts of another individual.’¹¹⁹ Similarly, in *Ilascu v Moldova and Russia*, the ECtHR upheld the view that in securing the rights under the Covenant, a State has ‘a positive obligations’ to take all measures ‘that is in its power to take and that is in accordance with international law to secure the rights guaranteed by the Convention’.¹²⁰

Moreover, the duty of the various international human rights treaty bodies is to interpret the provisions of the treaties to ensure that States effectively discharge their human rights obligations. If the objective of setting international human rights standards is to ensure that individuals are adequately protected from human rights abuse, then it is only necessary that States discharge their obligation to protect with due diligence in order to fulfil this objective.

¹¹⁸ *Velasquez Rodriguez v Honduras* [1988] Inter-American Court of Human Rights, (Ser. C) No. 4, para 172.

¹¹⁹ *Kilic v Turkey*, Application no. 22492/93, 28 March 2000, para 62. See also, *Osman v United Kingdom* [1998] VIII ECtHR; 29 EHRR 245, paras 114-116.

¹²⁰ *Ilascu and others v Moldova and Russia*, Application no. 4878/99, 8 July 2004, paras 331 and 333. See also the discussion under sections 2.3.2 and 2.3.2 for a more detailed discussion on how courts have applied the due diligence standard in the obligation to protect.

This idea of the objective of human rights is captured in the case law of the various human rights courts, dealing with third party interference with human rights and the States duty to protect. The following sub-sections focus on this.

2.3.2 The obligation to protect Civil and Political rights

As has been previously noted, CPR were initially conceived as strictly negative rights and required a minimum level of engagement with States. As a result, CPR were initially excluded from any type of positive action.¹²¹ However, the introduction of positive obligations was developed through human rights jurisprudence placing emphasis on the necessity of providing maximum protection of human rights. The Inter-American Court of Human Rights perfectly summarised the positive nature of civil and political rights in relation to the ACHR in the well-known case of *Velasquez-Rodriguez v Honduras*.¹²² There, the Court stated:

in principle, any violation of rights recognised by the Convention carried out by an act of public authority or by persons who use their positions of authority is imputable to the state. However, this does not define all the circumstances in which the state might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility because of lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹²³

¹²¹ Unless the norms wordings expressly included an obligation to prevent or punish, for example, the Right to life as recognised in the ECHR which provides, ‘Everyone’s right to life shall be protected by law...’, see ECHR, *ibid* (n 54), article 2.

¹²² *Velasquez* (n 118).

¹²³ *ibid*, paragraph 172.

In applying the due diligence standard to the protection of the rights under the Convention, the Court noted that States have the obligation

to ‘ensure’ the free and full exercise of the rights recognised by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the State Parties to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically enjoying the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognised by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.¹²⁴

Similarly, the HRC described the ICCPR obligations as both negative and positive in nature.¹²⁵ With respect to the positive dimension of the obligations, the HRC noted that States are required to ‘adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.’¹²⁶ The Committee further stressed that the failure to adopt ‘appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress the harm caused by acts of private persons or entities will result in a failure to ensure Covenant rights.’¹²⁷

For its part, the ECHR in Article 1 which provides the general obligation of States to secure for everyone within their jurisdiction, the rights protected by the European Convention, has been applied as a basis for the expression of the due diligence standard in the protection of

¹²⁴ *ibid*, para 166.

¹²⁵ UNHRC General Comment No. 31 (n 95) para 8.

¹²⁶ *ibid*, para 7.

¹²⁷ *ibid*, para 8.

ECHR.¹²⁸ *Ilascu v Moldova and Russia*, the ECtHR acknowledged that the undertakings given by a contracting State under Article 1 of the European Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, the positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory.¹²⁹ Following the principle of due diligence, positive duties to prevent and punish civil and political rights have found their place next to the traditional notion of negative obligation.

Having reviewed the theoretical framework for the application of the due diligence obligation to protect CPR, it is necessary to see how it is applied in practice. Arguably, the most examined CPR in this regard is the right to life.¹³⁰ The right to life is provided for in Article 2 of the European Convention, which expressly requires that states must prevent violations of this right. Therefore, as noted by the ECtHR, the preventive dimension of the obligation requires

The State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction...This involves a primary duty on the State to secure the rights to life by putting in place effective criminal-law provisions to deter the commission offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.¹³¹

The ICCPR requirement that each state party should not only ‘respect’ but also ‘ensure’ the rights contained therein by adopting such laws and other measures as may be necessary to give effect to the rights recognised in the Covenant is also an expression of the positive obligation

¹²⁸ ECHR (n 54), article.

¹²⁹ *Ilascu and others v Moldova and Russia*, (n 120), paras 331 and 333.

¹³⁰ Tzevelekos (n 115), 187.

¹³¹ *Kilic v Turkey*, (n 119), para 62.

of CPR.¹³² Article 6 provides that states should protect ‘by law’ the right to life.¹³³ This necessarily implies that the state obligation to ensure the right to life, they must necessarily adopt legislative measures to secure such right.¹³⁴ Similar provision can be seen in Article 17 which protects the right to privacy, article 9 and article 14 which provide guarantees against arbitrary arrest and for due process, including establishing and maintaining an independent judiciary, and ensuring the right to legal assistance.¹³⁵

These are clear indications that certain positive measures are necessary in ensuring that states protect the CPR of individuals from being affected by third parties, which invariably include transnational corporations.

2.3.3 The obligation to protect economic, social and cultural rights

Unlike civil and political rights, economic, social and cultural rights initially developed from a positive rationale that requires the state to provide the individual with certain entitlements considered vital to the individuals’ wellbeing.¹³⁶ This depicts a purely vertical relationship between the state and individuals. Yet, the positive obligations of states to ensure ESCR encompasses an affirmative due diligence dimension with respect to the activities of third parties.¹³⁷

¹³² ICCPR (n 37), article 2(1).

¹³³ *ibid*, article 6.

¹³⁴ *ibid*. article 2(2).

¹³⁵ Article 9 (3) ICCPR (n 37) provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful’. Under Article 14 ICCPR; ‘...in the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.

¹³⁶ Economic, social and cultural rights are now recognised as including both negative and positive obligations. In fact, the tripartite division of obligations with the emphasis on their negative and positive nature was first developed for ESCR. For example, the obligation not to arbitrarily evict people from their homes and the duty not to adopt legislation that denies members of some groups’ access to health are examples of negative aspects of ESCR obligations. See, Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights’ in Asbjorn Eide, Catarina Krause and Allan Ross, *Economic, Social and Cultural Rights: A Text book* (2nd edn, Martinus Nijhoff 1995), 25; Evelyn Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press 2015), 27.

¹³⁷ See section on 2.3.1.1.

The general obligations provision of the ICESCR requires that the state must ‘**undertake to take steps**...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the covenant by **all appropriate means**.’¹³⁸ Clarifying this provision, the CESCR has stated that in the context of the covenant as a whole, while the full realisation of the rights might be achieved progressively, steps toward achieving that goal must be taken immediately.¹³⁹ Such steps, according to the Committee must include means that are deliberate, concrete and targeted as much as possible towards meeting the obligations of the Covenant.¹⁴⁰ Thus, in discharging its obligation to protect, a state must necessarily undertake immediate steps by adopting all appropriate means to ensure that human rights abuse resulting from third party abuse are prevented, and where such abuses occur, it must take steps to punish the perpetrators. Some practical examples of how the courts, committees and commissions have interpreted this obligation are as follows:

Following the activities of Shell in Ogoni land, the African Commission of Human and Peoples Rights found breaches of the rights to health and a general satisfactory environment, the right to property, the right to housing, the right to food and the right to be free from forced deprivation of one’s wealth and resources.¹⁴¹ With respect to the right to food, the Commission declared that ‘the African Charter and international law require and bind Nigeria to protect and improve existing food sources to ensure access to adequate food for all citizens.’¹⁴² Interpreting the scope of the obligation it required that ‘the Nigerian Government...should not allow third parties to destroy or contaminate food sources, and prevent people’s efforts to feed themselves.’¹⁴³ The ACHPR concluded by holding that the respondent state breached its right

¹³⁸ ICESCR (n 38), article 2(1).

¹³⁹ UNCESCR ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, para 1, of the Covenant)’ (14 December 1990) UN Doc E/1991/23, para 2.

¹⁴⁰ *ibid*

¹⁴¹ *Social and Economic Rights Action Centre and the Centre for Economic Rights v Nigeria* [2001] AHRLR 60.

¹⁴² *ibid*, para 65

¹⁴³ *ibid*

to food obligations because it failed to prevent the private oil consortium from destroying food sources.¹⁴⁴

In *Sarayaku v Ecuador*, it was alleged that Ecuador granted a permit to a private company to carry out oil exploration and exploitation activities in the territory of the Kichwa indigenous People of Sarayaku.¹⁴⁵ In the course of carrying out its operations, the company destroyed caves, waterfalls and underground rivers used as drinking water sources for the people, and cut down trees and plants of great environmental and cultural value: these were also used for food.¹⁴⁶ The Inter-American Court found Ecuador to be in breach of its obligation to protect the people's right to communal property and cultural identity by failing to prevent the oil company's harmful activities.¹⁴⁷ It ruled that Ecuador failed to provide adequate, accessible and effective consultation mechanisms and environmental impact mechanisms prior to the commencement of the company's activities.¹⁴⁸ The court also noted that the Government of Ecuador did not ensure that there was a reasonable sharing of the benefits arising from the companies' activities in form of just compensation for the harm caused.¹⁴⁹

Similarly, in *Lubicon Lake band v Canada*, the Human Rights Committee found that Canada had breached of its obligation to ensure the rights of the Lubicon Lake Band to pursue its economic, social and cultural development, when it failed to prevent the provincial government of Alberta from expropriating their territory for the benefit of private corporate interests.¹⁵⁰ Thus, the protection of economic, social and cultural rights necessarily entails the states' obligation to adopt a standard for the prevention of human rights abuse by third parties.

¹⁴⁴ *ibid*, para 66.

¹⁴⁵ *Kichwa Peoples of the Sarayaku community and its members v Ecuador*, Case 167/03, Report No. 62/04, Inter-American Court of Human Rights., OEA/Ser.L/VII.122 Doc.5 rev.1 at 308 (2004).

¹⁴⁶ *ibid*, para 105.

¹⁴⁷ *ibid*, para 156-160.

¹⁴⁸ *ibid*, para 167.

¹⁴⁹ *ibid*, para 157. In breach of article 21 (1) of the ACHR- the right to just compensation following the appropriation of property, *ibid* (n 58).

¹⁵⁰ *Lubicon Lake Band v Canada*, Communication No. 167/1984 (26 March 1990), UN Doc. Supp. No. 40 (A/45/40) at 1 (1990).

It also requires the provision of mechanisms to compensate the affected individuals where possible and/or to deter future misconduct on the part of the wrong doers.

2.4 The extent of the obligation to protect

It is established that both CPR and ESCR are equally able to produce results with regard to the obligation to protect against third party harm. However, the mere existence of human rights harm caused by third parties does not mean that the state has failed to exercise due diligence in protecting human rights.¹⁵¹ This is because the obligation to protect is an obligation of conduct and not of result.¹⁵² Obligations of result require states to ensure the obtainment of a particular situation, - a specified result (in this case, respect for human rights) in accordance with the norms that obligate them to act or refrain from acting in the first place.¹⁵³ Conversely, the obligation of conduct merely requires that states employ every possible means to achieve the desired result.¹⁵⁴ If the result is not achieved, the responsibility of the state will only be questioned if the state cannot establish that it employed all the means available to it.¹⁵⁵ Thus, where a state can show that it has exercised all available means to prevent and punish human rights violations by TNCs, it has discharged its obligation to protect even if the human rights abuse occurs despite its efforts.¹⁵⁶ However, such means must be applied reasonably given the circumstances of each case.¹⁵⁷

¹⁵¹ *Velasquez* (n 118), para174.

¹⁵² The obligation of conduct and the obligation of result was introduced by the ILC Draft Articles on State Responsibility, adopted in its twenty-ninth session. Since then, they have become common terms in international legal practice. Yearbook of the International Law Commission, 1977, Vol. II Part one, Documents of the Twenty-Ninth session, UN. Doc. A/CN.4/SER.A/1977/Add.1 (Part 1), articles 20 and 21.

¹⁵³ *ibid*, article 21.

¹⁵⁴ *ibid*, article 20.

¹⁵⁵ Tzevelekos (n 115), 198.

¹⁵⁶ This is based on practical considerations as a state may use every means at its disposal but other extraneous factors may intervene and decisively impact the final outcome.

¹⁵⁷ *Velasquez* (n 118), para 177.

In *Osman v The United Kingdom*, the ECtHR listed a set of criteria for determining the reasonableness of a state's preventive and punitive measures. These criteria include the unpredictability of human conduct, the difficulties involved in policing modern society, the knowledge of the risk, the operational choices, the possibility for the authorities to provide the necessary measures, as well as the need for proportionality.¹⁵⁸ Apparently, these criteria do not provide a unitary method of interpretation. Rather, it seeks to determine the existence of a State's obligation to protect on various criteria, which bear no relation to the point of presenting a single method of interpretation. However, they serve as a limited set of tools, which may be employed by the relevant investigatory and adjudicatory bodies in determining the adequacy of the means adopted by states in discharging their positive obligations. Treaty bodies have suggested the means by which States may adopt in discharging their obligation to protect. They include; regulatory, monitoring and adjudicatory measures.

Legislation

Treaty bodies usually suggest various regulatory measures that States may adopt in protecting human rights. The HRC highlights that Article 2 of the ICCPR enjoins states parties to 'adopt legislative, judicial, administrative, educational and other appropriate measures in order to fulfil their obligations'.¹⁵⁹ Similarly, the CESCR confirms the means which should be used to satisfy the obligation to take steps as stated in Article 2(1) of the ICESCR, to be 'all appropriate means, including particularly the adoption of legislative measures.'¹⁶⁰

The requirement of the adoption of legislative measures in executing the States general obligations has been repeatedly included in treaties as a major means for the execution of States

¹⁵⁸ *Osman v United Kingdom* [1998] VIII ECtHR; 29 EHRR 245, para 116.

¹⁵⁹ UNHRC, General Comment No. 31 (n 95), para 7.

¹⁶⁰ UNCESCR, General Comment No. 3 (n 139), para 3.

parties' obligations.¹⁶¹ Consequently, most treaty bodies confirm that the adoption of legislation to prevent third party violations of human rights is among states' minimum obligations under the treaties in order to comply with the obligation to protect.¹⁶² For example, in its General Comment on state obligations under the ICESCR, the CESCR explained that the obligation to protect 'entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights'¹⁶³ The HRC has also indicated that legislative measures are an important means for punishing, preventing and deterring human rights abuse by private persons and third parties.¹⁶⁴

The treaty bodies do not generally specify what the content of the legislation should be or what form it should take. What is common in the commentaries is the reference to the State's obligation to take legislative measures to prevent abuse. In its 15th annual report, the African Commission on Human and Peoples Rights stressed that, 'the state is obliged to protect rights holders against other subjects by legislation...'¹⁶⁵ In the words of the Commission, 'protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms'.¹⁶⁶

¹⁶¹ See ICESCR (n 38), article 2 (1); ICCPR (n 37), article 2(3)(b); CAT (n 66), article 2(1); CRC (n 67), article 3(1); CEDAW, (n 65), article 2; and CRPD (n 68), article 4(1).

¹⁶² The UNCESCR in General Comment no. 3 highlighted that legislation is 'highly desirable and in some cases indispensable', (n 139), para 3; See also, UN Economic and Social Council, 'Statement on The Obligations of State Parties Regarding The Corporate Sector and Economic, Social and Cultural Rights' (20 May 2011) UN Doc E/C.12/1011/1, paragraph, 5; UNCESCR, 'General Comment No.5, Persons with Disabilities' (9 December 1999) UN Doc E/1995/22, paragraph 16, and UNCESCR, 'General Comment no. 7 'The Right To Adequate Housing (20 May 1997) UN Doc E/1998/22, para 8-9.

¹⁶³ UNCESCR General Comment No. 24 (n 104), para 16.

¹⁶⁴ UNHRC General Comment No. 31 (n 95), para 7 and 8.

¹⁶⁵ African Commission on Human and Peoples Rights, 15th Annual Activity Report of the ACHPR on *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, (application 155/962002), para 46

¹⁶⁶ *ibid*

Nevertheless, some treaty bodies have given some specific guidance on the content of state legislation in relation to sector specific areas involving activities of TNCs. The CESCR has suggested that states should require business entities to adopt measures to prevent abuses of Covenant rights by subsidiaries, subcontractors, and other business partners, and enable civil suits and other effective means of claiming reparations by victims of human rights abuses against the corporate perpetrators.¹⁶⁷ For TNCs conducting mining projects or engaging in large infrastructural developments, the Committee for the Elimination of Racial Discrimination ('CERD') emphasized that, 'development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population'.¹⁶⁸ Accordingly, the CERD recommended that State legislations should: set forth broad principles governing exploitation of land, including, environmental standards and equitable revenue distribution and rules pertaining to the participation of indigenous people in decision making concerning the affected communities.¹⁶⁹

Monitoring

The introduction of legislation alone is not sufficient to ensure human rights protection. It is necessary that the standards set up by states in their human rights regulations are clearly understood and applied by the third parties. Thus, the human rights treaty bodies have suggested that states must consistently monitor the activities of third parties to ensure that they do not contravene human rights regulations and affect the enjoyment of such rights. For example, The HRC has suggested that the obligation to protect indigenous peoples' cultural

¹⁶⁷ UNCESCR General Comment No. 3 (n 139), para 15-16.

¹⁶⁸ UN Committee for the Elimination of Racial Discrimination, 'Concluding Observations on Nigeria' (1 November 2005) UN Doc CERD/C/NGA/CO/18, para 19.

¹⁶⁹ *ibid*, para 19. See also UNCESCR 'Concluding Observations on Ecuador' (7 June 2004) UN Doc E/C.12/1Add.100, para 25

rights and ensure their participation in infrastructure decisions as contained in article 27 of the ICCPR, implies that states must monitor whether participating businesses are consulting with such communities.¹⁷⁰ The Committee on the Elimination of Racial Discrimination has also recommended that independent monitoring bodies be set up to conduct environmental impact assessment before any operating licence is issued to TNCs, as well as health and safety checks on the sites of gold mining activities.¹⁷¹ Such monitoring mechanisms, according to the CESCR, must be effective, well equipped and resourced.¹⁷²

One of such monitoring mechanisms include Human Rights Impact Assessment Instruments. A Human rights Impact Assessment Instrument is an instrument for examining policies, legislation, programs and projects to identify and measure their effects on human rights.¹⁷³ In this regard, they are crucial tools in discharging the obligation to protect. This is because, the assessment of the compatibility of policies, legislation, programs and projects, and their likely impact on human rights creates the opportunity to revise the regulations or adjust them before and after they are implemented in order to fill in protection gaps.¹⁷⁴

Another important set of monitoring mechanism are Human Rights Indicators. A Human Rights Indicator is specific information that a state could rely on to assess its own progress in ensuring the enjoyment of human rights.¹⁷⁵ Indicators are broadly classified as

¹⁷⁰ UNHRC, 'General Comment No. 23: Article 27 (Rights of Minorities)' (8 April 1994) CCPR/C/21/Rev.1/Add.5, paras 6.2-9..

¹⁷¹ Submission to the UN Committee on the Elimination of All forms of Racial Discrimination (CERD) 79th Session with regard to the United Kingdom's (UK'S) responsibility to ensure respect for the rights of the indigenous peoples overseas in the context of UK transnational corporations (TNC) activities affecting them. (8 August – 2 September 2011) <<https://studylib.net/doc/9048810/submission-to-the-un-committee-on-the-elimination-of-all-...>> accessed 1 May 2017.

¹⁷² UNCESCR 'General Comment no. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights' (11 August 2005) UN Doc E/C.12/2005/4, paras 38- 39.

¹⁷³ World Bank (Nordic Trust Fund), 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessment and Relevance for Development' (February 2013) <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf> (accessed 1 May 2017).

¹⁷⁴ James Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' (2011) 3 *Journal of Human Rights Practice* 2.

¹⁷⁵ OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation' (2012) HR/PUB/12/5, 2012.

quantitative or qualitative. The former are narrowly viewed as equivalent to statistics, and are usually articulated by directly observable objects, facts and effects or from perception, opinion assessment or judgement.¹⁷⁶ For example, the number of recorded forced evictions in favour of third parties, or ratings based on an average scoring by a group of experts or journalists on the state of the right to prior consultation before land divestments.¹⁷⁷ The latter is also articulated on the same observable indicia but expressed in narrative form. For example, the factual description of an event involving abuses of human rights by pollution of arable land, the perpetrator, and the victims, or, a narrative assessment on whether the right to food is properly guaranteed in law and practice in a given country.¹⁷⁸ In the work of the UN human rights treaty bodies the use of appropriate indicators is a way to help State parties make precise and relevant information available to the treaty bodies, and to help them assess progressive implementation of State obligations under the treaties.¹⁷⁹

The procedural right to a remedy- Adjudication

State regulation proscribing certain third-party conduct will have little impact without accompanying mechanisms to sanction perpetrators and compensate victims when abuses occur.¹⁸⁰ This is why most treaty texts provide for the guarantee of both procedural remedies (effective access to an appropriate adjudicatory body) when a right is alleged to have been

¹⁷⁶ *ibid*, 16

¹⁷⁷ *ibid*, 18

¹⁷⁸ *ibid*

¹⁷⁹ For example, the Committee against Torture recommended that Honduras should develop disaggregated indicators to monitor and document incidents of inter-prisoner violence with a view to revealing root causes and designing appropriate prevention strategies. – UN Committee against Torture, ‘Concluding Observations of the Committee against Torture: Honduras’ (23 June 2009) UN Doc CAT/C/HND/CO/1 para 17.

¹⁸⁰ OHCHR, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights’, (Report of the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises) (7 April 2008) UN Doc A/HRC/8/5, para 82.

infringed or where such infringement is imminent, and substantive remedies (award of adequate reparation to the victim).¹⁸¹

In all cases involving the provision of procedural remedies by establishing adjudicatory mechanisms, there are clear minimum elements. Essentially, the rights holder should be entitled to lodge a complaint before an ‘impartial’ and ‘independent’ body when he or she considers that the obligations arising from the right have not been complied with.¹⁸² Such a body is considered to be independent and impartial where it is not subject to the control or influence of the authorities whose actions or omissions are subject to its review.¹⁸³ Its independence and impartiality is also determined by its ability to issue orders to obligation holders when they are found to have breached their duties.¹⁸⁴ Adjudicatory tasks are usually performed by courts, although some other mechanisms such as administrative tribunals, quasi-judicial bodies or arbitrators may also be adequate and sometimes more effective if they comply with the criteria of impartiality and independence.¹⁸⁵

In the past, and even presently, some have claimed that ESCR are incapable of being determined by courts.¹⁸⁶ In order to justify this line of thinking, one of the arguments is that while CPR provide clear guidance on what is required in order to implement them, ESCR only set out aspirational and political goals.¹⁸⁷ The content of ESCR is supposedly variable and lacks the certainty required for adjudication.¹⁸⁸ For instance, it is usually said, that the right to health,

¹⁸¹ See, ICCPR (37), article 2(3); CERD (n 64), article 6; CAT (n 66), article 13; ACHR (n 58), article 25; ECHR (n 54), article 13; ACHPR (n 60), article 7 (1)(a). Also see UNCESCR, ‘General Comment No. 9: The domestic application of the Covenant (19th Session 1998) (3 December 1998) UN Doc. E/C.12/1998/24, para 2.

¹⁸² See ICCPR (n 37), article 14, ECHR (n 54), article 6, ACHR (n 58), article 8.

¹⁸³ International Committee of Jurists, *International Principles of the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1* (Geneva International Commission of Jurists 2007), 17- 32.

¹⁸⁴ *ibid*

¹⁸⁵ Protect respect and remedy framework (n 180), para 92.

¹⁸⁶ Evelyn Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Oxford University Press, 2015), 54-55.

¹⁸⁷ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice, second ed.*, (Cambridge University Press, 2016), 415.

¹⁸⁸ Christian Courtis, *Courts and the Leal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (International Commission of Jurists, 2008), 15.

food or the right to housing have no clear meaning and that they offer no obvious standard by which one can determine whether an act or omission fulfils or violates it.¹⁸⁹

It is true that without a clear standard establishing the content and scope of the rights and its accompanying obligations, judicial determination would be almost impossible. However, this issue is not peculiar to ESCR as the determination of the content and scope of all human rights whether civil, political, economic, social or cultural is susceptible to imprecise labelling.¹⁹⁰ This is because many legal rules are expressed in broad terms and to a large extent, unavoidable general wording.¹⁹¹

Nevertheless, different courts and committees have come up with innovative concepts to overcome the outmoded assumption that ESCR cannot be submitted to judicial review. It is not within the scope of this thesis to provide a detailed analysis of all the different concepts, however, some illustrative examples will be mentioned. One of such measures is the determination of the ‘core content obligation’ or ‘minimum core obligation’.¹⁹² By this standard, a State would be said to be in breach of its obligations where it fails to satisfy the minimum essential levels of the rights in issue to the extent that such right become unrecognisable or meaningless.¹⁹³ For example, in relation to the rights to food, health and housing, a State in which a significant number of individuals is deprived of essential foodstuff, of essential primary health care, or of basic shelter and housing, is *prima facie* violating its ESC obligations.¹⁹⁴ Another measure adopted by the courts is the adoption of a

¹⁸⁹ Jennifer Sellin, ‘Justiciability of the Right to Health-Access to Medicines: The South African and Indian Experience’ (2002) 2 *Erasmus Law Review* 4, 451- 463; Christian Courtis, ‘The Right to Food as a Justiciable Right: Challenges and Strategies’ (2007) 11 *Max Plank Yearbook of United Nations law* 1.

¹⁹⁰ Courtis ‘The Right to Food as a Justiciable Right’, *ibid*, 15.

¹⁹¹ For example, the freedom of expression is difficult to define with precision. It faces similar hurdles of vagueness to the same extent as ESCR, yet, this never leads to the hasty generalisation that they are not justiciable. Rather they are ongoing efforts that aim to define their meaning through case law and jurisprudence and administrative regulation. See Courtis, *ibid*.

¹⁹² Christian Courtis, ‘Standards to make Economic, Social and Cultural Rights Justiciable: A Summary Explanation’ (2009) 2 *Erasmus Law Review* 4, 389- 390.

¹⁹³ International Commission of Jurists, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (26 January 1997), guideline 9. <<https://www.refworld.org/docid/48abd5730.html>> accessed 5 May 2019.

¹⁹⁴ *ibid*

‘reasonableness’, ‘adequacy’ or ‘proportionality’ test. With these, judges measure whether legislative or regulatory measures adopted by States comply or fail to comply with the minimum core obligations.¹⁹⁵

A second argument put forth in support of the non-justiciability of ESCR is the provision in Article 2(1) of the ICESCR, which calls for the ‘progressive realisation’ of ESCR.¹⁹⁶ Following this provision, the treaty realises that the full realisation of the rights it contains would require gradual implementation. However, the CESCR has clarified this provision, first, by explaining that not every obligation arising from the Covenant is qualified by the idea of progressive realisation as some duties have immediate effect. The committee gave certain examples of such immediately realisable rights including those contained in Articles 3,¹⁹⁷ 7 (a)(i),¹⁹⁸ 8,¹⁹⁹ 10,²⁰⁰ 13(2)(a)²⁰¹ and 15(3),²⁰² which would be immediately applicable by judicial and other adjudicatory organs.²⁰³

However, the one most important within the scope of this thesis is the obligation contained in Article 2(1) - to ‘take steps by all appropriate means’ to implement the rights enshrined in the Covenant.²⁰⁴ This obligation is one that each State party is required to satisfy once it has ratified the ICESCR.²⁰⁵ The obligation to take steps by all appropriate means includes deliberate, concrete and targeted adjudicatory action by the courts and other necessary competent bodies depending on the circumstances of each case, with the view to ensure that

¹⁹⁵ Christian Courtis, ‘Standards to make Economic, Social and Cultural Rights Justiciable’ (n 190), 390- 393; See *Government of the Republic of South Africa and others v Grootboom and Others* 2001 (1) SA 46 (CC) 4 October 2000.

¹⁹⁶ ICESCR (n 38), article 2(1).

¹⁹⁷ The obligation to ensure the equal rights of men and women under the Covenant.

¹⁹⁸ The obligation to ensure fair payment of wages and equal remuneration for work of equal value without distinction of any kind.

¹⁹⁹ The Obligation to ensure the right to form trade unions

²⁰⁰ Obligations to ensure special protection for the family and all children and young persons.

²⁰¹ Obligation to ensure free and compulsory primary education for all.

²⁰² Obligation to respect freedom indispensable for scientific research and creative activity.

²⁰³ UNCESCR, General Comment No. 3 (n 109), para 5.

²⁰⁴ ICESCR (n 38), article 2(1).

²⁰⁵ UNCESCR, General Comment No. 3 (n109), para 2.

the rights of individuals as contained in the Covenant are determined.²⁰⁶ Thus, when an individual alleges that there has been an infringement on his or her rights by a third party, or that such an infringement is imminent, the State is obligated to set up independent and impartial systems of redress of a judicial or quasi-judicial nature to appropriately determine the rights of such an individual.

The substantive right to a remedy -Reparation

The obligation to provide reparation is immediately linked to the obligation to provide independent and impartial adjudicatory bodies. Where an individual's rights have been determined, and relevant adjudicatory body establishes that such rights have indeed been adversely affected, the State is duty bound to ensure that the individual receives reparation.²⁰⁷ The UN Basic Principles and Guidelines on the Right to remedy have set out the starting point for the forms of remedy that can be issued upon the finding of a breach of an obligation.²⁰⁸ They include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²⁰⁹ The CESCR also suggests identical remedies in the event of a breach of economic, social and cultural rights.²¹⁰ For its part, the Human Rights Committee spoke on the nature of remedies and the obligation of member States to provide them in its General Comment No. 31. In addition to those suggested by the UN Basic Principles and Guidelines on the Right to remedies and the CESCR, the HRC included 'measures of satisfaction such as, public

²⁰⁶ *ibid*, paras 2 – 5.

²⁰⁷ Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn., Oxford University Press; Oxford, 2005), 114.

²⁰⁸ UNGA, 'United Nations Basic Principles and Guidelines on the Right to remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law' (21 March 2006) UN Doc A/RES/60/147.

²⁰⁹ *ibid*

²¹⁰ UNCESCR, 'General Comment No. 14 (n 102) 'All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition', para 59.

apologies, public memorials, and guarantees of non-repetition and changes in relevant laws and practices, as well as bringing justice to the perpetrators of human rights violations.²¹¹

No form of reparation has been considered as the most effective, however, each means of reparation is usually based on the nature of the harm caused and its effects on the individual. In many situations involving TNCs especially in the extractive industry where indigenous people are deprived of their land due to the effects exploration and exploitation activities, the most appropriate form of redress would be the restitution of the land, but where the effects of the activities on the land are so severe, (as is usually the case) and such lands become inhabitable or lose their arability, just, fair and prompt compensation as far as possible in the form of what they lost would seem appropriate in the circumstance.²¹² Thus, adjudicatory bodies will need to consider the peculiarities of each case to determine the appropriate remedies for the aggrieved individuals.

2.5 Is there an extraterritorial obligation to protect?

The obligation to protect individuals from human rights abuses by third parties, including TNCs, which occur within a State's jurisdiction is relatively well settled. However, the extension of this obligation beyond the State's jurisdiction is still a debated subject. The phrase, 'within a State's jurisdiction' is often interpreted as being synonymous with the physical territorial boundaries of the State.²¹³ One major reason for this restrictive interpretation is the

²¹¹ See UNHRC, General comment no.31 (n 95), para 16; the Working Group on Involuntary or Enforced Disappearances issued a General Comment to Article 19 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance (E/CN.4/1998/43, 12 January 1998), cited 'rehabilitation and compensation' as appropriate remedy in cases of forced disappearance.

²¹² See UN Committee on the Elimination of Racial Discrimination, 'General Recommendation 23: Indigenous People (18 August 1997) UN Doc A/52/18 annex V, paragraph 5; UNCESCR 'Concluding Observations, Mexico' (9 June 2006) E/C.12/MEX/CO/4, para 28.

²¹³ Mark Gibney, 'On Terminology: Extraterritorial Obligations' in Malcom Langford et al, (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in international Law* (Cambridge University Press, 2013), 45; Wouter Vandenhole and Willem van Genugten, 'Introduction: and emerging multi-duty-bearer regime?' in Wouter Vandenhole ed., *Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015), 1.

way and manner in which international human rights law evolved- as affording protection to citizens and residents located within the territorial boundaries of the State.²¹⁴ The emergence of large transnational enterprises which possess the ability to operate beyond the territorial boundaries of their home States has led to the increasing challenge of the restrictive interpretation of the application of States' obligations. This challenge is worth serious consideration, especially when we consider the continuous growth in the transnational power and influence of TNCs, which give them the ability to affect the human rights of individuals across borders often times, negatively.²¹⁵

Supporting the challenge to the territorial limitation of human rights obligations, this section makes an argument for the extraterritorial application of the States obligation to take positive action to prevent their TNCs operating abroad from negatively affecting the enjoyment of human rights. In lending credence to this argument, this section draws support from an examination of the content of human rights obligations as contained in the various human rights instruments. The section also examines the criteria for the expansive application of human rights obligations, particularly in connection with the relationship between the State and its transnational corporate entities.

2.5.1 The UN Charter and the extraterritorial application of the obligation to protect

The UN Charter opens with reference to the horrors of the past, but declares that its objectives are in favour of 'future generations'. According to the Charter, these objectives include, 'international cooperation' in solving international problems and the promotion of human rights.²¹⁶ Confirming the human rights objective of the Charter, Article 55 provides that 'the

²¹⁴ See section 2.2.1 above.

²¹⁵ Robert McCorquodale and Penelope Simmons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 2, 599.

²¹⁶ UN Charter (n 30), article 1(3).

UN shall promote universal respect, for and observance of, human rights and fundamental freedoms for all without distinction...’ To underline that Article 55 is not merely exhortatory, Article 56 states that ‘all members pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55.’’ By virtue of these Charter provisions seen in the context of Article 103, the UN member States are obligated to cooperate, jointly and severally, to observe, promote and encourage universal respect for all human rights.²¹⁷

The idea of international cooperation presupposes the existence of an international community that goes beyond the relations between States.²¹⁸ Cooperation is inseparable from the realisation of a common ideal. It is not an end in itself, but a means to achieving an end.²¹⁹ It is in this sense that the importance of international cooperation in the field of human rights becomes apparent, in that, cooperation becomes inseparable from the realisation of the common ideal set out in the UN Charter-the guarantee of human rights universally.²²⁰

These principles of legal argument which are derived from the notion of international cooperation carry over into the positive obligation to protect through the reading of Article 56 of the charter which calls on States to pledge themselves ‘to take joint and separate action in cooperation with the organisation’.²²¹ The requirement to take action presupposes the adoption of measures towards achieving and securing human rights universally.

The word ‘joint’ has not been substantially discussed in the commentary to the UN or in scholarly work on Article 56, yet from the reading of the Article, it is obvious that the intention was that the action should be taken by the members, through the UN as well as by the

²¹⁷ Article 103 provides that ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ See UN Charter (n 30).

²¹⁸ UNHRC, ‘Study of the Human Rights Council Advisory Committee on Advancement of International Cooperation in the Field of Human Rights’ (29 February 2012), UN Doc. A/HRC/19/74, para 37.

²¹⁹ OHCHR, ‘Report on Enhancement of International Cooperation in the Field of Human Rights’ (12 December 2011) A/HRC/AC/8/3, para 35.

²²⁰ OHCHR, Study of the human rights council, (n 218), para 37.

²²¹ *ibid*, paragraph 38

members between and among themselves. If a narrower meaning was intended, the wording would probably have reflected this. The requirement of joint action clearly has an extraterritorial element. As Skogly notes, ‘only one of the States acting ‘jointly’ may at any given time address the promotion of respect for human rights domestically, all other States involved in the joint action will logically be addressing human rights respect in another State.’²²²

Apart from the requirement of joint action, Article 56 also calls for ‘separate action in cooperation with the UN’. When read together with Article 55, the argument for human rights obligations transcending the territorial boundaries of individual States is further strengthened. The article uses the term universal, rather than domestic, meaning that individual States shall promote the respect of human rights not only for individuals within their territory but also universally.²²³

Thus, the first instrument codifying international human rights law recognises the fact that a single State cannot comfortably embark on its own to ensure that all human rights are respected and observed.²²⁴ Certainly, if this were to be the case, there would be no need for the establishment of an international Charter prescribing human rights, rather, the human rights practices of each State would be governed solely by their domestic laws.²²⁵ Clearly, the international community at the time of signing and drafting believed that the protection of human rights is only possible through inter-state action. Following this, it could be asserted that the obligation of states to cooperate jointly and separately to secure human rights

²²² Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia, 2006), 76.

²²³ *ibid*

²²⁴ Margot Salomon and Ian Seiderman, ‘Human Rights Norms for a Globalised World: The Maastricht Principles on Extraterritorial Obligations of States in the area of economic, Social and Cultural Rights’ (2012) 3 *Global Policy* 458, 460.

²²⁵ Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (2nd edn Rowman and Littlefield, 2015), 110.

extraterritorially goes to the very essence of the establishment of international human rights law.

The UDHR, which provides an interpretation of the Charter also sets out clearly the need for international cooperation in ensuring that human rights are protected and respected universally, particularly in Articles 22 and 28. Article 22 generally sets out the right of every one to social security and ESCR, it then goes on to refer to the necessity of both ‘national and international cooperation in the realisation of these rights.’²²⁶ Article 28 takes this a step further and covers the full range of rights recognised in the Declaration including civil, political, economic, social and cultural rights. It provides that ‘everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.’²²⁷ It has been confirmed that this would necessitate the structural adjustments and use of all possible means both within States (‘social order’) and between States (‘international order’) to ensure the rights and freedoms contained in the document.²²⁸

The rights in the UDHR have been elaborated on and given binding force in the ICESCR and ICCPR. The scope of human rights obligations contained in these treaties as well as other international and regional human rights treaties of similar nature will now be examined.

²²⁶Article 22 UDHR states: ‘Everyone, as a member of society, has the right to social security and is entitled to the realisation, through effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.’ (n 32).

²²⁷ *ibid*, article 28.

²²⁸ Asbjorn Eide, ‘Article 28’, in Gudmundur Alfredsson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, 1999), 597, 602 and 612.

2.5.2 The extraterritorial application of the obligations under the ICESCR and other ESCR Instruments

The general obligations provision of Article 2(1) of the ICESCR refers to the States parties' obligation to 'take steps, individually and through international assistance and cooperation' for the realisation of the rights recognised in the covenant.²²⁹ It does not refer to either territory or jurisdiction as delimiting criteria for the application of its provisions. Thus, any intention that a territorial implication is implicit in the provision could be challenged based on the fact that some extraterritorial dimension to the ICESCR obligations seems contemplated in the undertaking by States parties' 'to take steps...through international assistance and cooperation' to achieve full realisation of covenant rights.²³⁰ Fons Coomans clearly demonstrates the relationship between international assistance and cooperation when he stated that 'cooperation is the wider term meaning a relationship providing for mutual advantages for the participating States, while providing assistance is a unilateral act requiring efforts from one State to the benefit of another State.'²³¹ Skogly suggests that an important aspect of the obligation of international assistance and cooperation is to ensure that the rights guaranteed by the ICESCR are not being affected by States actions and inactions in terms of negatively affecting the rights of individuals in other countries, or, that the rights are being abused by third parties.²³² The prevention of abuse by third parties can definitely not be achieved without the States taking positive steps to ensure that such abuse is prevented or halted.

A number of key statements in the General Comments of the CESCR refer to the extraterritorial reach of the obligations contained in the Covenant. In its General Comment on

²²⁹ ICESCR (n 38), article 2(1).

²³⁰ *ibid*

²³¹ Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 1, 9-10.

²³² Skogly, *Beyond National Borders* (n 222), 98.

the right to food, the CESCR stated that State Parties are obligated to ‘take steps to respect the enjoyment of the right to food in other countries, “to protect that right”, to facilitate access to food and to provide the necessary aid when required.’²³³ Similarly, in its General Comment on the right to health, the CESCR stated that, ‘depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.’²³⁴ In General Comment No. 24 on states obligations in context of business activities, the CESCR confirmed that the obligation to protect requires state parties to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities’.²³⁵ Beyond its General Comments, the CESCR has emphasised States extraterritorial obligations in other ways. In its Concluding Observations to Ireland’s 2002 treaty report, the CESCR, employing diplomatic niceties, ‘encouraged’ the Irish government, to ‘do all it can to ensure that the policies and decisions of [the international organisations where it has membership status] are in conformity with the obligations of States under the Covenant, in particular the obligations...concerning international assistance and co-operation.’²³⁶

Just like the ICESCR, the CRC also incorporates obligations, which have an extraterritorial reach. In Article 4, the CRC begins with the imperative to all States parties’ to ‘undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the convention.’²³⁷ This, like the ICESCR does not specifically refer to territory or jurisdiction. Rather, the provision goes on to state that ‘with regard to the economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework

²³³ CESCR, General Comment no. 12 (n 103) para 12, (emphasis added).

²³⁴ CESCR, General Comment no. 14 (n 102), para 39.

²³⁵ UNCESCR General Comment No 24 (104), para 30.

²³⁶ UNCESCR, ‘Concluding Observations: Ireland,’ (5 June 2005) UN Doc E/C.12/1/Add.77, para 37.

²³⁷ CRC (n 67), article 4.

of international cooperation.²³⁸ Thus, it could be argued that the States' obligation would necessarily require positive steps to undertake certain conduct, which, according to the CRC, includes 'all appropriate legislative, administrative, and other measures', and it is additionally required that these measures are implemented within the framework of international cooperation to achieve the rights enshrined in the covenant.

The CRPD also does not contain the territorial or jurisdictional limitation terms. Article 4(2) provides that

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of 'international cooperation,' with a view to achieving progressively the full realization of these rights.²³⁹

Unlike the ICESCR and the CRC, but similar to the UN Charter, the CRPD does not contain a reference to 'international assistance'. Nevertheless, 'international assistance' is now commonly seen to be part of international cooperation' thus, the difference is unlikely to imply a narrower sphere for the extraterritorial obligations.²⁴⁰

In Article 32, the CRPD calls on the State parties to recognise 'the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the convention.'²⁴¹ Hence, in spite of the fact that the territorial State has the primary obligation to comply with the requirements of the treaty, there is also a need for international cooperation to support the national efforts, which, according to Article

²³⁸ *ibid*

²³⁹ *ibid*, article 4(2).

²⁴⁰ Sigrun Skogly, 'Extraterritoriality-Universal Rights without Universal Obligations?' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, 2010), 8 – 82.

²⁴¹ CRPD (n 68) article 32.

4(1)(e) includes the adoption of all appropriate measures to eliminate discrimination on the basis of disability by third parties, including private enterprises.²⁴²

2.5.3 Extraterritorial application of the obligations in the ICCPR and other CPR instruments

The ICCPR like most other CPR instruments, differ from the ICESCR, CRC and CRPD in relation to their obligation's provisions. They make no mention of 'international assistance' or 'international cooperation' but rather, delimit the sphere of their application to either jurisdiction, territory, or both. However, the various treaty bodies have interpreted these delimiting criteria to extend beyond the physical boundary of the State parties. The ICCPR in Article 2(1) mandates each States party to undertake 'to respect and to ensure to all individuals within its "territory" and subject to its "jurisdiction"'.²⁴³

Two contending interpretations have been given concerning this provision. The first considers the expression 'all individuals within its territory and subject to its jurisdiction' as limiting a State Party's obligations recognised under the ICCPR to individuals who are both present within the State's territory and subject to its jurisdiction.²⁴⁴ This interpretation focuses on what its proponents consider as the ordinary meaning of the conjunction, 'and'. They contend that if the drafters had intended that 'jurisdiction' and 'territory' should be read disjunctively, they would have used the word 'or' instead of 'and'.²⁴⁵ The second interpretation on the other hand, is that the Covenant's application is not limited to the territorial confines of the State Parties. This second interpretation of Article 2(1) has been adopted by the Human

²⁴² *ibid*, 4(1)(e).

²⁴³ ICCPR (n 37), article 2(1).

²⁴⁴ Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, 2004) 47-48.

²⁴⁵ Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law' (2005)17 *International Journal of Refugee Law*, 557-564.

Rights Committee. The Committee in *Lopez v Uruguay*, stated that while Article 2(1) imposed an obligation on the State Parties to respect and ensure the obligations under the Covenant to individuals within their territory and subject to their jurisdiction, that language, ‘does not imply that the State party concerned cannot be held accountable for violations of the rights under the Covenant which its agents commit upon the territory of another State’.²⁴⁶

It is difficult to deny the fact that the most natural reading of the language in the general obligations provision of the ICCPR is limited to individuals who are both within the territory and subject to the State Parties jurisdiction.²⁴⁷ However, this logically coherent natural or ordinary meaning of the text does not signify the end of the interpretative enquiry.²⁴⁸ According to the well-established principle of treaty interpretation contained in the Vienna Convention of the Law of Treaties (VCLT), the ordinary or textual meaning of a treaty text has to be interpreted in the light of its context and its object and purpose, particularly where the ordinary or textual interpretation has the potential to render the treaty provisions internally contradictory, or where it is incoherent with its legally correct meaning to the point of absurdity.²⁴⁹ This incoherence was noted by the HRC which explained that ‘it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another State which violations it could not perpetrate on its own territory.’²⁵⁰ Allowing this would lead to a direct contradiction of the basic tenets of international human rights law.

In its General Comment No. 31, the HRC further explained that:

²⁴⁶ *Sergio Euben Lopez Burgos v Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), para 12.3.

²⁴⁷ Erik Roxstrom and Mark Gibney, ‘Human Rights and State Jurisdiction’ (2017) 18 *Human Rights Review* 2, 135.

²⁴⁸ *ibid*

²⁴⁹ *ibid*; Vienna Convention on the Law of Treaties, (23 May 1969) 1155 UNTS 331, article 215.

²⁵⁰ *Lopez*, paragraph, (n 244), paragraph 12.3

While article 2 is couched in terms of the obligations of State Parties towards individuals as the rights-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the rules concerning the basic rights of the human person are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.²⁵¹

Supporting its decision with the holding in *Lopez v Uruguay*, the ICJ in *the Wall* case stated that extraterritorial application of ICCPR obligations is a natural reading of the Covenant provisions considering the object and purpose of the treaty.²⁵² It further maintained that its interpretation was supported by the drafting history, noting that the drafters of the Covenant did not intend to allow States to escape from their obligations when they acted outside their national territory.²⁵³ The ICJ re-affirmed its position in *DRC v Uganda*, where it decided that Uganda, through the conduct of its armed forces in Congo, had violated its obligations under international human rights law.²⁵⁴

Some of the other main treaties addressing civil and political rights, such as, the ACHR, the ECHR, and the CAT, as well as some provisions of the CRC, conceive treaty obligations as operating within the States ‘jurisdiction’.

²⁵¹ UNHRC, General Comment No. 31 (n 95), para 2.

²⁵² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136, para 109.

²⁵³ *ibid* paragraph 109,

²⁵⁴ *Case Concerning Armed Activities on the Territory of The Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Reports 168, paras 215-219

Under the ACHR and the ECHR, the States parties obligations to ‘secure the rights contained in the Conventions have been interpreted by both the Inter-American Commission of Human Rights and the ECtHR as ‘not limited or merely co-extensive with national territory’, but extends to the acts of the States’ ‘agents which produce effects or are performed outside their own territory.’²⁵⁵ Under Article 2 (1) of the CAT, the State parties are obligated to take ‘effective measures to prevent acts of torture in any territory under its jurisdiction.’²⁵⁶ The Committee against Torture addressed the meaning of jurisdiction and territory in its General Comments No. 2 on the Implementation of Article 2 by State Parties.²⁵⁷ Although it did not specifically separate the concepts of territory and jurisdiction like the HRC did with the ICCPR, it interpreted Article 2 (1) as applying not only within the States’ parties’ sovereign territory but also extending to any territory under their jurisdiction.²⁵⁸

2.5.4 Other human rights treaties

There are yet other human rights treaties that do not contain a general provision using the terms ‘territory’, ‘jurisdiction’ or ‘international corporation and international assistance’ to stipulate the scope of applicability of the obligations they contain. These include, the CERD, CEDAW and the ACHPR. In the case of the CERD, there are a subset of obligations that are conceived in the context of the States ‘jurisdiction’. For example, the obligation in Article 3 concerning racial segregation and apartheid applies to parties with respect to the ‘territories under their jurisdiction.’²⁵⁹ Article 6 also provides for the obligation of States to provide remedies with respect to individuals ‘within their jurisdiction’.²⁶⁰ No other Article in the CERD, including

²⁵⁵ Inter-American Commission of Human Rights, *Victor Saldano v Argentina* [1999] Report no38/99, paragraph 17; *Case of Drozd and Janouzek v France and Spain* [1992] EHRR 745, at 91

²⁵⁶ CAT (n 66), article 2 (1).

²⁵⁷ UN Committee against Torture, ‘Implementation of Article 2 by State Parties’ (24 January 2008) UN Doc. CAT/C/GC/2.

²⁵⁸ *ibid*, para 7.

²⁵⁹ CERD (n 64), article 3.

²⁶⁰ *ibid*, article 3.

Articles 2 and 5 that contain a wide range of obligations, provide for any territorial limitation of the Conventions obligations. In *Georgia v Russia*, Russia asserted that based on the absence of a textual limitation of the CERD, the covenant could not apply to its alleged acts stemming from its military intervention in Georgia.²⁶¹ The ICJ acknowledged the lack of restriction in either Article 2 or Article 5 of the CERD, but stated that ‘these provisions generally appear to apply like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.’²⁶²

Just like the CERD, there is no reference to jurisdiction or ‘international assistance or cooperation’ in the general obligations provision of the ACHPR.²⁶³ However, during its 57th session, the African Commission on Human and People’s rights adopted General Comment No.3 on the right to life contained in article 4 of the ACHPR. In paragraph 14 of General Comment No. 3, the African Commission notes that ‘a state has certain obligations to protect the life of individuals outside its territory.’²⁶⁴ According to the Commission, ‘the nature of these obligations depends for instance on the extent the state has jurisdiction or otherwise exercises effective authority, power or control over either the perpetrator or the victim.’²⁶⁵ In paragraph 18 of the General Comment, the African Commission affirms the obligations of states’ to hold accountable corporate nationals domiciled in their territory or jurisdiction responsible for committing or contributing to arbitrary deprivations of life extraterritorially.²⁶⁶ General Comment No.3 further emphasises a broad interpretation of the right to life as the right to a ‘dignified life’, which, according to the Commission includes the ‘realisation of various

²⁶¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary objections) [2011] ICJ Reports 70, para 193-194

²⁶² *ibid*, para 109.

²⁶³ See ACHPR (n 60), article 1.

²⁶⁴ African Commission on Human and Peoples Rights, General Comment No. 3: The Right to Life (Article 4), (4-18 November 2015) African Union Executive Council Doc. Ex.CL/921 (XXVII), para 14.

²⁶⁵ *ibid*

²⁶⁶ *ibid*, para 18.

economic, social and cultural rights’ - rights whose infringement may in certain circumstances entail violations of the right to life.²⁶⁷

As for the CEDAW, there is no reference to any delimiting criteria in its provisions, however, the CEDAW Committee has stated in its General recommendations that ‘the obligations of States Parties...apply without discrimination both to citizens and non-citizens, within or outside their territory.’²⁶⁸ The Committee stressed that ‘the State parties are responsible for ‘all their actions affecting human rights, regardless of whether the affected persons are in their territory’ or outside it.’²⁶⁹

2.5.5 Findings on the extraterritorial applicability of human rights treaty obligations

Contrary to the restrictive interpretations of international human rights obligations, the various human rights treaty texts and the relevant treaty bodies do suggest that the application of human rights obligations are not limited to the territorial boundaries of States. The UN Charter declares that the basis for the establishment of a universal framework for the protection of human rights is to ensure that all States work together to ensure respect and protection for such rights. All other human rights instruments, binding or non-binding, are built on the basis of the objects and purposes expressed in the UN Charter.²⁷⁰ A denial of the extraterritorial applicability of human rights obligations will go against the very essence of international human rights law. It is on this basis that the various human rights supervisory bodies interpret the treaty provisions as having extraterritorial flavour. Thus, the key question should not be whether international human rights obligations extend extraterritorially, but rather, in what circumstances this occurs.

²⁶⁷ *ibid*, para 43.

²⁶⁸ UN Committee on the Elimination of Racial Discrimination against Women, ‘General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All forms of Discrimination against Women (16 December 2010) UN Doc. CEDAW/C/GC/28, para 12.

²⁶⁹ *ibid*, para 12.

²⁷⁰ See section 2.2.1 above.

The majority of the human rights treaties discussed above, particularly those addressing civil and political rights (-the ICCPR, CAT, ACHR, and the ECHR), conceive the State parties' obligations as operating within the States' 'jurisdiction'. Under these treaties, States are obligated to ensure the protection of the human rights of individuals 'within their jurisdiction'.²⁷¹ The ICJ not only confirmed the extraterritorial reach of the term 'jurisdiction' as contained in the ICCPR and other human rights treaties which expressly refer to the term.²⁷² It also read the concept into the ICESCR in the Wall Advisory Opinion,²⁷³ the ACHPR and the CRC in *DRC v Uganda*,²⁷⁴ and the CERD in *Georgia v Russia*,²⁷⁵ as a trigger for the extraterritorial application of the obligations contained in the treaties.

Thus, it can be said that the idea of jurisdiction in international human rights law is a threshold criterion.²⁷⁶ In other words, where a State is said to have jurisdiction over individuals the State has an obligation to protect them from human rights abuses by third parties, and where jurisdiction is not established, no such obligation arises.²⁷⁷ This would mean that in order to establish whether a State has human rights obligations towards individuals located beyond the States territorial confines, it is essential to determine that the State has extraterritorial jurisdiction to that effect.

Most interpretations of the term jurisdiction as it applies extraterritorially, have been linked to the consequences of the application of the ECtHR standard of effective control over foreign territory or persons.²⁷⁸ In determining whether a State has jurisdiction under the various

²⁷¹ See section 2.5.3 above.

²⁷² *The Wall Advisory Opinion* (n 252), paragraph 109.

²⁷³ *ibid*, paragraph 112

²⁷⁴ *DRC v Uganda* (n 254), para 216- 217.

²⁷⁵ *Georgia v Russia* (n 261), para109.

²⁷⁶ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012)25 *Leiden Journal of international Law* 4, p. 860.

²⁷⁷ *Ibid*, pp. 860-864.

²⁷⁸ See *Loizidou v Turkey* (Preliminary Objections) - 15318/89 [1995] ECtHR 10; *Cyprus v Turkey* 2001-IV ECtHR 56, 77; *Drozdz v Janousek v France*, [1992] ECtHR 240, 91; *Bankovic et al v Belgium et al* [2001] ECtHR 890; *Al-Skeini v United Kingdom* [2011] ECtHR 53, 84.

human rights treaties, two major questions are usually up for determination. Does the State exercise effective control of an area or territory in which the victim/victims of the alleged human rights violation is located (spatial model of jurisdiction)?²⁷⁹ Or, does the State through its agents exercise authority or control over the individual victim of the alleged human rights violation (personal model of jurisdiction)?²⁸⁰ It is the exercise of control/authority that brings the individual/individuals within the jurisdiction of the State for the purpose of the application of the States human rights obligations. Conversely, a lack of control/authority, and invariably, a lack of jurisdiction would mean that a States human rights obligations will not apply extraterritorially.

However, this approach does not do justice to the idea of human rights, nor does it sufficiently consider global and social changes caused principally by the globalisation and transnationalisation of relations and operations. States spheres of influence are distributed globally in different ways. It is now possible for a State, through its nationals, policies and programs, to influence the human rights of individuals extraterritorially, without having to exercise effective control directly over territory or persons. Moreover, restricting the States' ability to influence human rights to only territory and persons within its physical control goes against the universality of human rights. If the universal validity of human rights rests on the idea that human rights are valid in all countries, and that all States are bound to promote the respect human rights everywhere, then the limitation of the obligations of States to the current notion of jurisdiction must be questioned.

²⁷⁹ In *Loizidou v Turkey* (n 278), the ECtHR held in respect of the ECHR that, 'although Article 1 sets limits on the reach of the Convention, the concept of jurisdiction under this provision is not restricted to the national territory of the high contracting parties...bearing in mind the object and purpose of the Convention, the responsibility of a contracting party may also arise when as a consequence of military action-whether lawful or unlawful- it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration'-para 62.

²⁸⁰ According to the court in *Alskeini v United Kingdom* (n 278), 'It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual', para 137.

The difficulty in establishing jurisdiction based on the effective control standard was captured by Milanovic in his discussion of the Genocide case. According to him:

Since it was impossible to prove the required degree of certainty that the Srebrenica genocide was attributable to Serbia under either the test of complete control or the test of effective control, the Court nonetheless found Serbia responsible for failing to prevent that genocide, i.e., for its own wrongful act of failing to exercise due diligence to prevent violations by third parties.²⁸¹

Thus, the court relied on the Serbia's ability to prevent genocide even when effective control could not be established. The ICJ, provided in detail, the basis for the establishment of the due diligence obligation to protect human rights extraterritorially.

2.5.6 The criteria for establishing the extraterritorial obligation to protect

According to the ICJ in the *Genocide* case,

A State will only violate its due diligence obligations when it manifestly failed to take all measures to prevent genocide which are within its power and which might have contributed to preventing the violation.²⁸²

Discussing the criteria for assessing when a State has discharged the due diligence obligation, the ICJ stated:

The first which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing genocide. This capacity itself depends, among

²⁸¹ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011), 47.

²⁸² *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, para 430.

other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.²⁸³

Furthermore, the court added a knowledge requirement, noting that

a State's obligation to prevent, and the corresponding duty to acts, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of committing genocide or reasonably suspected of harbouring specific intent...it is under a duty to make such use of these means as the circumstances permit.²⁸⁴

Thus, according to the ICJ, where a state has the capacity to effectively influence a third party and such a state can foresee or has knowledge that such third party is committing, about to commit or has committed genocide, such a State may be held responsible for failing to prevent genocide or punishing the perpetrators. Thus, even in the absence of effective control over territory or persons, the state can be held responsible for failing to exercise due diligence in preventing the third party from committing genocide when the State has the capacity to

²⁸³ *ibid*

²⁸⁴ *ibid*, para 431.

influence the third party's actions and has knowledge of its potential to cause harm or that such harm has been committed. In this case, it is the act or omission of the state in relation to the third party that brings the individual under the power of the State and triggers corresponding obligations on the state to exercise due diligence in protecting his or her human rights against third party abuse.²⁸⁵

However, the ICJ limited its judgement to defining the specific scope of the obligation to prevent genocide. It stated that it did not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for states to prevent certain acts'.²⁸⁶ Nevertheless, the court acknowledged that States may bear obligations other than the prevention of genocide, which 'protect essential humanitarian values, and which may be owed *erga omnes*'.²⁸⁷

The concept of *erga omnes* was introduced into positive law by the ICJ in the *Barcelona Traction* case of 1970, when determining that *erga omnes* obligations are the concern of all States. According to the court, because of the importance of the obligations involved, all States can be held to have a legal interest in their protection.²⁸⁸ The ICJ reasoned that

Such obligations derive, for example, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.²⁸⁹

The court in this passage, did not clarify whether its reference to 'basic rights of the human person' was synonymous with human rights generally. However, in a latter part of the

²⁸⁵ Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extraterritorial Obligations of States that Bind Corporations' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013).

²⁸⁶ *Bosnian Genocide* case (n 282), para 429.

²⁸⁷ *ibid*, para 147.

²⁸⁸ *Barcelona traction Light and Power Company ltd* (Second phase) [1970] 3 ICJ Rep 3, para 33.

²⁸⁹ *ibid*, para 34.

judgement, the court indicated that it had intended to distinguish between human rights in general and basic rights of the human person. The court emphasised that in contrast to the ECHR, ‘which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim’,²⁹⁰ ‘on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.’²⁹¹

Here, the court appears to suggest that while basic rights of the human person give rise to obligations *erga omnes*, and are appropriate for protection by all States regardless of where the victim is located, other human rights, can be espoused, under the agreements embodying such rights, only by the State of nationality of the victims.

This pronouncement is problematic, particularly when the need to classify human rights as either ordinary or basic arises. It has been suggested the term ‘basic rights’ refers to fundamental rights;²⁹² that the irreducible core of rights, deemed non-derogable under the ICCPR, ECHR and ACHR constitute fundamental rights.²⁹³ However, that irreducible core consists of only four rights- the right to life, the prohibition of slavery, torture and retroactive penal measures. It is not clear whether there would be consensus reaching beyond these limited set of rights. While some may insist that due process rights are fundamental and indispensable, others would consider that the rights to food, adequate standard of living and other basic needs take precedence.²⁹⁴

²⁹⁰ *ibid*, para 91.

²⁹¹ *ibid*

²⁹² It has been suggested that fundamental rights refers to ‘consistent patterns of gross violations of certain rights to such a critical level that it may be regarded as a breach of customary law.’ However, this position would hold true if applied to all internationally recognised human rights, rather than to ‘fundamental rights’ only. See, Theodore Meron, ‘On a hierarchy of International Rights’ (1986) 80 AJIL 1, p. 6.

²⁹³ *ibid*, p. 11.

²⁹⁴ *ibid*

Beyond this, an examination of the provisions of the UN Charter,²⁹⁵ the UDHR,²⁹⁶ the ICCPR,²⁹⁷ the CERD²⁹⁸ and the CEDAW,²⁹⁹ reveals that the terms ‘human rights’, ‘freedoms’, ‘fundamental human rights’, ‘fundamental freedoms’, ‘rights and freedoms’, and most commonly, ‘human rights and fundamental freedoms’ are generally used interchangeably. This is an indication that there is no substantive or definable legal difference between these terms. In these instruments at least, human rights are not inferior to fundamental rights and freedoms. They are the same.

Notwithstanding the above discussion, the ICJ in the *Bercelona Traction* case is clear on one issue. Its reference to the body of general international law and to universal or quasi-universal agreements suggests that a fundamental right must be firmly rooted in international law and that claims or goals, would not qualify. Since the courts judgement, there has been a growing acceptance in contemporary international law of the principle that, apart from agreements conferring on each State party locus standi against the other State parties, all States have a legitimate interest in and the right to protect against human rights generally. The universal acceptance in principle of human rights by States of all political stripes and their invocation at domestic and international levels, coupled with the active involvement of virtually all States, individually and collectively, to promote and protect human rights through the UN and regional human rights systems in Africa, the Americas and Europe, has led to a certain belief that states have assumed human rights obligations beyond the mere acceptance of treaty law.³⁰⁰ Endorsing this view, the International Law Institute wrote in its Resolution on

²⁹⁵ (n 30) Preamble, Articles 1(3), 13(b), 55(c), 62(2), 76(c).

²⁹⁶ (n 32) Preamble, Articles 2, 29(2), 30.

²⁹⁷ (n 37) Articles 2(1), 3, 5(1), 5(2).

²⁹⁸ (n 64) Preamble, Article 1(1).

²⁹⁹ (n 65) Preamble, Articles 1, 3.

³⁰⁰ Robert Howse and Makau Mutua, ‘Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation’ (Buffalo Legal Studies Research Paper Series 2010/008, 2001) <https://www.iatp.org/sites/default/files/Protecting_Human_Rights_in_a_Global_Economy_Ch.htm> accessed 28 August 2019.

the Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, that

Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights.

This international obligation, as expressed by the International Court of Justice is *erga omnes*; it is incumbent on every state in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.³⁰¹

If the universal respect of human rights is to be achieved, it is necessary that this emerging approach be adopted to ensure that the international community as a whole has a legal interest in their protection.³⁰²

Thus, with this understanding, a detailed consideration of the criteria for establishing extraterritorial obligation to protect based on the *Genocide* decision will now be undertaken.

³⁰¹ The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, 63 *Institute De Droit International Annuaire* 338 (1989), article 1.

³⁰² According to the Commentary to the Maastricht Principles which focus on ESCR but are expressed as equally applicable to CPR, 'the preservation of human rights is in the interest of all states, even in the absence of any specific link between the state and the situation where human rights are violated: they are owed *erga omnes*. Thus, while the beneficiaries of human rights obligations are the rights-holders who are under a state's authority and control, the legal obligations to ensure the rights in question are owed to the international community as a whole.' –Olivier De Schutter et al, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1, 1103.

2.5.6.1 The Capacity to influence effectively

According to the ICJ, the first criterion for establishing the extraterritorial obligation to exercise due diligence is the ‘capacity to influence effectively’.³⁰³ In describing the elements of this criterion, the court stated that such capacity depends, *inter alia*, on the geographical distance of the state concerned from the scene of the events, as well as links of all other kinds, between the state and the main actors in the event. According to the court, physical proximity is not necessarily decisive.³⁰⁴ This point is very plausible especially as the advent of globalisation has collapsed the concept of space,³⁰⁵ while introducing connections such as economic, political, regulatory, financial and other links between States and TNCs.

One apparent example of the application of these links are international investments. States are usually very active in the investment activities of their TNCs, they provide financial assistance through pension schemes and Export Credit Agencies (ECA), which help TNCs to carry out their capital intensive projects overseas.³⁰⁶ These schemes are regulated by the domestic legislation and policies of the State, and TNCs are heavily reliant on them.³⁰⁷ As such, the States’ investment behaviour signalling approval or disapproval of TNC activities could go a long way in influencing the human rights impact of TNC activities. The threat of divestment will largely influence the TNCs to follow the direction desired by the State. Precisely because States have the power to influence the activities of TNCs through investment schemes, it could

³⁰³ *Bosnian Genocide*, case (n 282), para 430.

³⁰⁴ Cedric Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’ in Malcom Langford, Wouter Vandenhoe, martin Scheinin and Willem Genutgen (eds), *Global Justice, State Duties: The extraterritorial scope of economic, social and cultural rights in international law* (Cambridge University Press, 2013), 205.

³⁰⁵ Barney Warf, ‘Time-Space Compression’ (*Oxford Bibliographies*, 6 May 2015) <<http://www.oxfordbibliographies.com/view/document/obo-9780199874002/obo-9780199874002-0025.xml#firstMatch>> accessed, 7 June 2017.

³⁰⁶ Karyn Keenan, ‘Export Credit Agencies and International Law of Human Rights’ (*Halifax Initiative Coalition and ESCR-Net*, January 2008), 1 <http://www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf> accessed 7 June 2017.

³⁰⁷ Cedric Ryngaert, (n 304); Ozgur Can and Sara L. Seck, ‘The Legal Obligations with Respect to Human Rights and Export Credit Agencies’ (*Halifax Initiative Coalition and ESCR-Net*, 4 June 2006), 5 <<http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/HR%20and%20ECAs%202006.pdf>> accessed 7 June 2017.

be argued that they have a due diligence obligation to prevent such TNCs from negatively affecting the human rights of the individuals located in the areas where they operate.³⁰⁸

Another major example of a connecting link is Bilateral Investment Agreements (BIAs). Home States conclude BIAs with host States in favour of their corporate nationals who invest in the host States.³⁰⁹ These agreements include regulatory terms that govern the investments of their corporate nationals in foreign States.³¹⁰ Typically, they introduce provisions that emphasise protection to foreign corporate investors without any regard to the human rights consequences of foreign investment.³¹¹ Thus, corporate investors may carry out their activities without due regard to the human rights of the individuals located within the areas where they operate. The dispute that arose as a result of the provisions of the US-Ecuador Bilateral Investment Treaty is a good illustration of this problem.³¹² The Agreement was signed between the United States of America and Ecuador in favour of Chevron (successor of Texaco), a US corporation carrying out oil exploration activities in Ecuador. It included a provision granting Texaco immunity from all suits arising from its operations.³¹³ In the event of gross human rights abuse resulting from environmental pollution of the Ecuadorian Amazon, the affected indigenous people were estopped from claiming compensation in the Ecuadorian courts against the corporate entity.³¹⁴

³⁰⁸ A major exemplification of this point is the exclusion of Wal-Mart because of its poor human rights record from the Norwegian State pension fund. - See, Ken McPhail, 'Corporate Responsibility for Human Rights and Business Schools' Responsibility to Teach it: Incorporating Human Rights into the Sustainability Agenda' in Mariam Cadiz Dyball, Ian Thomas and Richard M. S. Wilson (eds), *Sustainability in Accounting Education* (Routledge 2014), 110-111.

³⁰⁹ Robert McCorquodale and Penelope Simmons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law (2007) 7 *The Modern Law Review* 598, 621-622.

³¹⁰ *ibid*

³¹¹ Muthucumaraswamy Sornarajah, *International Law on Foreign Investment* (Cambridge University Press 2012), 222.

³¹² *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v The Republic of Ecuador*, Interim Award, 1 December 2008, <<http://www.italaw.com/documents/Chevron-TexacovEcuadorInterimAward.pdf>> accessed 7 June 2017.

³¹³ *ibid*, para 48.

³¹⁴ See *Chevron and Texaco v The Republic of Ecuador*, Final Award 31 August 2011, 140, <<http://www.italaw.com/sites/default/files/case-documents/ita0154.pdf>> accessed 7 June 2017. The issues arising from the US-Ecuador Agreement are discussed in more detail in Chapter 3 of this thesis.

As home States have the leverage of concluding such agreements with the host States, they have the capacity to effectively influence their corporate nationals' operations by including human rights obligations and complaints standards for their corporate nationals.

Further explaining the States' 'capacity to influence effectively', the court stated that such capacity to effectively influence varies greatly from one State to another depending on the States' legal position vis-à-vis the actors causing the harm.³¹⁵ Based on this, it has been stated that following the international law principle of active personality,³¹⁶ the home states, (where TNCs are registered and thereby nationals) should regulate the activities of their corporate nationals by implementing domestic legislation that binds their extraterritorial operations.³¹⁷ The CESCR has indicated that States should take steps

to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where state parties can take steps to influence other third parties in respect of the right, through legal or political means such steps should be taken in accordance with the Charter of the United Nations and applicable international law.³¹⁸

In its General Comment concerning the right to health, the CESCR noted that

in order to comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other Countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties

³¹⁵ *Bosnian Genocide* case (n 282), paragraph 430.

³¹⁶ The active personality principle also known as the 'nationality principle' is a principle of international law, which recognises that a State can adopt laws and regulations governing the conduct of the State's nationals while outside of the States borders.

³¹⁷ See, General Comment No. 3 of the African Commission (n 264), para 18; Surya Deva, Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: 'Who Should Bell the Cat?' 92004) 5 *Melbourne Journal of International Law* 37, 42.

³¹⁸ UNCESCR, General Comment No. 15, (n 102), para 33.

by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.³¹⁹

Concerned at reports of adverse effects of operations by TNCs registered in the United Kingdom but conducted outside its territory that affect the rights of indigenous peoples to land, health, environment and an adequate standard of living, the Committee on the Elimination of Racial Discrimination called upon the United Kingdom ‘to take appropriate legislative and administrative measures to ensure that acts of transnational companies registered in the State party comply with the provisions of the Convention.’³²⁰

After the CERD had received submissions from indigenous peoples in the United States complaining about the conduct of Canadian mining Companies on indigenous lands in the United States, the CERD, in its Concluding observations to Canada noted that Canada should

Take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of right of indigenous peoples in territories outside Canada. In particular, the Committee recommends that [Canada] explore ways to hold transnational corporations registered in Canada accountable.³²¹

Noting with concern the reported participation and complicity of Australian mining companies in serious human rights violations in third countries, the Committee on the Rights of a Child called upon the state party to ‘examine and adapt its legislative framework (civil and administrative)...regarding abuses to human rights, especially child rights, committed in the territory of the state party or overseas and establish monitoring mechanisms, investigation, and

³¹⁹ UNCESCR, General Comment No .14, (n 102), para 39.

³²⁰ UN Committee on the Elimination of Racial Discrimination, ‘Concluding Observations: United Kingdom of Great Briton and Northern Ireland’ (4 September 2011) CERD/C/GBR/CO/18-20, paragraph 29.

³²¹ UN Committee on the Elimination of Racial Discrimination, ‘Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on Elimination of Racial Discrimination’ (17 March 5 2007) U.N. Doc. CERD/C/CAN/CO/18).

redress of such abuses, with a view towards improved accountability, transparency and prevention of violations.³²²

However, a common problem with regards to the TNCs is the separation of the legal personalities of the parent and the subsidiary. TNCs operate extraterritorially through subsidiaries that are registered in the States in which they conduct their activities.³²³ By virtue of such registration, they are considered as separate legal entities from their parent companies that are registered in the home States.³²⁴ The home states of the parent companies will typically be incompetent or reluctant to regulate corporate activity abroad.³²⁵ There is, however, practice developing in some jurisdictions where parent companies are linked to the foreign subsidiaries when it can be established that the conduct that led to the human rights abuse by the foreign subsidiaries was set in motion by the parent company, or where the parent company benefits from the human rights harm caused by its foreign subsidiary.³²⁶ However, for reasons to be discussed in chapter 3 of this thesis, these methods have not recorded any significant success.

2.5.6.2 The Knowledge and foreseeability requirement

The second part of the ICJs analysis which runs cumulatively with the first, focuses on the element of knowledge and foreseeability. According to the court, ‘a State’s obligation to prevent, and corresponding duty to act, arise at the instant that the State learns of, or should

³²² UN Committee on the Rights of the Child, ‘Concluding Observations: Australia’ (June 2012) CRC/C/AUS/CO/4, para 28 (a).

³²³ Section 54 of the Companies and Allied Matters Act (‘CAMA’) of Nigeria provides that ‘subject to section 56 to 59 of this Act, every foreign company which before or after the commencement of this Act was incorporated outside Nigeria, and having the intention of carrying out business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose,’ Companies and Allied Matters Act 1990 CAP C20 Laws of the Federation of Nigeria 2004.

³²⁴ *Barcelona Traction, Light and Power Company (Belgium v Spain)* (Second Phase merits) [1970] ICJ Reports 3, para 184.

³²⁵ A detailed discussion on the issues arising from the separate legal personality of the parent and subsidiaries is undertaken in chapter three of this thesis.

³²⁶ See generally, Jan Wouters and Cedric Ryngaert, ‘Litigation for overseas corporate human rights abuses in the European Union: The Challenge of jurisdiction’ (2009) 40 *The George Washington International Law Review* 4, 939-975.

normally have learned of, the existence of a serious risk that genocide will be committed.³²⁷ Thus, a state's obligation arises not only if it is aware or was made aware of the risks the TNCs activities posed to human rights, but also if the state should have been aware of the risks.³²⁸ According to the commentary to the Maastricht principles, it is this second strand of knowledge that provides the normative backing for the due diligence obligation to protect.³²⁹ This is because it requires an assessment as to what actions a State must take to implement preventive measures, and to ensure cessation of violations as well as provide effective remedies when the rights are negatively impacted.³³⁰ This element of foreseeability also provides the limiting factor for the knowledge requirement as the State cannot be responsible to provide measures against what is unforeseeable.³³¹

The ICJ in the Genocide case went on to explain that the knowledge or foreseeability requirement, which triggers the State's positive obligations might result from 'actual or constructive' awareness of the relevant events which should be interpreted in the light of any history which the actors may have had in relation to the harm.³³² According to McCorquodale and Simmons:

It cannot reasonably be argued today that states do not know that their corporate nationals (or the latter's foreign subsidiaries) may engage in human rights violating activity in their extraterritorial operations. The negative impact of some extraterritorial corporate activity on human rights, particularly economic, social and cultural rights, is now well documented. In addition, there are increasing numbers of investor and

³²⁷ *Bosnian Genocide* case (n 282) paragraph 431.

³²⁸ Commentary to the Maastricht Principles (n 302), 20.

³²⁹ *ibid*

³³⁰ *ibid*

³³¹ The same measures suggested by the various treaties and treaty bodies for the implementation of the obligation to protect within the States territorial boundaries (see section 2.3.3) are also suggested for the regulation of the extraterritorial activities of third parties. - See section 2.7.1.

³³² *Bosnian Genocide* case, (n 282), para 431.

consumer campaigns in relation to extraterritorial TNC human rights impacts abroad, and of claims being brought in national courts against TNCs for egregious violations of human rights...At the very least, it can be asserted that states have constructive knowledge that corporate nationals may violate human rights standards in their extraterritorial operations.³³³

Citing examples of such circumstances of constructive knowledge, they noted that ‘where the corporate nationals invest in conflict zones, failed states or repressive regimes, and engage in a business relationship with host State governments or a non-state actor party to a civil conflict’, they are already put on notice of the imminent risk of human rights harm, and must then set up measures to prevent such harm from occurring.³³⁴ This is consistent with the general international law principle, which posits that where a state knows that its national’s activities will cause, or are causing harm to other States or persons, it has a duty to prevent such harm.³³⁵ Thus, whether by actual or constructive knowledge, a state is aware or can foresee any extraterritorial harm or potential harm by its TNCs, it has an obligation to take steps to prevent the harm, end it, and remedy it.

³³³ McCorquodale and Simmons (n 309), 619 – 620.

³³⁴ *ibid*, 620.

³³⁵ The *Trail Smelter* decision is usually the starting point of reference to this general principle. - see *Trail Smelter (United States of America v Canada)* (first decision) [1941] 35 AJIL 684. The ICJ later acknowledged the principle as that of general international law in the *Corfu Channel Case, - Corfu Channel (United Kingdom v Albania)* [1949] ICJ Reports 4, at 22. Since then, the ICJ has repeatedly applied the principle to the different fields of international law. - see, *Legality of the Threat of Use Nuclear Weapons, Advisory Opinion* [1996] ICJ 226. See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ 136, 195; *Legality of the Threat of Use Nuclear Weapons, Advisory Opinion* [1996] ICJ 226. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ 136, 195.

2.6 Conclusion

The states' obligation to protect is well established in international human rights law. The obligation includes the duty to exercise due diligence in taking all reasonable measures/steps, in accordance with the states' capabilities, to prevent human rights harm by third parties, including TNCs, to stop the continuity of such harm and to provide adequate remedy when the harm occurs. It is generally accepted both in jurisprudence and scholarly work on the subject that this obligation primarily rests on the territorial State, i.e., the State where the human rights harm in issue occurs. Despite the objections to its extraterritorial application, this chapter has examined the basic international and regional human rights law treaties, case law and publications by scholars in the field, and established that human rights obligations also include an extraterritorial focus. Thus, while it is true that international human rights law places the primary obligation to protect on the host States of TNCs, the home states have a concurrent obligation to protect human rights as well. In this regard, it has been asserted that it is the concept of jurisdiction defined as effective control that brings the individual under the power of the home state, triggering its obligations towards the individuals in the host state. However, the current State of globalisation and transnationalisation has extended the States sphere of influence beyond the confines of the current concept of jurisdiction. It does not satisfactorily respond to the state's obligation to protect individuals against the harmful operations of private business entities, which the State may not have control over, but may be able to influence by way of legal means. Nevertheless, available case law and decisions indicate that by wielding effective influence over a corporate entity coupled with the requisite knowledge of its violative conduct, a state may well have positive human rights obligations towards individuals in foreign territories, whether or not it exercises effective control. Evidently, a theoretical case can be made for all States to protect human rights both within their territories and extraterritorially, based on their capacity to prevent human rights harm. However, the reality is that at present,

there is no international legally binding instrument that expressly requires States to regulate the activities of TNCs in international human rights law beyond their national boundaries,³³⁶ and case law on extraterritorial jurisdiction is still limited by notions of effective control/authority. TNCs operate with transnational fluidity. Their activities span across national boundaries and different national legal orders. Without an international instrument that takes their transnational nature into consideration in providing regulatory standards, there may be challenges in the implementation of the obligation to protect and the ability of victims to gain access to remedy for corporate related abuse. The next chapter examines these challenges.

³³⁶ At its 26th session in June 2014, the Human Rights Council established an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect human rights with a mandate to elaborate an international legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises. A Zero Draft of the binding instrument was released in July 2018. Its provisions are examined in chapter 5 of this thesis.

CHAPTER 3

**PRACTICAL IMPEDIMENTS TO THE IMPLEMENTATION OF THE
OBLIGATION TO PROTECT IN THE DOMESTIC REGULATION OF
TRANSNATIONAL CORPORATION**

3.1 Introduction

Although there are credible theoretical explanations for the duty of both host and home states to protect individuals against international human rights violations by TNCs, there are certain factors that impede the implementation of this duty in practice.

It should be noted that the activities of TNCs across national boundaries is much more than a step across a geographical line.¹ It is also a step into different economic, social, and legal settings which largely influence the scope and content of state regulations.² As most host states (who bear the primary responsibility for protecting individuals against TNC operations that result in human rights violations) are still in the process of developing their economies, TNC operations have become a crucial factor for economic growth.³ Their uniquely powerful position makes it easy to influence decision making by the governments of the host states.⁴ This is why it is inevitable that the more economically stable home states equally take up responsibility to ensure that the activities of their foreign subsidiaries do not result in human rights violations.⁵ However, regulation by home states is not without its own problems. The

¹ William C. Frederick, James E. Post, and Keith Davis, *Business and society: corporate strategy, public policy, Ethics* (7th edn, McGraw Hill Inc. 1997), 187.

² Edwin C. Mujih, *Regulating Multinationals in Developing Countries': A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower Publishing Limited 2012), 69.

³ The **host state** is any state, other than the home state, in which a multinational company operates, often through subsidiaries. In foreign direct investment terms, it is the state receiving the investment. In the context of human rights abuses associated with corporate activity it is also sometimes called the **territorial state**, as it is the state in whose territory the abuses occur.

⁴ Sarah Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises,' in Menno Kamminga and Sam Zia-Zarifi (eds.) *Liability of Multinational Corporations under International Law*, (The Hague, Kluwer Law International 2000), 78.

⁵ The **home state** is the state of incorporation or registration of the TNC, where it has its legal address or registered main office. In legal terms, this place is known as the centre of TNCs affairs. See Oliver De Schutter, 'Sovereignty-plus in the era of interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations' (CRIDHO Working paper 2010/5), 6.

extension of regulation from the home state to activities of TNCs taking place in host states raises questions on jurisdiction, while the complex, multifaceted structure of the corporate entities presents procedural obstacles.

This chapter begins with a discussion on the specific issues that impede the host states execution of its international human rights law duty to protect. It will address how and why these impediments have made home states more attractive to victims who wish to seek remedies for the harm caused by TNCs. The chapter will go on to examine the various attempts at extraterritorial regulation of TNCs by home states, and the associated limitations of such attempts. In conclusion, this chapter will address how the impediments facing both host and home states affect their international human rights law obligation to protect individuals against the operations of TNCs that result in the violation of their human rights.

3.2 Host States regulation of TNCs

Although host states are under an international human rights obligation to use their national legal structures to prevent harmful TNC operations from negatively impacting human rights,⁶ most of these states are developing states with the principal objective of economic development.⁷ In many host states, domestic legislation is heavily compromised by the economic considerations of the states' unbalanced relationship with TNCs.⁸ TNCs often take

⁶ Article 2 (1) of the International Covenant on Civil and Political Rights provides that the duty of the state to protect human rights is to be applied to all individuals 'within its territory and subject to its jurisdiction...'; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). This is also the position of the Committee on Economic, Social and Cultural Rights regarding the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)). See Committee on Economic, Social and Cultural Rights, 'General Comment No. 12: The right to adequate food, Art. 11, ¶ 15' U.N. Doc. E/C.12/1999/5 (May 12, 1995).

⁷ David Kinley and Junko Tidaki, 'From Talk to Walk: The Emergence of Human Rights Obligations for corporations at International Law' (2003-04) 44 *Virginia Journal of International Law* 4, 938; Edwin C. Mujih, *Regulating Multinationals in Developing Countries* (Gower Publishing Limited, 2012), 69; Simons and Macklin provide a full discussion on the limitations of domestic laws and legal mechanisms from a variety of states. See Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and Home State Advantage* (Routledge, 2014), Chapter 4.

⁸ *ibid*

advantage of the development needs of these states and co-operate with the governments to engage in irresponsible behaviour that results in human rights violations. This problem is exacerbated by the fact that some states who have the desire to implement their international obligations do not possess the requisite means and mechanisms to do so.⁹

Using factual examples of cases where the issue of TNCs and human rights have been addressed, the following sections will demonstrate how economic exigencies have rendered many developing host states unwilling or unable to apply their national legislation in regulating the activities of TNCs.

3.2.1 Unwillingness to regulate

When a state is unwilling to regulate it means that the state has the capacity to regulate but chooses not to do so, and therefore not to fulfil its obligation. The reasons for the states' unwillingness vary, but in the field of business and human rights, two reasons stand out: The pursuit of economic gain and corruption.

3.2.1.1 The pursuit of economic gain

Transnational corporations, through their global economic activities, serve as valuable channels of technology, create employment, provide means through which local firms can increase their productivity and export potential, and diversify the economy.¹⁰ Due to the anticipated economic benefit to be derived from the corporations activities, some developing states, (who, because of their vast deposits of natural resources, are usually host to TNCs who

⁹ Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (2009) *Netherlands International Law Review* 2, 176-177.

¹⁰ Elisa Giuliani, 'Multinational Corporations' Economic and Human Rights Impact on Developing Countries: A Review and Research Agenda' (Discussion Papers del Dipartimento di Economia e Management – Università di Pisa n. 158, September 2016), 2 <<https://www.ec.unipi.it/documents/Ricerca/papers/2013-158.pdf>> accessed 10 9 April 2016..

explore, exploit and produce these resources), mortgage their capacity to regulate the activities of TNCs by deliberately tailoring their national legislation towards assisting TNCs to evade human rights standards.¹¹ In such situations, TNCs will likely act with impunity as the incentives for state officials to act in the interest of its citizens have been compromised. A major example that reflects this attitude of host states is the mine waste dumping incident which took place in the Ok Tedi and Fly rivers in Papua New Guinea.

The Ok Tedi mine is operated by the consortium, Ok Tedi Mining limited (OTML), a joint venture led by the Australian company, Broken Hill Proprietary Company limited (BHP) as majority shareholder and mine operator for the most part of its operations.¹² The mine which is situated by the Ok Tedi River, a tributary of the Fly river was developed in the 1980's to exploit the large copper and gold deposits in the region.¹³ About 250 indigenous communities live along the Ok Tedi and Fly rivers relying on the water, adjacent land and forests for their sustenance.¹⁴ From the outset, the Ok Tedi mine has been one of the country's most important sources of foreign exchange and has accounted for a large percentage of the country's annual GDP.¹⁵ Over the span of three decades, the mine had been dumping its waste into the Ok Tedi river. Thousands of people living along the river, who are dependent on the local natural

¹¹ Martin-Joe Ezeudu, 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court' (2011) 11 *African Human Rights Journal* 1, 36-43.

¹² Lawrence Kalinoe and M. J. Kuwimb, 'Customary Land Owners Right to Sue for Compensation in Papua New Guinea and the Ok Tedi Dispute' (1997) 25 *Melanesian Law Journal* 65, 2: 'An American transnational, Kennecott Copper Corporation, carried out the initial explorations in the late 1960s but withdrew from developing the mine in the mid-1970s, shortly before Papua New Guinea's Independence from Australia. In 1981, amidst soaring gold prices, OTML was created as a truly transnational consortium to operate the mine, with Australia's BHP 30 percent interest), America's Amoco Minerals Corporation 30 percent, a German industrial conglomerate, 20 percent, and the Papua New Guinea Government, 20 percent. The operation of OTML is conducted by BHP. In recent times, the ownership of OTML is being restructured to give BHP 52 percent, the Papua New Guinea Government 30 percent and the Metal Mining Corporation, 18percent'.

¹³ Amnesty International: *Injustice Incorporated: Corporate abuses and the human right to remedy* (Report) (7 March 2014) AI Index POL 30/001/2014, 81.

¹⁴ *ibid.*

¹⁵ World Wide Fund For Nature (WWF), 'Ok Tedi, Papua New Guinea; Belching Out Coper, Gold and Waste' <http://wwf.panda.org/what_we_do/where_we_work/new_guinea_forests/problems_forests_new_guinea/mining_new_guinea/ok_tedi_forest_new_guinea/> accessed 30 September 2016.

resources for the vast majority of their sustenance needs have been affected.¹⁶ The contaminated water resulted in the death of large numbers of aquatic life which was a major source of food for the indigenous people.¹⁷ Increased sedimentation in the river led to flooding of the riverbank lowlands which were traditionally used as farmlands. This in turn resulted in a significant reduction in the quality and quantity of plants, including *sago* trees, the staple food of majority of the communities.¹⁸ The people's rights to health, adequate standard of living, food, water and healthy environment were severely undermined.¹⁹

Although the PNG government allowed the OTML to dump its waste in the river, it did not provide any corresponding measures for mitigating the environmental impacts and resultant human rights effects it had.²⁰ The government defended its stance on the grounds that the need to secure the economic benefits from the mine justified the human rights and environmental trade-off. The minister for Environment and Conservation at the time, Mr Jim Yer Waim was quoted as stating that:

Everybody (ministers) were concerned with the effects on the Fly river and everybody was concerned with the welfare of the nation. We decided in favour of the people. It was the best decision any responsible government could take under the circumstances. In anything there has got to be give and take. We risked our environment in favour of the people.²¹

Perhaps the most accurate summary of the rationale behind the government's stance was given by *The Times of PNG*:

¹⁶ Amnesty International (n 13).

¹⁷ *ibid*, 82.

¹⁸ *ibid*.

¹⁹ Bill Townsend, 'Giving away the river: environmental issues in the construction of the Ok Tedi mine,' in John C. Pernetta (ed), *Potential Impacts of Mining on the Fly River*, 1988, 116-118, available at: <http://www.ais.unwater.org/ais/aism/getprojectdoc.php?docid=4103> (accessed September 30 2016).

²⁰ Amnesty International (n 13), 85.

²¹ *Post Courier*, 24 September 1989, 1, as quoted in Kalione and Kuwimb (n 12), 4.

Because of political expediency, environmental experts say the government is foregoing the welfare and health of thousands of Western Province (Fly River) people and the environment of the nation to boost its financial capacity in a trying time.²²

The government's decision was criticised as 'an unjustifiable sacrifice of the rights and interest of the local population, and an outright capitalisation to pressure from the mining company which had consistently resisted the construction of a tailings dam because the cost would have made the whole enterprise economically unfeasible.'²³ The government's decision was clearly a calculated plan to secure economic revenue from Ok Tedi. The statement suggesting that it was 'in favour of the people' was one of political expediency that actually jeopardised the health and welfare of thousands of Fly River people.²⁴

As a result of the severe deprivations caused by the harmful activities of the companies, the affected communities initiated several legal proceedings against BHP and OTML in both Australia and PNG.²⁵ In a bid to avoid liability arising from the suits, OTML and the PNG government concluded an agreement that OTML was to compensate all those who were affected by the mine on the condition that they abandon the suits filed against the companies. The agreement resulted in the Mining (Ok Tedi Eighth Supplemental Agreement) Bill of 1995 which was to be codified into a law that would criminalise all future actions against OTML.²⁶ However, the Bill was widely criticised and was later rearranged resulting in the enactment of two separate but related pieces of legislation; the Mining (Ok Tedi Restated Eighth

²² *The times of PNG* as quoted in Kalinoe and Kuwimb, (n 12), 4.

²³ Kalinoe and Kuwimb, *ibid*.

²⁴ David Hyndman, 'Zipping Down the Fly River on the Ok Tedi Project,' in John Connell and Richie Howitt (eds), *Mining and Indigenous People in Australasia* (Sydney University Press 1991), 82.

²⁵ See *The Broken Hill Proprietary Company Ltd v Dagi and Others* [1996] 2 VR 117; *Rex Dagi and Others v The Broken Hill Proprietary Company Limited (unreported) Supreme court of Victoria*, Suit No. 5782 of 1994 (CAN 004 028 077); *Barry John Shackles and Daru Fish Supplies Pty. Ltd. v The Broken Hill Proprietary Company and Ok Tedi Mining Limited* No.5980 of 1994; *Baat Ambetu and Others v. The Broken Hill Proprietary* No.6861 of 1994; *Alex Maun and Others v The Broken Hill Proprietary Company Limited* No.6862 of 1994; all quoted in L. Kalione and M. J Kuwimb 'Customary Land Owners, p. 6.

²⁶ Amnesty International, (n 13), 85.

Supplemental Agreement) Act 1995²⁷ and the Compensation (Prohibition of Foreign Legal Proceedings) Act 1995.²⁸ Although the new Acts abandoned the criminalisation of further prosecution of OTML, they contained several provisions that infringed the people's rights to seek redress. While offering a package of 110 million Kina (\$93million) to the affected communities, the Mining Act eliminated all previously available legal options for seeking compensation from OTML and its shareholders in the PNG courts, including those used in the existing law suits.²⁹ It specifically excluded the application of any domestic law to the environmental and social impacts of the mine or to compensation claims arising from these impacts.³⁰

The Act established that any act or omission for which BHP and OTML were being sued were illegal and non-actionable.³¹ Therefore, the victims could no longer pursue civil claims against the company and consortium for these acts. Furthermore, the Compensation Act contained provisions that could be used by OTML and its shareholders as an absolute defence against any compensation claims against them.³² The Act established that its provisions would apply to foreign proceedings, and that any judgement against OTML obtained in a foreign court

²⁷ The Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act, No. 48 of 1995. (Hereafter referred to as the Mining Act).

²⁸ The Compensation (Prohibition of Foreign Legal Proceedings) Act, No.41 of 1995. (Hereafter referred to as the Compensation Act).

²⁹ Section 5(5) of the Mining Act provides: Under the law of Papua New Guinea, no cause of action or other right exists in relation to an Existing Compensation Claim or in relation to a Compensation Claim that is not an Existing Compensation claim which may form the basis for Compensation proceedings.'

³⁰ According to section 5(6) of the Mining Act (see (n 27)), 'under the law of Papua New Guinea, any act or omission that would, notwithstanding this Act, constitute a basis for Compensation Proceedings is to the extent that such Compensation Proceedings would relate to an Existing Compensation Claim; and to the extent that such Compensation Proceedings would not relate to an Existing Compensation Claim, justifiable within the meaning of the rule known in *Philips v Eyre* [1870] LR 6QB 1'; see the Mining Act (n 27).

³¹ *ibid*, section 5.

³² *ibid*; section 5(4) of the Mining Act provides that 'The fact that the Company has undertaken the obligations imposed upon it...constitutes an absolute defence to any Compensation Proceedings to the extent that they relate to an Existing Compensation Claim; and constitutes an absolute defence to any Compensation Proceedings to the extent that they do not relate to an existing Compensation Claim whether or not that defence is pleaded, and whether those Compensation Proceedings are commenced before, on or after the date upon which the Company permanently ceases mining and milling operations and that defence may be relied upon not only by the Company but also by any other party to the relevant compensation proceedings.

could not be enforceable in PNG.³³ Through this legal regime, OTML and its owners became virtually immune from legal action. Consequently, the indigenous people were forced to live with the deplorable conditions that resulted from the activities of BHP and OTML, while the corporations derived benefit from the vast resources in the region.

Apart from situations like this one in Papua New Guinea, where host states have deliberately fashioned their laws to enable MNCs evade liability, in other instances, host states may have set up regulations such as anti-pollution and environmental legislations, that regulate TNC activity, however, their effective implementation and enforcement are usually not ensured. In fact, it has been said that in Nigeria ‘judges have developed a paternalistic attitude to the interpretation of some anti-pollution laws, against the background that nothing should be done to disturb the operations of oil trade which is the main source of the nation’s revenue’.³⁴ For instance, in the case of *Allan Irou v Shell B.P.*,³⁵ the judge rejected an application for an injunction in favour of the plaintiff whose land, fish pond and creek had been polluted by the defendants oil mining operations, his *ratio decidendi* being that, nothing should be done to disturb the operations of trade (i.e., in petroleum) which is the main source of the nation’s economy. The judge stated that:

To grant an order would amount to asking the defendants [shell BP] to stop operating in the area...the interest of third persons must in some cases be considered, for example, where the injunction would cause stoppage of trade or throwing out a large number of working people.³⁶

³³ Section 4 of the Compensation (Prohibition of Foreign Legal Proceedings) Act provides that ‘Subject to this section, no compensation proceedings may be taken or pursued in a foreign court...where, in contravention of this Act, compensation proceedings are taken or pursued in a foreign court in respect of a compensation claim, that compensation claim will cease to be actionable in Papua New Guinea and each act or omission alleged to give rise to that compensation claim will be deemed to have been justifiable in Papua New Guinea.’ Section 3 of the same Act defines a foreign court as ‘any court, forum or tribunal (by whatever name known) not established under the laws of Papua New Guinea’.

³⁴ Amos Adeoye Idowu, ‘Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode’ (1999) 17 *Netherlands Quarterly of Human Rights* 2, 181.

³⁵ *Allan Irou v Shell B.P.* (Unreported) Suit No. W89/9 1, Warri HC/26/11/73, as quoted in Idowu, *ibid*.

³⁶ *ibid*

In rejecting another request for an injunction against the defendants in *Chinda v Shell BP*,³⁷ the presiding judge described the plaintiff's statement of claim demanding the restraint on Shell BP from operating within five miles of the plaintiff's village due to the pollution its activities had caused, as an 'absurdly and needlessly wide demand.'³⁸

3.2.1.2 Corruption of state officials

The ability of host states to effectively regulate the activities of TNCs and sanction erring companies is evidently compromised by economic considerations of the states. Consistent with this trend is the fact that the immense value that host states place on the economic gains of TNC activities have influenced corrupt state officials to engage in unscrupulous practices that affect human rights.³⁹

Corruption has serious impact on human rights, especially economic, social and cultural rights. The duties accepted by states to take steps to maximise their available resources to achieve the progressive realisation of their duties under the ICESCR invariably involve the provision of services that generate large public service contracts which may create opportunities for corruption.⁴⁰ For instance, where government officials divert public resources from education and health care because they have been bribed or for their personal aggrandisement, they are thereby diminishing any improvement or progress.

In the context of business operations especially in the natural resources and extractive sector, state officials are not the only facilitators of corruption. The role TNCs play is very critical as many public sector corrupt practices will never take place without the assistance of corporate entities. These patterns of corruption are very evident in resource driven conflicts in

³⁷ *Chinda and 5 others v Shell-BP Petroleum Development Company* (1974) 2 RSLR 1.

³⁸ *ibid*, paragraph 123.

³⁹ John Ruggie, 'Business and Human Rights: The Evolving agenda' (2007) 101 AJIL, 819.

⁴⁰ ICESCR (n 6), article 2 (1).

developing states.⁴¹ They typically involve the bribery of public officials by TNCs in order to allow them free reign to adopt unchecked practices in their operations to the detriment of the people living within the sphere of their operations.⁴² Corrupt leaders who are faced with situations of intra-state insurgency seek to build up their power bases by accumulating wealth from the bribes received from the TNCs to fight off threats from insurgent factions.⁴³ They use the bribes to acquire weapons, ammunitions and pay outs for the military to aid in the conflicts that result in mass human rights violations, at the expense of the developmental needs of the state.⁴⁴

In 1971 Mobil oil, a US based company and predecessor of Exxon Mobil, discovered large gas resources in Arun, located in Aceh province, Indonesia.⁴⁵ The yields from the produce in the gas fields contributed billions of dollars in revenue to the Indonesian national budget at the time. In return for exclusive access to the fields' natural gas deposits, Mobil provided Indonesia's military dictator, General Suharto, blank shares in Mobil Oil, among other forms of payment.⁴⁶ Mobil oil continued its operations at the Arun site which, until 2001, was one of the largest and most profitable natural gas projects in the world.⁴⁷ In 1976, Aceh became a site where violent separatists' insurrection took place. Since then, it was held under direct military

⁴¹ Global Witness, 'Is there an African Resource Curse?: Testimony of Corinna Gilfillan, Director of the US Office of Global Witness, before the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations, of the Committee of Foreign Affairs, US House of Representatives' (18 July 2013) <<https://docs.house.gov/meetings/FA/FA16/20130718/101156/HHRG-113-FA16-Wstate-GilfillanC-20130718.pdf>> accessed 1 November 2016; Frank Vogl, 'Natural Resources, Natural Corruption?' (*The Globalist*, 3 October 2012), <<http://www.theglobalist.com/natural-resources-natural-corruption/>> accessed 10 October 2016.

⁴² Rose Cecily, 'The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption' (2011) 24 *Leiden Journal of International Law* 3, 721.

⁴³ Amnesty International, (n 13), 192.

⁴⁴ The Sentry, 'The Nexus of Corruption and Conflict in South Sudan: Dismantling the Financing of Africa's Deadly Conflicts', (Report, July 2015) <https://thesentry.org/wp-content/uploads/2015/07/report_NexusCorruptionConflict_SouthSudan_TheSentry.pdf> accessed 1 November 2016, 4-5; see also, M. Cawthra, 'Collusion and Criminality: Fuel Conflict in the Niger Delta' (2011) 2011 *African Centre for the Constructive Resolution of Disputes: Conflict Trends* 2, 49. <<http://accord.org.za/wp-content/uploads/2011/07/ACCORD-Conflict-Trends-2011-2.pdf>> accessed 1 November 2016.

⁴⁵ International Centre for Transnational Justice 'A matter of Complicity? Exxon Mobil on Trial for its Role in Human Rights Violation in Aceh' (Report, November 2008), <<https://www.ictj.org/sites/default/files/ICTJ-Indonesia-Aceh-Exxon-2008-English.pdf>> accessed 1 November 2016), 7.

⁴⁶ *ibid*

⁴⁷ *ibid*

control from 1990 to 1998. Military personnel stationed in the area were alleged to have violated several human rights of individuals living in the region including, torture, rape, extrajudicial execution, and forced disappearances of civilians.⁴⁸ In the midst of the conflict, Mobil allegedly contracted with the notorious Indonesian military to supply security for its plant in Arun paying monthly and annual fees for their services and providing them with facilities and supplies.⁴⁹ The situation has resulted in a long legal battle between Exxon Mobil and the inhabitants of the region.⁵⁰

This sort of collusion between governments and TNCs is not peculiar to Indonesia. For example, allegations of complicity in human right violations have also been made in South Sudan where the Canadian corporation, Talisman Energy, allegedly aided the Sudanese government in committing genocide, war crimes and crimes against humanity against non-Muslim Sudanese living in the area of Talisman's oil concession by funding the Sudanese governments assault on the individuals in the region.⁵¹ Reports of other instances of TNC and host state collusion have been stated to have occurred in Burma, between the Burmese government and Unocal, and in Angola and Congo Brazzaville between Elf and the Angolan and Congolese governments, amongst others.⁵²

The extractive industry is replete with examples of the unwillingness of states to deal with corruption based human rights violations. These patterns expose the fact that victims would need to be able to hold TNCs directly accountable for their primary roles in initiating such practices. However, domestic regulation appears to be unsuitable for this purpose because

⁴⁸ *ibid*, 3.

⁴⁹ *ibid*, 9.

⁵⁰ Business and Human Rights Resource Centre 'ExxonMobil lawsuit (re Aceh)' <<https://www.business-humanrights.org/en/exxonmobil-lawsuit-re-aceh>> accessed 8 January 2017.

⁵¹ See generally, *The Sentry*, (n 44); see also, *The Presbyterian Church of Sudan et. al v Talisman Energy Inc.* Republic of Sudan 244 F. Supp. 2d 289 (US Court of Appeals for the Second Circuit, 2003).

⁵² Martial K Frindethie, *Globalisation and the Seduction of Africa's Ruling Class. An Argument for a New Philosophy of Development* (McFarland and Company Inc., 2010), 203.

the state officials who are entrusted with creating an atmosphere for the realisation of human rights regulations engage in corrupt practices in concert with the TNCs.⁵³

3.2.2 Host states' inability to regulate

The perfunctory attitude towards the implementation of the host state's duty to protect against human rights violations is not always due to the pursuit of economic gain or corruption. There are genuine circumstances where host states are unable to fulfil their human rights obligations. Many host states have weak institutional, legal and financial structures. Most times TNCs capitalise on these weaknesses to evade liability for their harmful acts.⁵⁴

3.2.2.1 Lack of sufficient legal, institutional and financial means to regulate

In what has been termed, 'the worst industrial accident in history', a massive leak of lethal gas from a pesticide plant operated in Bhopal, India, by Union Carbide India Limited (UCIL), a subsidiary of the US company, Union Carbide Company (UCC) claimed thousands of lives and left thousands more injured.⁵⁵ The gas leak resulted in the death of over 15,000 persons while thousands more, to this day, suffer health problems including, lung infections, neurological and reproductive disorders, and respiratory difficulties.⁵⁶ Upon investigation, it was discovered that one of the major causes of the accident were technological failures.⁵⁷ The plan for the health and safety systems of UCIL was highly substandard in comparison to that

⁵³ An examination of how international regulations deal with the issue of corruption and human rights in the business sector will be examined in chapter 4.

⁵⁴ Jamie Cassels 'Outlaws: Multinational Corporations and Catastrophic Law' (2000) 31 *Cumberland Law Review* 311, 317; Halina Ward, 'Securing Transnational Corporate Accountability Through National Courts: Implications and options' (2001) 24 *Hastings International and Comparative Law Review* 431, 463-464; Joseph (n 9), 177.

⁵⁵ Mark W. Janis, 'The Doctrine of *Forum Non Conveniens* and the Bhopal Case' (1987) 34 *Netherland International Law Review* 2, 1.

⁵⁶ Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 years on* (29 November 2004) AI-Index ASA 20/015/2004, 10- 18,

⁵⁷ Cassels (n 54), 316.

of its US parent company, who owned controlling shares in UCIL.⁵⁸ India's general safety regulations were ineffective and its inability to provide safety standards for regulating the operations of UCIL were described as being 'based on the paradigm of a labour intensive low-tech industry.'⁵⁹ The relevant government departments were underfunded and under staffed and the inspection systems were vastly inadequate to put the hazards under check.⁶⁰

The victims, in a consolidated lawsuit represented by the Government of India, brought a civil suit in the US District courts under the Alien Tort Claims Act, claiming against UCC, compensation and punitive damages to the tune of \$3billion. The hearing was focused on the admissibility of the suit since the events had occurred in India. The claimants' lawyers argued seriously for a US hearing as US courts allowed greater opportunities for class actions and higher compensation for victims. They contended that:

India had only incompletely emerged from the heritage of colonial rule...the Indian system is characterised by massive blockages of cases and enormous delays which can be considered a permanent feature of the Indian system...tort law in India is underdeveloped and (of all the tort law cases that had been entertained), none dealt with the problems arising from complex technologies...the bar in India does not possess the pool of skill, the fund of experience or the legal capacity to efficiently and effectively pursue massive and complex litigation... the Indian legal system contained a paucity of devices to prevent timely resolution of complex cases.⁶¹

⁵⁸ *ibid*

⁵⁹ *ibid*, 317

⁶⁰ *ibid*

⁶¹ Affidavit of Marc S. Galanter (Counsel for the Claimants) in Re: Union Carbide Corporation Disaster Gas Leak at Bhopal, India, December 1984, US District court, Southern District of New York, MDL Docket No. 626 Misc. No. 21-38 J(FK), 85 CIV 2696 (JFK)

Yet, in a decision that could be interpreted as either a deference to the Indian legal system or a victory for UCC, the US District Court held that the suit should be tried in India.⁶²

The Indian supreme court, upholding the decision of the high court, held that UCC was liable to pay a mere \$470million in compensation against the \$3billion that was initially claimed.⁶³ This was for full and final settlement against all past and future claims.⁶⁴ From the compensation sum, pay-outs of \$4,000 was made for deaths, and \$2,000 for serious injuries. These amounts were far less than the annual wages of factory workers in Bhopal.⁶⁵ In other large class action suits in more developed states, high standards of safety regulations have been followed and higher levels of compensation have been paid.⁶⁶ Public health disasters on larger scales in the US resulting from asbestosis related diseases caused by TNC activities have resulted in jury verdicts ranging anywhere between \$1million to \$20million per victim.⁶⁷ Disappointingly, the Indian courts did not refer to any international standard for determining damages for the class action. Rather, they justified their judgements by comparing it to the sums conventionally awarded in Indian personal injury and fatal accident cases.⁶⁸

The regulatory and judicial system failures in India afforded UCC the opportunity to get off cheaply at the expense of the victims in Bhopal. This typifies the challenges faced by many host states who do not have efficient legal systems to prevent MNCs from evading accountability. Unfortunately, MNCs have moved beyond capitalising on the regulatory loopholes in host states institutional set-ups. In certain situations, MNCs themselves create a

<<http://14.139.60.114:8080/jspui/bitstream/123456789/706/10/Affidavit%20of%20Marc%20S.%20Galanter.pdf>> accessed 1 November 2016.

⁶² *Re Union Carbide Corporation gas plant disaster at Bhopal, India*, 809. F. 2d 195 [1984].

⁶³ *Union Carbide Corporation v Union of India* [1989] 1 S.C.C, 674

⁶⁴ *ibid* at 675.

⁶⁵ Jamie Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal' (1991) 29 *Osgood Hall Law Journal* 1, 37.

⁶⁶ Colin Gonsalves, *Kaliyug: The Decline of Human Rights Law in the Period of Globalisation* (New Dheli, Human Rights Law Network), 128.

⁶⁷ Cassels, *The Uncertain Promise of Law* (n 65), 39.

⁶⁸ *ibid*, 41; *Union Carbide Corporation v Union of India* (n 63).

legal atmosphere to escape liability, rendering host states handicap when they face human rights violations of their citizens resulting from the MNCs activities.

3.2.2.2 Deliberate action by TNCs to evade liability

Chevron, (which succeeded Texaco), is one transnational corporate entity that has long been accused of causing an environmental and human rights catastrophe while conducting oil operations in the Ecuadorian Amazon for many decades.⁶⁹ The attempt by the indigenous people in the region to pursue litigation and obtain redress and compensation for the harm done to their homelands has been met by several obstacles that have been placed in their path by Chevron.⁷⁰ The suits had moved back and forth between the US and Ecuadorian courts since 1993.⁷¹ Finally, in 2011 the indigenous people as claimants, won an \$18 billion award in 2011.⁷²

In a bid to evade liability resulting from the suits, Chevron initiated investment arbitration proceedings against Ecuador before the Permanent Court of Arbitration (PCA) in The Hague in 2009.⁷³ The arbitration proceedings were based on two agreements that formed the US-Ecuador Bilateral Investment Treaty (BIT) that was signed between the US and Ecuador while the suits against the corporation were ongoing.⁷⁴ The Agreements were

⁶⁹ Sarah Joseph, 'Protracted lawfare: The tale of Chevron Texaco in the Amazon' (2012) 3 *Journal of Human Rights and the Environment* 1, 70.

⁷⁰ *ibid*, 71.

⁷¹ *ibid*

⁷² This award was later reduced to \$9.5 billion. However, in August 2016, the plaintiffs were barred from collecting the \$9.51 billion judgement stating that it could not be obtained based on allegations that the lawyers for the Ecuadorian community had used fabricated evidence, made bribes and ghost-wrote court documents. See Business and Human Rights Resource Centre, 'Chevron and Texaco Law suits (Re Ecuador)' available at <<https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>> accessed 17 November 2016.

⁷³ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877 <<http://www.italaw.com/documents/ChevronTexacoEcuadorPartialAward.PDF>> accessed 17 November 2016.

⁷⁴ See *Chevron v Texaco Interim Award*, 1 December 2008, at <<http://www.italaw.com/documents/Chevron-TexacovEcuadorInterimAward.pdf>> accessed 1 November 2016). BITs were originally created to protect the interests of foreign investors and capital-exporting states against expropriation of their assets in developing host States. They evolved in the 1980s and 1990s as one-sided agreements that limited the measures taken by states against foreign investors or foreign owned investments. Most BITs include significant substantive and procedural

concluded in secret, and key documents were withheld from the affected communities.⁷⁵ They provided that the Ecuadorian government was to release Texaco from all current and future suits in exchange for remedial work and the payment of compensation.⁷⁶ In its claim against Ecuador, Chevron stated that the proceedings against it were unfair and in contravention of the BIT.⁷⁷ It requested that the arbitral panel stop Ecuador from pursuing the litigation or indemnify it from damages accrued as a result of the suits in the Ecuadorian court.⁷⁸ The PCA issued an Interim Measures Order in favor of Chevron ordering Ecuador to take all measures to suspend enforcement of the Ecuadorian judgment.⁷⁹ Thereafter, it gave a ruling in favor of Chevron stating that Ecuador had not abided by its obligations under the BIT. Chevron was awarded \$77.70 million.⁸⁰

The acceptance of Chevron's arguments was disastrous to the indigenous people affected by the activities in the Amazon. It did not provide any avenue for the affected communities, who suffered the direct effect of the harmful activities, to become parties to arbitral the proceedings. The fact that they were blindsided by the arbitration proceedings exposes the fact that Chevron acted deliberately to circumvent the ongoing domestic proceedings without the participation of its adversaries in the relevant litigation. And Ecuador, being bound by the BIT to abide by any arbitral award made against it could not risk jeopardizing its reputation with regard to foreign investment generally.⁸¹

rights to foreign investors in host states. For instance, they establish dispute settlement procedures at give foreign investors opportunities to bypass the domestic judicial systems of host states and bring proceedings directly against states to international arbitral tribunals like the Permanent Court of Arbitration PCA. However, they lack any counter balancing investor responsibility neither do they include provisions that expressly allow host states to regulate in areas of public interest such as human rights or the environment and public order. -See S. Joseph, *Protracted Lawfare*, p.81.

⁷⁵ Judith Kimmerling, 'Indigenous People and the Oil Frontier in the Amazon: The case of Ecuador, Chevron Texaco and *Aguinda*' (2006) *International Law and Advocacy* 413, 494.

⁷⁶ Chevron v Texaco Interim Award (n 74), para 48.

⁷⁷ *ibid*

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ Chevron v Texaco Final Award 31 August 2011, <<http://www.italaw.com/sites/default/files/case-documents/ita0154.pdf>> accessed 1 November 2016), 140.

⁸¹ Joseph (n 69), 83.

The legitimization of the harmful activities carried out by TNCs, coupled with the institutional, legal and technical difficulties involved in seeking redress for human rights abuse in developing host states enable TNCs to perpetrate human rights violations with impunity. Under these circumstances of unwillingness and incapacity of host states, victims of human rights violations resulting from TNC activities have to look elsewhere for ways of obtaining redress when their human rights are violated.⁸²

3.3 Home states and extraterritorial regulation of TNCs

Home states are usually known to have higher human rights standards, functioning and non-corrupt legal systems, financial and personal resources, and the necessary technology to conduct efficient investigation and prosecution.⁸³ These factors make home states more attractive for victims to seek remedies for corporate human rights abuses.⁸⁴

Although jurisdiction is primarily territorial, the Permanent Court of International Justice in the *Lotus case* espoused the principle that states are free, in principle, to legislate on any situation beyond their territorial boundaries, that they deem necessary so long as there is no recognized prohibitive rule to the contrary.⁸⁵ However, after the *Lotus* decision, and beginning with the ‘Harvard Research on International Law’s Draft Convention on

⁸² Tebello Thabane, ‘Weak Extraterritorial Remedies: The Achilles Hell of the ‘Protect, Respect and Remedy Framework and Guiding Principles’ (2014) 14 *African Human Rights Law Journal* 43, 51.

⁸³ Marion Weschka, ‘Human Rights and Multinational Enterprises: How can multinational Enterprises be held responsible for Human Rights Violations Committed Abroad?’ (2006) 66 *Heidelberg Journal of International Law* (2006), 629.

⁸⁴ The failure to secure an effective remedy is in itself a human rights violation. See Convention for the Protection Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), article 13; ICCPR (n 6), article 2(3); American Convention on Human Rights (ACHR), article 25 (American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978); African Charter on Human and People’s Rights, article 7 (African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM (African Charter); the Convention against Torture, article 1 (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force) (26 June 1987) 1465 UNTS 6 (CAT).

⁸⁵ PCIJ, *SS Lotus*, PCIJ Reports, Series A, No. 10, 18-19 (1927).

Jurisdiction’, the international community has taken a more restrictive approach.⁸⁶ It is now generally accepted that when a state intends to legislate on any issue extraterritorially, it must rely on a permissive principle for the exercise of such jurisdiction.⁸⁷ Hence, home states must possess the capacity to regulate the conduct of their TNCs abroad under an internationally recognized principle of extraterritorial jurisdiction in order to perform their due diligence duty to protect human rights. Five international principles are recognized in this regard.

First, according to the ‘**nationality principle**’, a state can adopt legislation which governs the conduct of its nationals that are carried out in a foreign state.⁸⁸ Because jurisdiction is exercised over a national who is allegedly the perpetrator of an offence, it is also referred to as the ‘active personality principle’.⁸⁹ Second, the ‘**passive personality principle**’ which is a reverse of the nationality principle provides that a state can legislate extraterritorially where the victim of a harmful act is the national of the legislating state.⁹⁰ Under the third principle, the ‘**protective principle**’, states can establish extraterritorial legislation over persons located abroad for engaging in acts that affect the internal or external security of the home state.⁹¹ The

⁸⁶ Harvard Research on International Law, ‘Draft Convention on Jurisdiction with Respect to Crime’, (1935) 29 AJIL, 439.

⁸⁷ In the *Arrest Warrant Case (Democratic Republic of Congo v Belgium)* [2002] ICJ Report 3, Lord Guillaume in his separate opinion stated that, ‘under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes, committed abroad as between foreigners.’ paragraph, 4.

⁸⁸ Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (4th edn., Oxford University Press 2003), 288.

⁸⁹ A good example can be found in the French Penal Code which provides that; ‘French Criminal Law is applicable to any felony, as well as to any misdemeanour punishable by imprisonment, committed by a French national or by a foreigner outside the territory of the republic...’ See French Penal Code, articles 113-116 <file://lanes/homes/20/osim/Downloads/Code_33.pdf> accessed 1 December 2016.

⁹⁰ James Crawford, *Brownlie’s Principles of International Law* (8th edn., Cambridge University Press 2012), 461. Passive personality has been applied to support jurisdiction in instances of terrorist or other organized, overseas attacks against U.S. nationals, U.S. government officials, or U.S. government property (such as an embassy or military vessel). The Harvard Research on International Law did not include the passive personality jurisdiction in its Draft Convention because of its overlap with the universality principle, but courts and scholars have accepted its basis for jurisdiction. See the Harvard research project at p. 579, and Ian Brownlie, *Principles of Public International Law* (1973), 296 where he states that ‘the passive personality principles application falls under the principles of protection and universality’.

⁹¹ Crawford, *ibid*, 462. The protective principle covers a variety of offences including currency, immigration and economic offences. Courts of the UK and the US have punished aliens for acts on the high seas concerning illegal immigration and considerations of security. In *Joyce v DPP* [1946] AC 347, the House of Lords stated that an alien who left the UK in possession of a British passport owed allegiance and was accordingly guilty of treason

fourth head of prescriptive jurisdiction is the so-called ‘**effects doctrine**’. This doctrine may apply where an extraterritorial offence causes some harmful effect in the legislating state, without representing an interest sufficiently vital to the internal or external security of the state in question to justify invoking the protective principle.⁹² Although the effects doctrine is controversial, it has been acknowledged by states and international judicial bodies.⁹³ According to the fifth basis for extraterritorial legislation, the ‘**Universality principle**’, extraterritorial legislation is permitted in relation to offences committed by foreign nationals against foreign nationals.⁹⁴ Such offences are however limited to a certain category of crimes that the international community recognizes as extremely prejudicial to the interests of all states. They include, torture, genocide, war crimes, piracy, slavery and crimes against humanity.⁹⁵

In the area of business and human rights, States have focused on the ‘nationality principle’ as a basis for exercising extraterritorial jurisdiction over the subsidiaries of their TNCs operating abroad. However, doubts have been expressed as to the propriety of allowing a state to treat as its national, a foreign subsidiary incorporated under the laws of a host state, but managed, controlled or owned by TNCs registered in the state concerned.⁹⁶ In the *Barcelona Traction* case, the International Court of Justice (ICJ), appeared to exclude basing

when he subsequently broadcast propaganda for Germany in wartime. See also, *The Eichman case* [1962] 36 ILR 5, 18, 54-57.

⁹² Crawford (n 90), 462-463. The most widely cited example of this jurisdiction which has been strongly resisted by many states, including European Union states is the anti-trust legislation of the United States of America. Under this legislation, a foreign company having partial operations in the US may become liable to heavy penalties under US law for engaging in anti-competitive practices even if the actual activities complained of takes place outside the US territory. Obviously, any increase in volume of domestic legislation with this kind of extraterritorial effect is likely to lead to disputes with those states whose nationals are affected by such legislation, especially where the acts over which jurisdiction is claimed are lawful under the laws of the states where they took place. For instance, US anti-trust legislation could penalize UK companies trading lawfully in the UK but who have some minimal operating activity in the US. See Martin Dixon, *Textbook on International Law* (Oxford University Press 2007), 149-152.

⁹³ The US has repeatedly clashed with Europe over the extraterritorial application of the US anti-trust laws, although an accommodation has been reached with the conclusion of the US/EU Agreement on the Application of Competition Laws 1995 OJ 95/45, <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=300>> accessed 3 December 2016. Also, see the *Lotus case* (n 85), at 23; and the Joint and separate opinions of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case* (n 87), at 3 and 77.

⁹⁴ Anthony Aust, *Handbook of International Law*, (Cambridge University Press, 2007), 45.

⁹⁵ *ibid*, 45-46.

⁹⁶ De Schutter (n 5), 11.

the nationality of the TNC on that of its shareholders, at least in relation to diplomatic protection. In deciding that Belgium could not exercise diplomatic protection of shareholders in a Canadian TNC with respect to measures taken against that corporation in Spain, the ICJ recalled that under domestic law, there is a separation of the rights of the company and those of its shareholders, and that ‘the concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights’.⁹⁷ However, the ICJ in the same case acknowledged that ‘the law has recognized that the independent existence of the legal entity cannot be treated as an absolute’.⁹⁸ It asserted that the veil separating the legal personalities of the company and that of its shareholders may be lifted in order to prevent the misuse of the privileges of legal personality both in national and international law.⁹⁹

Although the courts holding concerns the legal personality of the corporation and its individual shareholders, the same exception to the separate legal personality would apply where a shareholder is a corporate entity.¹⁰⁰ It therefore follows that the independent existence of TNC subsidiaries and their parent companies cannot be treated as an absolute.¹⁰¹ Separate incorporation will be discarded to prevent the misuse of the legal personality in order to protect third persons or to prevent the evasion of legal requirements or of obligations.¹⁰² Thus, where the operations of a foreign subsidiary of a TNC go beyond the purposes for which it was originally intended to serve and results in human rights harm, the home state may exercise jurisdiction over such subsidiary in pursuance of its international human rights obligation to protect.

⁹⁷ *Case Concerning the Barcelona Traction Light and Power Co. (Belgium v Spain)* [1970] I.C.J Rep. 3, 5 February 1970, paragraph 184.

⁹⁸ *ibid*, paragraphs 38-39.

⁹⁹ *ibid*

¹⁰⁰ Philip Bloomberg, ‘The Corporate Entity in an Era of Multinational Corporations’ (1990) 15 *Delaware Journal of Corporate Law* 283, 325-328.

¹⁰¹ De Schutter (n) 5), 11.

¹⁰² *ibid*

Based on the nationality principle, the United States of America, Australia, the United Kingdom and Canada had made efforts at setting extraterritorial legislation to ensure that their TNCs do not act contrary to the standards set by international human rights law abroad, unfortunately, their efforts failed.¹⁰³ Taking a seeming universal approach towards the repression of certain internationally condemned acts, the US Alien Tort Claims Act has recorded some success in holding TNCs accountable for their human rights violations overseas. However, its increasingly narrowing extraterritorial reach has threatened its efficacy.¹⁰⁴ European states have taken a different approach which has a territorial focus. Using tort law, they typically look for a territorial connection with the host state where the human rights abuses occurred.¹⁰⁵ This is usually the case when negligence of the TNC parent company can be established.¹⁰⁶ As the parent company usually organizes its subsidiaries operations, its failure to live up to its duty of care has a structural connection. The identification of this connection is the basis upon which the extraterritorial regulation is established. Nevertheless, this too is not without its limitations.¹⁰⁷ The following sections will address the attempts and accompanying limitations faced by the US, Australia, the UK and Canada, the US ATCA, and European states' in setting up extraterritorial human rights legislation to regulate TNC operations.

¹⁰³ See section 3.3.1.

¹⁰⁴ *Kiobel* discussed below, section 3.3.2.

¹⁰⁵ Jan Wouters and Cedric Ryngaert 'Litigation for Overseas Corporate Human Rights abuses in the European Union: The Challenge of Jurisdiction', Institute for International Law Working Paper No. 124, July 2008 <<https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP124e.pdf>> accessed 28 November 2016, 4-5.

¹⁰⁶ *ibid*

¹⁰⁷ See Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights, (2011) 3 *University of Hong Kong Law Review* 1, .3 <<http://www.biforbusinessintegrity.com/pdf/publications/Tort-litigation-against-multinational-corporations-by-Richard-Meeran.pdf>> accessed 28 November 2016).

3.3.1 Failed legislative attempts at extraterritorial regulation in Australia, US, UK and Canada

In June 2000, the United States Corporate Code of Conduct Act (US Bill) was introduced to the US Congress.¹⁰⁸ The US Bill required US nationals (including US based TNCs) employing more than twenty persons in a foreign state, either directly or through foreign subsidiaries, to implement the Corporate Code of Conduct covering a wide range of standards for protecting human rights in the foreign state. For instance, the Bill mandated the corporations to provide safe and healthy working places, provide fair employment including the prohibition of child and forced labour, respect international human rights standards and uphold responsible environmental protection and environmental practices.¹⁰⁹ The US Bill was referred to three congressional committees on the day of its introduction and was subsequently referred to subcommittees of each committee. After the US elections in 2000, the Bill was reintroduced in identical form in August 2001 and then in 2006 and again referred to various committees. However, none of the congressional committees took final action on the Bill.¹¹⁰

The US Bill was closely followed by the introduction of the Australian Corporate Code of Conduct Bill (Australian Bill) to the Australian senate in September 2000.¹¹¹ The Australian Bill sought to impose and enforce internationally recognized standards in the areas of human

¹⁰⁸ H.R. 4596 (106th Congress Session): Corporate Code of Conduct Act, 7 June 2000 <<https://www.govtrack.us/congress/bills/106/hr4596/text>> accessed 14 November 2016.

¹⁰⁹ Section 3 (b) of the US Bill; Section 3 (b) (8) of the Bill required US corporations to ‘take the necessary steps to implement the Corporate Code of Conduct to comply with the minimum international human rights standards contained in the following United Nations instruments relating to international human rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery and the International Convention on the Elimination of all forms of Racial Discrimination.’

¹¹⁰ Code of Conduct Act, HR 4596, 106th Congress, 2001, <<https://www.congress.gov/bill/106th-congress/house-bill/04596>> accessed 17 November 2016; Corporate Code of Conduct Act, HR 2782, 107th Congress 2001 <<https://www.congress.gov/bill/107th-congress/house-bill/02782>> accessed 17 November 2016; Corporate Code of Conduct Act, HR 5377, 109th Congress, 2006, <<https://www.congress.gov/bill/109th-congress/house-bill/5377>> accessed 17 November 2016.

¹¹¹ Australian code of Conduct Bill 2000, <<http://www.austlii.edu.au/au/legis/cth/bill/ccocb20002002248/>> accessed 17 November 2016.

rights, the environment, labour and occupational health and safety on the conduct of any TNC incorporated in Australia with more than 100 employees in a foreign state.¹¹² It also sought to regulate the activities of the subsidiary of Australian TNCs, whether or not the subsidiary was incorporated in Australia.¹¹³ The Australian Bill included a requirement for all companies captured under its provisions to submit reports that included independent auditing of environmental impacts, statements of foreseeable risks in relation to overseas operations, statement in relation to any violation of environmental, employment, health and safety or human rights law standards of host states and ‘any other matter related to environmental, health and safety, employment and human rights standards observed by the corporation.’¹¹⁴ Following the recommendation by the Australian Parliamentary Joint Statutory Committee for Corporations and Securities, the Bill was subsequently abandoned.¹¹⁵

Later in 2003, a Corporate Responsibility Bill (UK Bill) was introduced in the UK Parliament.¹¹⁶ The UK Bill was to place obligations on MNCs incorporated in the UK whose annual turnover is £5million or more to carry out their activities in accordance with international standards as well as the laws of host countries with respect to environmental protection, public health and safety, employment and human rights.¹¹⁷ It required that directors of targeted TNCs to take all reasonable steps to minimize any negative environmental, social and economic impacts of their operations or proposed operations.¹¹⁸ The UK Bill also provided that parent companies would be directly liable for damages for the actions of their subsidiaries

¹¹² *ibid*, sections 3 and 4.

¹¹³ *ibid*, sections 3 (1)(a) and s. 4

¹¹⁴ *ibid*, section 3 (1)(a)

¹¹⁵ The Australian Senate, Corporate Code of Responsibility Bill, Report of Corporations and Securities Committee, 28 June 2001, paragraph 4.5, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2001-06-28%2F0086;query=Id%3A%22chamber%2Fhansards%2F2001-06-28%2F0000%22>> accessed 14 November 2016.

¹¹⁶ Corporate Responsibility Bill (UK Bill), Bill no.129 of 2003.

¹¹⁷ *ibid*, para 2, 12(1)

¹¹⁸ *ibid*, para 7

where such actions resulted in serious environmental and human rights damage overseas.¹¹⁹ The Bill, however, lapsed after it did not reach a second reading during the time allocated for debate.¹²⁰

Six years later, the Canadian Bill C-300 (Canadian Bill) was introduced to the Canadian Parliament in response to the increasing consensus over the attitude of its TNCs.¹²¹ The purpose of the Canadian Bill was to ensure that TNCs engaged in mining or oil or gas activities in developing states, and receiving financial support from the Government of Canada acted in a manner consistent with international environmental best practices and with Canada's commitment to best environmental practices and international human rights standards.¹²² The Bill sought to introduce an individual complaints system from victims (including foreign victims) of corporate abuse, and an analysis of these complaints and decision from the Minister of Foreign Affairs and the Minister of International Trade.¹²³ However, in a close vote of 140 to 134, the Bill was defeated.¹²⁴

Although the different legislative attempts placed human rights obligations on the extraterritorial activities of TNCs in various ways and degrees, the failure of the Bills were based on a common ground. The US, Australian, UK and Canadian legislatures feared that unilateral extraterritorial regulation would place their MNCs at a competitive disadvantage. The Parliamentary Joint Statutory Committee for Corporations and Securities in Australia expressed this concern when it stated that it was unacceptable that any legislation should imply

¹¹⁹ *ibid*, paragraph 6(10)

¹²⁰ Adam McBeth, 'A look at Corporate Code of Conduct Legislation' (2004) 33 *Common Law World Review* 3, 225-226.

¹²¹ Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3658424> accessed 2 December 2016.

¹²² *ibid*, section 3

¹²³ *ibid*, section 4 (1) and (4)

¹²⁴ Penelope Simons and Audrey Macklin, 'Defeat of responsible mining bill is missed opportunity' (The globe and mail, November 2010) < <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/defeat-of-responsible-mining-bill-is-missed-opportunity/article4348527/>> accessed 2 December 2016.

restrictions on only certain corporations.¹²⁵ Critics of the Canadian Bill argued that if the Canadian bill had been successful, it would have put Canadian companies at a disadvantage in the mining, oil, and gas markets in comparison to their international competitors.¹²⁶ This was so because provisions of the bill were not applicable to foreign controlled companies operating in Canada and it did not extend to Canadian companies operating in non-developing states.¹²⁷ The US business community has been generally averse to the idea of adopting unilateral extraterritorial regulations because of its tendency to grant superior bargaining power to non-US TNCs in the global market.¹²⁸ This issue was raised when the business community fiercely opposed the Foreign Corrupt Practices Act (FCPA), claiming that it granted superior bargaining power to non-US competitors in international markets because they were unconstrained by the laws criminalizing transnational bribery.¹²⁹ The failure of the UK Bill has also been attributed to the UK's general lack of support for the idea of enacting legally binding instruments circumscribing the activities of its TNCs abroad because of its unfavourable effects on business.¹³⁰

In the light of the limitations to domestic extraterritorial legislation, victims of corporate human rights abuse have sought out other accountability mechanisms. A beacon of hope presented itself in form of the US Alien Tort Claims Act.

¹²⁵ The Australian Senate, Corporate Code of Responsibility Bill report (n 115), paragraph 4.11.

¹²⁶ Richard Janda, 'Note: An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries [Bill C-300]. Anatomy of a Filed Initiative' (2010) *McGill International Journal of Sustainable Development Law and Policy* 2, 102 <<https://www.jstor.org/stable/i40180795>> accessed 2 December 2016.

¹²⁷ Canadian Bill (n 121), section 4(1).

¹²⁸ Tetsuya Morimoto, 'Growing Industrialization and our Damaged Planet: The Extraterritorial Application of Developed Countries Domestic Environmental Laws to Transnational Corporations Abroad' (2005) 1 *Utrecht Law Review* 2, 151.

¹²⁹ *ibid*

¹³⁰ With the reluctance of states in establishing unilateral extraterritorial legislation due to the issue of competitive disadvantage, the obligation to protect is defeated. The surest way of allaying the fears of states will be to establish a unified system of extraterritorial regulation. This way, TNCs will have identical human rights obligations with respect to activities abroad. Unfortunately, this system of regulation is presently missing. The absence of a unified system of human rights regulation for TNCs and its effect on the area of business and human rights will be further addressed in subsequent chapters.

3.3.2 Human rights under the United States Alien Tort Claims Act (ATCA)

The ATCA is a US domestic statute that was adopted as early as 1789 by the US Congress. It grants the US Federal courts jurisdiction ‘over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’¹³¹ For almost 200 years, the ATCA lay dormant until the *Filartiga v Pena-Irala*¹³² decision which set the precedent for US courts to punish non-American citizens for tortious acts in violation of the law of nations or any treaty which the US is a party, that were committed outside the US. In that case, the Filartiga family contended that their son, Joelito Filartiga was kidnapped and tortured to death by Pena Irala, who was inspector general of Police in Paraguay at the time. Although the Filartiga family did not consist of US nationals and the crime was committed outside the US, the court held that ‘an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations’.¹³³ And that under the clear language of the Alien Tort Statute, it could consider any claim that met three conditions: an action by an alien, for a tort, committed in violation of the law of nations.¹³⁴

The *Filartiga* decision had concerned alleged torture by a state official, but in a latter decision in the *Kadic v Karadzic* case, the court explained that the ATCA cannot only be invoked against state actors, but also against private individuals (i.e., non-state actors) for purely private acts.¹³⁵ The court stated that the law of nations could be determined by looking at the works of jurists of public international law, general practice of states and judicial decisions recognising and enforcing the law of nations.¹³⁶ Following this, the court found that

¹³¹ Alien Torts Claims Act, 28, U.S.C 1350 (1978), now 28 U.S.C 1350 (2013).

¹³² *Filartiga v Pena-Irala* 630 F. 2D 876 (2D Cir. 1980).

¹³³ *ibid*, para 880.

¹³⁴ *ibid*

¹³⁵ See *Kardic v Karadzic* 70 F.3d 232 (2nd. Cir. 1995).

¹³⁶ *Filartiga* (n 132) paragraph 880, quoting *United States v Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), at, 175.

private persons indeed violate the law of nations including genocide and war crimes.¹³⁷ The court went on to state that although customary international law recognises the violation of torture, it only does so when it is perpetrated under the colour of state authority.¹³⁸ *Kadic* introduced a wave of ATCA litigation in which plaintiffs' lawyers sought to hold TNCs responsible for human rights abuses that amounted to violations of the law of nations. Two of the most prominent of these cases are *Doe v Unocal* and *Wiwa v Shell*.

In *Doe v Unocal*,¹³⁹ the plaintiffs brought an action under the ATCA against the US based Unocal. It was alleged that Unocal, which hired the Burmese army to secure and protect its construction project in Burma, knowingly assisted the military in perpetrating violations of international human rights including, torture, murder, rape, pillage and forced labour.¹⁴⁰ Upholding the ATCA's reach, the court found that because Unocal knowingly benefited from the forced labour and was well aware that the military had a record of abusing human rights, it either knew or should have known that the army units were committing human rights violations on its construction site. *Doe v Unocal* was settled in 2005 for an undisclosed sum. In *Wiwa v*

¹³⁷ In holding that private persons could be liable for genocide, the court looked at the Genocide Convention which states that 'persons committing genocide... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals' (see Article IV of the Convention on Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 227). In considering war crimes, the court considered the Geneva Convention of 1949 as a relevant source, particularly common article 3 which covers 'armed conflict not of an International character' and binds 'each party to the conflict.' - Common Article 3 to the Four Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; 75 UNTS 85; 75 UNTS 135; 75 UNTS 287). Although it does not expressly mention private persons, the court concluded that private persons may be 'parties to the conflict'. Other offences including murder, rape, pillage, etc., are also considered as offenses for which private persons could be held responsible provided they reach a certain degree of intensity or wide scale of occurrence-see Articles 5, 6, 7, 8, 25 and 27 of The Rome statute of the International Criminal Court (adopted 17 July 1988, entered into force 1 July 2002) ISBN No. 92-9227-227-6.

¹³⁸ *Kadic v Karadzic*, (n135), paragraph 883; The court relied on the UN Convention against Torture which defined torture as severe pain or suffering that is 'intentionally inflicted by or at the instigation of a public official or other person acting in official capacity.' (Article 1(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. However, the standard for determining MNC complicity with the state has not been firmly established. In *Doe v Unocal* the standard for establishing complicity was knowingly giving assistance and encouraging the violations' while in *Presbyterian Church of Sudan et al v Talisman Energy Inc et al* 582 F.3d 244, (2nd Cir. 2009), the court held that the basic element for complicity was that the accused acted purposefully with the intention of committing the violations and not that they simply had knowledge of the violations (paragraph 39).

¹³⁹ *Doe v Unocal*, 395 F. 3d 932 (9th Cir. 2002).

¹⁴⁰ *ibid*, 963 F. Supp. At 883.

Royal Dutch Petroleum (Shell),¹⁴¹ the plaintiffs alleged that Shell had collaborated with the Nigerian government in committing torture and murder, summary execution and other grave violations of international law of some of the leaders of the Ogoni people in Nigeria. The US Court of Appeal declared its competence to hear the case despite the fact that the wrongful acts were committed abroad, the plaintiffs were not resident in the US and Shell had its principal office in the United Kingdom. It stated that it had subject matter jurisdiction to entertain the suit under the ATCA. On the eve of the trial, the case was settled out of court with Shell agreeing to pay \$15.5 million as compensation to the plaintiffs.

3.3.2.1 Limitations of the ATCA

Although the courts in *Doe v Unocal* and *Wiwa v Shell* embraced wide ranges of subject matter jurisdiction over the defendant MNCs, the broad application of such jurisdiction was short-lived.

In 2004, the US Supreme Court considered the scope of the ATCA in its decision in *Sosa v Alvarez-Machain*.¹⁴² It found that the ATCA was merely a jurisdictional grant which did not give rise to new causes of action.¹⁴³ The court suggested that there are limits to what the law can construe as violating the law of nations for the purpose of the Statute. It held that courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than in the 18th century paradigms when the ATCA was enacted.¹⁴⁴ The court explained that the 18th century paradigms it referred to are violations of safe conduct, infringement of the rights of ambassadors and piracy.¹⁴⁵ However, it did not provide a specific test to determine when a

¹⁴¹ *Wiwa v Royal Dutch Petroleum (Shell)*, 226 F.3d 88 (2d Cir. 2000).

¹⁴² *Sosa v Alvarez Machain* 542 US 629 (2004).

¹⁴³ *ibid*, paragraph 2755, per Scouter J. for the majority.

¹⁴⁴ *ibid*, paragraph 2763.

¹⁴⁵ *ibid*, paragraph 2756 per Scouter J for the majority.

norm has attained sufficient ‘content and acceptance among civilized nations’ to reach the stated paradigms in order to create a cause of action that can be brought under the ATCA.¹⁴⁶

Following the decisions in *Kiobel v Shell*, the overall application of the ATCA to transnational litigation involving TNCs and human rights violations has been threatened.¹⁴⁷ In that case, a suit was brought against Royal Dutch Petroleum Company and their joint subsidiary Shell Petroleum Development Company of Nigeria Ltd. The case can be traced back to the activities that took place in the 1990’s where the Ogoni people stood against the environmental and human rights violations resulting from the oil exploration activities of Royal Dutch Shell and its subsidiaries. In the midst of severe repression by the Nigerian government, nine leaders of the group including Dr Barinem Kiobel, were arrested and charged with specious crimes.¹⁴⁸ The leaders were tortured and eventually executed. Upon seeking asylum in the US, Dr Kiobel’s widow along with eleven others who were victims or the relatives of the victims, instituted an action under the ATCA in US district court against Shell and its subsidiaries. They contended, amongst other things, that Shell and its subsidiaries, were complicit with the Nigerian government in perpetrating the human rights abuses.¹⁴⁹ After granting a *certiorari* for oral arguments on the question on whether TNCs could be sued under the ATCA, the court stated that under its existing precedent in *Sosa v Alvarez-Machain*, it had to consider whether under international law, ‘corporate liability for a violation of the law of nations was well established by the civilised world and established with a specificity sufficient to provide a basis

¹⁴⁶ The court alluded to the test in *United States v. Smith*, 5 Wheat. 153, 163-180, n. a, 5 L. Ed. 57 (1820) which called for the comparisons with the specificity with which the law of nations defined piracy). The Court also approved Edwards J’s decision in *Tel-Oren v Libyan Arab Republic* 517 F. Supp 542 (D.D.C 1981), which had suggested that the limits of the ATCA’s reach were defined by ‘a handful of heinous actions, each of which violates definable, universal and obligatory norms.’ However, the Court, noting the severity of its proposed test, hinted that not even all heinous acts may be actionable, as although some policies ‘are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offences.’

¹⁴⁷ *Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

for jurisdiction under the ATS.¹⁵⁰ The court went on to hold that it was not.¹⁵¹ The entire complaint was subsequently dismissed. The court's rationale was that corporations have never 'been subject to any form of liability...under the traditional international law.'¹⁵² Based on this, it concluded that corporate liability could not be a 'basis of a suit under the ATS'.¹⁵³

Granting an order of certiorari, the US Supreme Court ordered that the case be reargued. After the oral arguments had been heard, the court raised a different question- whether and under what circumstances the ATCA permits a cause of action for the extraterritorial conduct by TNCs which amount to violations of international law.¹⁵⁴ It did not however, rule on the question of whether international law recognised corporate liability, which could have answered whether corporations could be sued under the ATCA. Rather, it went on to hold that the ATCA was subject to the presumption against extraterritoriality, which provides that 'when a statute gives no clear indication of extraterritorial application, it has none.'¹⁵⁵ It stressed that the mere fact that the ATCA refers to suits by aliens for torts in violation of international law does not imply an extraterritorial reach since such torts could occur either within or outside the US, and that the mere presence of a US corporation on US territory was not enough to rebut the presumption.¹⁵⁶ Based on the facts, all the relevant conduct took place outside the territory of the US, therefore, it was beyond the ATCA's reach.

It should however be noted that the presumption against extraterritoriality was previously based on the idea that the application of US law extraterritorially may amount to a violation of international law rules limiting the reach of domestic law.¹⁵⁷ At the time of the

¹⁵⁰ *ibid*, para 130

¹⁵¹ *ibid*, paras 131-145

¹⁵² *ibid*, paras 148-149

¹⁵³ *Ibid*, para 149.

¹⁵⁴ *Kiobel v Royal Dutch Petroleum Co.*, 132 S. Ct 1738 (2012).

¹⁵⁵ *Kiobel v Royal Dutch Shell Co.*, 133 S. Ct 1659 (2013).

¹⁵⁶ *ibid*, para 1665.

¹⁵⁷ This was previously known as the presumption against extra-jurisdictionality. See, David L. Sloss, 'Kiobel and Extraterritoriality. A rule without a Rationale' (2013) 28 *Maryland Journal of International Law* 1, 241.

presumption, international law imposed jurisdictional limitations on the application of domestic legislation beyond the territorial boundaries of a state.¹⁵⁸ However, the international law rationale for the presumption is no longer tenable because international law now recognizes several bases for the extension of domestic legislation extraterritorially.

As an initial matter, it had been previously established in *Sosa* that the ATCA does not give rise to new causes of action. Rather it allowed federal courts to recognize causes of action based on sufficiently prescribed norms of international law.¹⁵⁹ If the plaintiffs were merely asking the court to apply international law, it is unclear why the presumption against extraterritoriality is even applicable.¹⁶⁰

Even if the Supreme Court's argument that international law prohibited the application of domestic laws extraterritorially were to be considered, it does not seem to justify the application of the presumption in *Kiobel*. Based on the international law principles of nationality, passive personality, the protective principle, the effects doctrine and the universality principle, extraterritorial legislation is permitted.¹⁶¹ However, since none of the parties in *Kiobel* were US nationals and none of the acts complained of had direct bearing on US territory, the first four principles cannot be relied on to establish extraterritorial jurisdiction. Nevertheless, it should be noted that there is general acceptance of the fact that there is a 'procedural agreement' amongst States to criminally prosecute a limited group of universally condemned activities, including torture, genocide, crimes against humanity, and war crimes-

In practice, the presumption against extraterritoriality was an application of the *Charming Betsy* principle which provided that 'an act of congress ought never be construed to violate the law of nations if any other possible construction remains. See *Murray v Schooner Charming Betsey* 6 US (2 Cranch) 64, 118.

¹⁵⁸ Traditionally the territorial boundaries of a state provided the foundation for jurisdictional queries. Territoriality was considered as a defining pillar of international law. For instance, in the 1600's the Treaty of Westphalia conceptualized a nations power as ending at its territorial borders. Each state possessed exclusive jurisdiction within its own territory. See, A. Parish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61 *Vanderbilt Law Review* 5, p. 1455, citing L. Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42 *AJIL*, p. 20, 28-29

¹⁵⁹ *Sosa* (n 142), para 2763.

¹⁶⁰ Rather than seeking to extend domestic law extraterritorially, the plaintiffs sought redress for offenses that were sufficiently recognized under international law.

¹⁶¹ See section 3.3 above.

crimes which are also considered as human rights violations.¹⁶² In light of this consensus concerning universal criminal jurisdiction, Justice Stephen Bryer in the case of *Sosa v Alvarez Machain* noted:

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.¹⁶³

Justice Breyer was obviously referring to the practice of civil law states, which allow victims of crime to attach civil claims for compensation to criminal prosecution (referred to as *action civiles*), to conclude that the international community's consensus regarding universal criminal jurisdiction 'necessarily contemplates a significant degree of civil tort recovery as well'.¹⁶⁴ At the international level, this assertion is supported by the fact that pursuant to Article 75(2) of

¹⁶² *Sosa* (n 142), para 762.

¹⁶³ *ibid*, paras 762-763.

¹⁶⁴ *Ibid*; See, Code de Procedure Penale, version consolidee au 12 avril 2019, articles 689-2 – 689-10 (universal jurisdiction), arts 2-3 (action civile); Germany: Volkerstrafgesetzbuch [Act to Introduce the Code of Crimes against International Law], 26 June 2002, sections 403–406c (action civile); civile); Spain: Ley Orgánica del Poder Judicial (Organic Law of the Judiciary) 22 May 1995, art 23(4) (universal jurisdiction).

the Rome statute of the International Criminal Court (ICC), the ICC has the power to ‘make an order directly against a convicted person specifying appropriate reparations to, or in respect of victims, including restitution, compensation and rehabilitation.’¹⁶⁵ ‘Punishment and compensation represent two distinct, but complementary ways of condemning past, and deterring future, wrongdoing’.¹⁶⁶ Thus, the exercise of universal civil jurisdiction is consistent with the justifications put forward for the exercise of universal criminal jurisdiction under international law.

The provision of appropriate reparation to victims of international crimes corresponds with the right to effective remedy in international human rights law. The various human rights treaties prescribe obligations for State parties to provide effective remedy for victims of human rights in the form of compensation, restitution or rehabilitation, according to the circumstances of each case.¹⁶⁷ This requirement also finds expression in the general obligation to protect human rights, which has been interpreted by the various treaty bodies to include the responsibility of States to exercise due diligence to not only regulate, and investigate violations, but to also provide remedy to human rights victims.¹⁶⁸

Assuming the *Kiobel* allegations were true, the ATCA’s extraterritorial application would be consistent with international law because it falls within the scope of the universality principle as a basis for providing remedy for internationally condemned acts that also amount to human rights violations. This would be the legitimate starting point for the petitioners in *Kiobel* to claim their right to remedy.

¹⁶⁵ Rome Statute of the International Criminal Court (n 137).

¹⁶⁶ Donald Francis Donovan and Anthea Roberts, ‘The Emerging Recognition of Universal Civil jurisdiction’ (2006) 100 AJIL 142, 154.

¹⁶⁷ See, the Universal Declaration of Human Rights, 10 December 1948, 217 A (III), article 8; the ICCPR (n 6), article 2(3). (The United States ratified the ICCPR in 1992); Convention against Torture and other inhuman and Degrading Treatment, or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, article 14 (ratified by the US in 1994); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 60 UNTS 195, article 6 (ratified by the US in 1994) - United Nations OHCHR, ‘Status of Ratification Interactive Dashboard’ <<http://indicators.ohchr.org>> accessed 28 August 2019.

¹⁶⁸ See chapter 2, section 2.4.

Nevertheless, the court stressed that the presumption against extraterritoriality could only be displaced where the claims ‘touch and concern the US...with sufficient force’, and that mere corporate presence was insufficient to displace the presumption.¹⁶⁹ But no interpretation of what will touch and concern the US with sufficient force was given, leaving it open for lower courts to decide in subsequent litigation.

The lower courts have already been quick to base their judgements on the *Kiobel* decisions to dismiss pending cases. In *Balintulo et al v Daimler et al*, the second circuit of the US court of Appeal held that corporate citizenship could not displace the presumption. It stated that ‘if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*’.¹⁷⁰ In *Cardona v Chiquita Brands International* the court held that the suits were barred under the presumption because the relevant conduct and the alleged torts occurred outside the US.¹⁷¹ However, in December of 2015, the second circuit of the Court of Appeal gave its ruling in the *Arab Bank case*.¹⁷² In considering the liability of the foreign defendant company for alleged harmful acts committed abroad, the court did not consider the touch and concern standard that was articulated in the Supreme Court decision in *Kiobel*, rather it confirmed the position in the first *Kiobel* decision, that corporations cannot be held liable for violations of the law of nations.¹⁷³

Upon its rehearing, it was acknowledged that when the court in *Kiobel* stated that mere corporate presence is insufficient to discharge the touch and concern requirement, it implied that corporate presence could perhaps ‘in combination with some other fact alleged’ be sufficient to confer ATCA jurisdiction over TNCs, suggesting the possibility of liability under

¹⁶⁹ *Kiobel* (155) para 1669.

¹⁷⁰ *Balintulo v Daimler AG* 727 F. 3d, 174, 190 (2d cir. 2013). But see, *Al-Shimari v CACI Premier Technology* 758 F. 3d at 530

¹⁷¹ *Cardona v Chiquita Brands International Inc*, 760 F. 3d 1185, 1189 (11th Cir. 2014).

¹⁷² *Arab Bank Case*, 808 F. 3d, 144 (2nd Cir. 2015) as amended December 17 2016.

¹⁷³ *ibid* para 148.

the ATCA.¹⁷⁴ However, it failed to consider whether the case before it would have passed the touch and concern requirement. Judge Pooler, who wrote the lead dissenting judgement in the *Arab Bank* case rightly stated that the court may have erroneously framed the question when it asked whether there was a norm of corporate liability under international law applicable to corporations so as to bring claims against corporations within the ambit of the ATCA.¹⁷⁵ The court was probably searching for a direct rule of corporate responsibility applicable to corporations.

Besides the fact that corporate liability for human rights violations had long been recognised since the revival of the ATCA in *Filartiga*, it is also certain that the law of nations does not provide norms of liability that are applicable to specific actors.¹⁷⁶ Rather, there are established norms of international human rights law for which every state is obligated to protect. According to the various human rights monitoring the implementation bodies, the obligation to protect requires that States adopt a standard of due diligence in discharging their obligations.¹⁷⁷ This necessarily requires that States adopt regulatory, investigatory and punitive measures, and that these measures should be used diligently, to the best of the States' abilities. In other words, States should use all the means reasonably available to them to protect human rights violations by third parties, regardless of whether the conduct occurs inside or outside of their territories, as long as they have the capacity to effectively influence the activities or persons likely to commit or already committing the violation.¹⁷⁸

Although it is no secret that the views of the human rights treaty bodies lack an expressive formal binding character under international law, it is, however, also well known that in applying human rights treaty provisions, human rights courts refer to the general

¹⁷⁴ *ibid* para at 155.

¹⁷⁵ *ibid* para 8 (per, Pooler J).

¹⁷⁶ See *Doe v Unocal* (n 139) and *Wiwa v Shell* (n 141).

¹⁷⁷ See chapter 2, section 2.3.1.1.

¹⁷⁸ Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12 *Human Rights Law Review* 1, 19.

comments of these bodies.¹⁷⁹ Besides this, the duty of the various international human rights treaty bodies is to interpret the provisions of the treaties to ensure that States effectively discharge their human rights obligations. If the obligation to protect individuals against third party abuse, including TNCs is internationally recognised, it is necessary that this obligation applies in a way that the transnational character of a third party would not water down the content of the obligation. If States have the capacity to and are in a position to discharge their obligation to protect human rights beyond their national boundaries, the obligation should not be limited.

Applying this reasoning to the *Kiobel* case, if the obligation to protect individuals against third party abuse, including TNCs is internationally recognised, and the ATCA, based on the permissive rules of international law provides jurisdictional means for which the obligation may be exercised, then the US courts are clearly in a position to effectively influence the activities of TNCs in such cases and should, therefore, do so.

While some have expressed the view that the decisions in *Kiobel* and its progeny signal the end of ATCA litigation and probably the end of transnational litigation against TNCs for human rights violations, others have argued that the decisions have provided an opportunity for an examination of approaches of courts in other States.¹⁸⁰

¹⁷⁹ See, *Osman v United Kingdom* [1998] VIII ECtHR; 29 EHRR 245, paras 114-116; *Velasquez Rodriguez v Honduras* [1988] Inter-American Court of Human Rights, (Ser. C) No. 4, paragraph 172; *Ilascu and others v Moldova and Russia*, Application no. 4878/99, 8 July 2004, paras 331 and 333; *Kilic v Turkey*, Application no. 22492/93, 28 March 2000, para 62.

¹⁸⁰ Andrew Sanger, 'Corporations and Transnational Litigation: Comparing *Kiobel* with The Jurisprudence of English Courts' (2013) 107 AJIL 4. e24.

3.3.2.2 The Brussels Regulation

No other domestic regulation is comparable to the US ATCA. However, there is an alternative that can achieve similar results. This involves the use of ordinary tort law to hold TNCs accountable for their harmful activities that amount to human rights violations. The EU Parliament through its resolution in 2002 and 2007 on the issue of foreign direct liability referred to the Brussels Regulation, (which became the Brussels Convention and now the Recast Brussels Convention), as providing the necessary judicial basis for cases involving foreign direct liability of TNCs before EU member states.¹⁸¹ The Regulations provide that, all EU States may entertain suits against corporations who have their principal place of business or registered offices domiciled within their territory.¹⁸² The cause of action is to be founded based on the law of each individual EU state, where the case is instituted.¹⁸³ For the action to be maintained in relation to a human rights violation, such a claim must be actionable as a well-established tort.¹⁸⁴ For instance, in the case of torture, claimants would need to allege a domestic tort of assault, wrongful death for disappearance and killings, and negligence for injuries from unsafe working conditions and environmental damage.¹⁸⁵

Although the torts alleged are not labelled ‘torts in violation of international law’, suing under them can ensure liability and compensation for harmful conduct, just like in cases under the ATCA.¹⁸⁶ The courts in the Netherlands have successfully applied the Brussels Regulation to transnational litigation involving harmful TNC actions abroad. In *Akpan v Shell*,¹⁸⁷ a farmer and fisherman living in the village of Ikot Ada Udo in Akwa Ibom State in Nigeria claimed

¹⁸¹ Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), Council Regulation (EC) No 44/2001 of 22 December 2000

¹⁸² *ibid* article 4 and article 60

¹⁸³ *ibid*, article 2 (1)

¹⁸⁴ Robert McCorquodale, ‘Waving, not drowning: Kiobel Outside the United states’ 107 AJIL 4, 848.

¹⁸⁵ *ibid*, 850

¹⁸⁶ *ibid*

¹⁸⁷ *Akpan v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd.* [2013] LJN BY9854 (Netherlands).

that his farmland and fish ponds had been destroyed as a result of oil leaks from an oil installation belonging to Shell Petroleum Development Company of Nigeria (SPDC), a subsidiary of Royal Dutch Shell (RDS) incorporated in Nigeria.¹⁸⁸ After about 629 barrels of oil had been spilled, an employee of SPDC stopped the leak.¹⁸⁹ Upon its failure to compensate Akpan for the losses suffered as a result of the leak, Akpan sought to initiate proceedings in the District Court of the Hague against both RDS and SPDC. Akpan claimed that SPDC had breached its duty of care to prevent leaks and thus had committed a tort of negligence, and RDS, the Dutch parent company had violated the law by failing to enact guidelines instructing SPDC to prevent and adequately react to oil leaks.¹⁹⁰ However, the defendants contended that the external nature of the claims required a stronger connection. In response to this, the court confirmed its jurisdiction over both SPDC and RDS citing the Brussels regulation.¹⁹¹ Given that SPDC is not domiciled in an EU state the court turned to the interpretation of Article 7(1) of the Dutch Civil Procedure Code, which provides that if a court has jurisdiction over one defendant it would be deemed to have concurrent jurisdiction over the other, provided the rights of action are connected and a joint hearing would promote efficiency.¹⁹² Based on this, it found that the connection between the claims against both defendants was sufficient to justify a joint hearing.¹⁹³

With the narrowing of the ATCA's reach, and the decision in *Akpan's case*, the EU state courts may appear to be viable fora for instituting cases against TNCs for their harmful activities abroad. Nevertheless, cases brought under the Brussels Regulations lack one crucial element- human rights. The necessity for cases under the regulations to be couched under the

¹⁸⁸ *ibid*, paras 2.2-2.3 and 3.1

¹⁸⁹ *ibid* para 2.7

¹⁹⁰ *ibid* para 3.1

¹⁹¹ *ibid*

¹⁹² Dutch Code of Civil Procedure, Book 1: Litigating before District Courts of Appeal and the Supreme Court, Article 7(1) < <http://www.dutchcivillaw.com/civilprocedureleg.htm> > accessed 3 December 2016.

¹⁹³ Judgement in Motion Contesting Jurisdiction, 30 December 2009, 330891/HA ZA 09-579 at 3.6. < <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/judgment-courtcase-shell-in-jurisdiction-motion-oruma> > accessed 3 December 2016.

law of tort forces claimants into a very small box. Plaintiffs have to fit all their cases within certain restrictive legal parameters.¹⁹⁴ For instance, a violation of the right to food or to water, or even the right to life as in the *Akpan* case had to be brought as a claim in tort law for negligence. While the effects of the litigation may seem the same as ATCA cases, couching human rights claims as torts diminishes the significance of the harm. Framing the claims in human rights language sends a message that best interprets the views of the victims which causes the TNCs to reflect on the gravity of their acts. Also, the lack of legal expression in human rights terms diminishes the normative content of the state's duty to protect human rights as it suggests that TNCs may not be liable for violations of human rights resulting from their harmful activities.

3.3.3 The Doctrine of *Forum Non-conveniens*

Even where it is established that a court has jurisdiction, it may not always exercise such jurisdiction in practice. In some instances, claims against TNCs in foreign states continue to be dismissed on grounds of *forum non conveniens*.

Under the doctrine, the court is vested with the discretion to resist jurisdiction when the convenience of the parties and 'the ends of justice' dictates that the case should take place elsewhere.¹⁹⁵ However, the doctrine has been used as a tool by parent companies of TNCs to defeat, delay and frustrate suits brought against it for alleged violation of human rights by its subsidiaries.¹⁹⁶ Cassels describes the doctrine as a 'shield from liability for injuries abroad.'¹⁹⁷ The shield has become almost infallible as most of the cases in which *forum non conveniens* was invoked by the courts have either been abandoned or settled out of court for small amounts

¹⁹⁴ McCorquodale (n 185), 851.

¹⁹⁵ *Gulf Oil Corporation v Gilbert* in 1947, ¹⁹⁵ 330 U.S. 501; 67 S. Ct. 839; 91 L. Ed. 1055; 1947 U.S. LEXIS 2551.

¹⁹⁶ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012), 92.

¹⁹⁷ Jamie Cassels, *The Uncertain Promises of Law: Lessons from Bhopal* (University of Toronto Press 1993), 144.

of compensation.¹⁹⁸ The parameters of the doctrine have been addressed in many domestic courts, especially in US ATCA cases and cases instituted against TNCs in the UK and EU member states. In order to illustrate the difficulties posed by the doctrine some of these decisions will be cited.

3.3.3.1 Application of *forum non conveniens* in US courts

In the US, the basis for dismissal of a suit on *forum non conveniens* grounds is twofold.¹⁹⁹ First, the defendant must show that there is an adequate alternative forum, and second,²⁰⁰ the defendant has to show the court that certain public and private factors tilt in favour of a dismissal.²⁰¹ In *Gulf Oil Corporation v Gilbert*,²⁰² the public and private interest factors were listed as including, access to proof, availability of witnesses and means to secure their attendance, proximity of the premises if relevant to the action, and considerations of the enforceability of a judgement.²⁰³ Public interest factors include, congestion of courts, appropriateness of having localised cases litigated in their home states, and burden of jury actors. Because *Gilbert* concerned choice between two domestic fora (New York and Virginia), the court did not give any guidance as to the weight to be attached to the factors for cases where the alternate forum is a foreign country.²⁰⁴ In the case of *Piper Aircraft Co v Reyno*,²⁰⁵ the Court explained the factors in their application to foreign forums where it stressed that no decision of a foreign plaintiff to bring a case in a US court should receive substantial deference than the same decision by US citizens or residents. The court did not, however, emphasize on

¹⁹⁸ Upendra Baxi, Inconvenient Forum and convenient Catastrophe: The Bhopal Case (1986) 36 *International and Corporate Law Quarterly* 3, 1-30.

¹⁹⁹ *Piper Aircraft Co v Reyno* 454 U.S. 235; 102 S. Ct. 252; 70 L. Ed. 2d; 1981 U.S. LEXIS 133

²⁰⁰ An adequate forum is simply one that offers a remedy for the claim and will treat the plaintiff with a basic level of fairness. See *Piper Aircraft case*, *ibid* para 254-255.

²⁰¹ See *Wiwa v Royal Dutch Shell* (n 142) para 100.

²⁰² *Gulf Oil case* (n 196), para 508-509.

²⁰³ *ibid* para 508.

²⁰⁴ *ibid* paras 508-509.

²⁰⁵ *Piper Aircraft case* (n 199).

any of the *forum non conveniens* requirements. Rather it stated that ‘if central emphasis was placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.’²⁰⁶ The court left it to lower courts to apply the doctrine and weigh the competing factors in individual cases. As a result, many TNCs have taken advantage of the doctrine to limit their liability in suits brought by foreign plaintiffs.

In the *Bhopal case*,²⁰⁷ the *forum non conveniens* doctrine was a major basis for dismissal in the US courts. Following the plaintiff’s contention about the unsuitability of the Indian legal system to entertain the suit, the defendants argued that nearly all records relating to liability were in India and not in the US.²⁰⁸ Also, important safety inspection documents and inspection officers themselves were located in Bhopal, India.²⁰⁹ But the main focus of the courts final analysis was based on the nationality of the plaintiffs. The court stated that ‘the additional presence in India of all but less than a handful of claimants underscores the convenience of holding the trial in India and because plaintiffs are not US nationals, their forum choice was not entitled to much deference.’²¹⁰

In *Aguinda v Texaco*²¹¹ Ecuadorian plaintiffs sued Texaco Inc. for severe contamination and destruction of their communities. They alleged that Texaco’s transnational harmful environmental activities in the region negatively impacted on the lives of thousands of people in Ecuador and Peru. The US District Court approved the Ecuadorian forum because tort claims similar to those alleged in this case had been successfully prosecuted in Ecuador. Furthermore, several United States courts had previously found that Ecuador was a reasonable venue to address similar claims. With this support, the first portion of the *Piper v Reyno* test had been

²⁰⁶ *ibid* paras 249-250.

²⁰⁷ *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India In December, 1984*; 634 F. Supp. 842; 1986 U.S. Dist. Lexis 25624.

²⁰⁸ *ibid* LEXIS section 2A

²⁰⁹ *ibid*

²¹⁰ *ibid*, LEXIS section 3A and 3B

²¹¹ *Maria Aguinda v Texaco, Gabriel Ashanga Jota v Texaco, Inc* 303 F 3d 470 (2001); *Aguinda v Texaco, Inc*, 303 F 3d 470 (2002)

satisfied. The second-stage of the test required the defendants to demonstrate that the *Gilbert* factors weighed so heavily in their favour as to tip the plaintiff-biased scale in their direction. First, the defendants argued that all plaintiffs were foreigners. Based on past precedent, this type of plaintiff is granted less deference. Secondly, relevant governmental officials lived in Ecuador. These key witnesses would be silenced in a US trial because the Government of Ecuador refused to waive sovereign immunity. Thirdly, they stated that only minimal and insignificant ties linked the US owned Texaco to its Ecuadorian subsidiary. The court noted that the dispute was primarily between Ecuadorian citizens and the Republic of Ecuador, and that Ecuador's interest in the case was more substantial than that of the US. In the court's opinion, this case has everything to do with Ecuador and nothing to do with the United States.' The trial was dismissed from the US.

The dismissal of cases based on FNC grounds is complemented by the high probability that the plaintiffs will not be able to pursue their claim elsewhere. A penurious plaintiff may face difficulties reinitiating the litigation in another forum as many states do not offer contingent fee systems. Therefore, where a plaintiff cannot afford a lawyer in another state, such a plaintiff will be forced to forfeit his case.

Even in instances where the plaintiff can afford a lawyer, the substantive law in the alternative forum may prevent the plaintiff from seeking compensations. *Piper v Reyno* suggests that the court has the discretion to dismiss an action from the US even where the plaintiff shows that the law of the forum is less favourable. A decision to dismiss on *forum non conveniens* grounds not only denies the plaintiff the power of choosing a forum but may also cause him to forfeit his cause of action. This thwarts the very goals of fairness and convenience that the *forum non conveniens* doctrine was designed to achieve. The courts ought not to dismiss cases on grounds of *forum non conveniens* unless they are satisfied that such proceedings amount to an abuse of process in the sense of vexation, harassment or oppression

of involved corporations.²¹² A decision to dismiss when this is not the case may cause the claimant to forfeit his cause of action denying him his access to effective remedy which is a corollary of the states' duty to protect.²¹³ As previously stated, states are required to take all necessary measures in ensuring that victims of human rights are adequately protected, including measures of prevention and remediation. Failure of the courts of a state to provide adequate remedy when it is in a position to do so means that it has failed to carry out its duty.

3.3.3.2 *Forum non Conveniens* in the UK and EU

The English courts have demonstrated their willingness to entertain matters that involve liability of TNCs for their acts abroad. In fact, English courts have taken more favourable positions to the claimant when faced with similar jurisdictional issues like the cases under the ATCA. Of note is their treatment of the doctrine of *forum non conveniens*.

In the United Kingdom, the contemporary doctrine of *forum non conveniens* is derived from the Judgement of the House of Lords in *Spiliada Mar. Corp v Consulex Ltd*.²¹⁴ In this case, the House of Lord provided a two-stage test for the establishment of *forum non conveniens*. The defendant must show that there is an alternative forum that is 'clearly or distinctly' more appropriate than the English Court, premised upon connecting factors showing that the alternative forum demonstrating that the alternative forum has the closest and most substantial relation to the dispute.²¹⁵ Where the court is satisfied that the defendant has carried out this task, then the burden shifts to the plaintiff who will then show that the court should not

²¹² Deva (n 196), 88.

²¹³ See chapter 2, section 2.4.

²¹⁴ *Spiliada Mar. Corp v Consulex Ltd* [1986] ALL ER 843.

²¹⁵ This is also the position in Canadian courts, see *Recherches Internationales Quebec v Camboir Inc* [1998] QJ No 2554, Quebec Super. Ct, 14 August 1998 but Australian Courts take a slightly different view, see, *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55.

dismiss the case on *forum non conveniens* grounds because justice cannot be achieved in the alternative forum.²¹⁶

This approach was taken in *Connelly v RTZ Corp Plc*,²¹⁷ where the plaintiff instituted an action against a UK parent company for its failure to adequately control working conditions at its Namibian subsidiary. The working conditions allegedly led to the plaintiff contracting laryngeal cancer. The plaintiff was unable to obtain legal aid in Namibia and the technical and legal issues could not be litigated in Namibia. Whereas, in England, he could either obtain legal aid or get a lawyer on a ‘no win, no fee’ basis.²¹⁸ The House of Lords allowed the case to be brought before a UK court on the basis of the practical obstacles he faced in Namibia.²¹⁹ The court stated that:

The availability of financial assistance in this country coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum.²²⁰

The decision in *Connelly* enabled the plaintiffs in *Lube and others v Cape Plc*,²²¹ to conclude their claim in England which was continuously traced up and down the court system for three years. In that case, the plaintiffs who suffered from asbestosis related diseases due to their exposure to health and safety hazards while working for a South African subsidiary of the

²¹⁶ John Burke, ‘Foreclosure of the Doctrine of *Forum Non Conveniens* under the Brussels I Regulation: Advantages and Disadvantages’ (2008) 3 *The European Legal Forum*, 2.

²¹⁷ *Edward Connelly v RTZ Corporation Plc and RTZ Overseas services* 02/05/1996, [1997] I.L.Pr. 643

²¹⁸ *ibid*

²¹⁹ See House of Lords, *Connelly v RTZ Corp. Plc*, 24/07/1997, [1997] 3 WLR 373.

²²⁰ *ibid* para 57.

²²¹ *Lube v Cape Plc* [2000] 1 W.L.R 1545.

British owned Cape Plc, sued the company in the English High court, asking for compensation. The defendant subsequently altered its corporate structure in South Africa and soon thereafter it no longer had assets in South Africa. After an application to stay the proceedings on grounds of *forum non conveniens* had been granted at the trial stage, the decision was overturned on appeal. The House of Lords, following the line of reasoning similar to that used in *Connelly* held that, under *Spiliada*, England was the appropriate forum to settle the matter, since under the relevant factors, substantial justice will not be obtained in the alternative forum.²²²

Similarly, in *Lulongwe and others v Vendata plc*,²²³ the Supreme Court found that the claimant group of penurious Zambian villagers could proceed with their claim in England, notwithstanding that Zambia was overwhelmingly the proper place for the claim to be tried.²²⁴ The court stated that the crucial factor to be considered in allowing such a case is that ‘there is a real risk that the claimants would not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place or the convenient or natural forum’.²²⁵ The court went on to note that ‘if there is a real risk of the denial of substantial justice in a particular jurisdiction,’ then it is obvious ‘that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice.’²²⁶

The above decisions reflect the idea behind the doctrine of *forum necessitatis*, where a court other than that which has the strongest nexus to a claim could consider the claim in order to avert a denial of justice.²²⁷ The doctrine exists as a separate jurisdictional category in a considerable number of domestic legal systems, notably in Europe and Canada.²²⁸ However,

²²² *ibid* para 157

²²³ *Lulongwe and others v Vendata plc* [2016] EWCH 957 TCC

²²⁴ *ibid*, para 85

²²⁵ *ibid* para 20.

²²⁶ *ibid*, para 88; see also, *Owusu v Jackson* [2005] ECR 1383; *Flatela Vava and others v Anglo American South Africa Ltd* [2014] EWCA Civ 1130

²²⁷ Chilenye Nwapi, ‘Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor’ (2014) 30 *Utrecht Journal of international and European Law*, 24.

²²⁸ Most states consider the *forum necessitatis* doctrine as stemming from article 6 (1) of the ECHR, ‘...everyone is entitled to fair and public hearing within reasonable time and by an independent and impartial tribunal established by law’ (). The ECtHR has taken Article 6 to imply a right to access to court that is both effective and

the *forum necessitatis* doctrine is rarely applied in practice, even less so in business and human rights cases, where the victims' right of access to justice is nonetheless crucial.²²⁹ From the design and practice of the doctrine in European and Canadian legal systems, there are two apparent conditions for its application: (1) the impossibility or unreasonableness of the plaintiff bringing his case in an alternate forum; and (2) a connection between the case and the jurisdiction where the plaintiff requests the assertion of *forum necessitatis*. Although these two elements are common to most provisions on *forum necessitatis*, their precise content and the threshold that have to be met differ between states, with some still being a matter of internal debate.²³⁰

There are other in the UK and EU that may explain why the EU and the UK still present challenges for extraterritorial litigation. In relation to the procedural rules and the types of claim brought by claimants, the United States offers more advantageous procedural rules, including extensive discovery options, class action suits, and punitive damages. In English and Dutch courts on the other hand, the losing party typically pays the other side's substantial litigation costs. This serves as a source of serious discouragement to potential plaintiffs who are usually penurious. The Connelly, Cape PLC and Thor Chemicals cases were all publicly funded by the UK Legal Services Commission. This means that the lawyers representing the claimants had a steady stream of funding for their expenses and legal fees. However, in the UK, obtaining such public funding is no longer realistic. Cases are now run on a no-win no fee basis.²³¹ Although NGO's may be allowed to litigate on behalf of the victims, class actions are not generally

practical, which necessary means that a refusal to establish jurisdiction in cases where no other court is competent or the case cannot reasonably be brought in another court, could amount to a denial of the right to access to court See *Goulder v United Kingdom* [1975] 1 EHRR 524. For a discussion on the states and their specific regulations on the *forum necessitatis* doctrine, see generally, Nwapi *ibid*.

²²⁹ Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe: the Promises Held by Forum Necessity-based Jurisdiction' (2016) 80 *The Rabel Journal of Comparative and International Private Law* 4, 789 <<https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Business-and-Human-Rights-Litigation-in-Europe-and-Canada.-The-Promises-of-Forum-of-Necessity-Jurisdiction.pdf>> accessed 1 May 2019.

²³⁰ *ibid*, 794-802.

²³¹ See section 58 and 58A Courts and Legal Services Act 1990; this is also the case in Australia under section 3.4.27 and 3.4.28 of the Legal Profession Act 2004 Version No. 033, No. 99 of 1004 (Victoria).

facilitated, not even for transnational human rights and environmental claims that usually involve many victims.

3.3.4 The twin principles of separate legal personality and limited liability

Even where the victims of human rights violations resulting from TNC operations are able to overcome the *forum non conveniens* obstacle, there is no guarantee that they will be successful in getting remedies for their violations. In the very limited situations where prosecution can be secured, the foreign subsidiary who committed the harmful act may not have the economic capacity to compensate the victims, especially as TNC related violations usually involve a large number of victims. Some parent companies wilfully keep their foreign subsidiaries economically deficient, as a result, the subsidiaries are incapable of compensating the victims. In other instances, the subsidiaries, who are the apparent actors may just be following the instructions, policies and decisions of the parent company which result in human rights violations. When faced with these situations of uncertainty, it is more feasible for victims to sue the centre of control, which is the parent company. However, two principles that regulate the corporate system make this difficult: The ‘separate legal personality’ of the corporation from its shareholders or owners, and the ‘limited liability’ of investors, protecting them from business risks to the amount of their investments.²³²

These twin principles developed at a time when the concept of parent and subsidiary corporations was unknown, and corporations were prohibited from acquiring or holding shares in other corporations unless express permission was granted by statute.²³³ Nevertheless, the principles were extended to govern the relations of parent and subsidiary corporations of a

²³² The principle of separate legal personality is the foundation upon which the corporate structure is built. See *Salomon v Salomon Co Ltd* (1987) AC22 at para 19, see also, *Prest v Petrodel Resources* (2013) 3 WLR 1 at paragraph 5.

²³³ Phillip I. Blumberg, *The Multinational Challenge to corporation Law: The Search for a New Corporate Personality*, (Oxford University Press, 1993), 52.

corporate group based on the assumption that if they were applicable to shareholders, they should also be applicable where shareholders are corporations.²³⁴ This extension causes an anomaly because it makes no distinction between TNCs as investors and investors simpliciter. Parent companies are not passive investors like in simple corporations. In the multinational corporation setting, both the parent and the subsidiary companies carry out business in common, with the parent maintaining central control.²³⁵ The twin doctrines as applied to TNCs are stretched beyond their original intent of protecting investors to protecting the TNC itself. By appropriating the doctrine of separate legal personality of simple corporations to the parent-subsidary relationship within a corporate group, the parent company can misappropriate the fiction of separation and shift the liability to those shoulders which cannot bear it.²³⁶ This inappropriate extension results in situations of irresponsibility for human rights violations.

It means that no matter how much environmental damage a corporation causes, no matter how much debt it defaults on, no matter how many Malibus explode or tires burst or workers and consumers die of asbestosis, no matter how many people it puts out of work without their pension benefits or other protections; in short, no matter how much pain it causes, the corporation is responsible for paying damages (if at all) only in the amount of assets it has.²³⁷

²³⁴ *ibid*

²³⁵ Philip Blumberg, 'The Corporate Entity in the Era of Multinational Corporations' (1990) 15 *Delaware Journal of Corporate Law* 283, 327.

²³⁶ Deva, (n 196), 100.

²³⁷ Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (Yale University Press, 2001), 53.

The results stemming from the misapplication of the twin principles of separate legal personality and limited liability are alarming when it is used by parent companies to restrict and even avoid altogether, liability for its actions that cause human rights violations.²³⁸

However, it is fair to note that states have recognised the difficulties presented by the twin principles and have set out various techniques to limit their effects.²³⁹ Three major methods are employed; piercing the corporate veil, the enterprise theory, and the direct liability of parent companies.

3.3.4.1 *Piercing the corporate veil*

Piercing the corporate veil is a judicially imposed approach, applied mainly by US courts to evade the obstacles presented by the separate legal personality principle. Upon incorporation, the principle of separate legal personality places a conceptual veil distinguishing the TNC from its subsidiaries, preventing the parent company from being held liable for its subsidiaries' wrongful acts is set up. But in certain situations, 'when the court finds that the subsidiary corporations' existence is under the control of the parent to the extent that it has no independent reason for its own existence, the subsidiary would be found to be a mere agent or instrumentality of the parent company.²⁴⁰ The courts will pierce the corporate veil, disregarding the separation between the parent and subsidiary corporations, and treat them as a single economic unit allowing the acts of the subsidiary to be imputed to the parent company.²⁴¹

Following this reasoning, the court in *Bowoto v Chevron Texaco* held that Chevron was responsible for the alleged complicity of its Nigerian subsidiary, Chevron Nigeria limited, with the Nigerian military in violently suppressing protests against the country's activities in the

²³⁸ Blumberg (n 235), 495.

²³⁹ *Case concerning Barcelona Traction, (Belgium v Spain)* [1970] ICJ 3, paragraph 56, 58.

²⁴⁰ Olivier De Schutter, 'Towards a new Treaty on Business and Human Rights' (2016) 1 *Business and Human Rights Journal* 1, 22.

²⁴¹ *ibid*, 23

region.²⁴² It stated that due to the volume, content and timing of communication between Chevron Texaco and Chevron Nigeria limited especially on the day of the protest, it was evident that chevron ‘exercised more than the usual degree of direction and control which a parent exercises over its subsidiary’.²⁴³ Chevron Nigeria Limited was therefore held to be an agent of Chevron Texaco.

Apart from the circumstances stated in the *Bowoto* case, courts consider an unlimited variety of factors to establish that the subsidiary was actually under the control of the parent company. They look at whether there was any form of misrepresentation or fraudulent or wrongful conduct; whether there was an intermingling of funds; whether there was a failure to follow corporate formalities; the independence of the company’s board of directors; whether there was common decision making between the parent and the subsidiary; common policies; common policy makers; and whether the parent and subsidiaries share directors and officers.²⁴⁴ However, there is no laid down criteria or hierarchical order in which these factors may be applied.²⁴⁵ This could serve as a major disincentive for claimants to pursue claims against TNCs as it creates uncertainty in pleading their case. The requirement of control necessary implies the provision of some sort of evidence (such as minutes of meetings and account statements, etc.) which is in the custody of the TNCs.²⁴⁶ It is highly unlikely that the TNC will release such information to claimants to be used against them during trial.

Another limitation of this approach is that it may discourage parent companies from exercising strict control over the activities of their subsidiaries even where they are in a position to do so.²⁴⁷ As the corporate veil will only be pierced when it is established that the subsidiary

²⁴² *Bowoto v Chevron* 312 F. Sup 2d. 1229 (2004).

²⁴³ *ibid* para132-133.

²⁴⁴ Gwynne Skinner, Parent Company Accountability. Ensuring justice for Human Rights Violations, September 2015, *International Corporate Accountability Round Table* (ICAR), 16, <<http://icar.ngo/wp-content/uploads/2015/06/ICAR-Parent-Company-Accountability-Project-Report.pdf>> accessed 06 December 2016.

²⁴⁵ *ibid*

²⁴⁶ *ibid*

²⁴⁷ De schutter (n 240), 27

has no independent existence of its own, abandoning the subsidiaries to monitor and supervise their own day to day operations will serve in parent companies' best interests.²⁴⁸ This will however be detrimental to the interest of those communities that are host to subsidiary companies with inefficient and ineffective health and safety technology and equipment.

3.3.4.2 The single economic entity theory

The single economic entity theory is a variation of the piercing the corporate veil approach. In situations where a parent company and its subsidiaries are not operated as wholly separate entities but instead combine their resources to achieve a common business purpose, the courts will treat both the subsidiary and parent as a single economic entity. Flowing from this reasoning, the TNC is regarded as a 'conglomeration of unity of a single entity, each unit performing a specific function, the function of the parent company being to provide expertise, technology, support and finance. In so far as there is any result from negligence in respect of any of the parent company functions then the parent will be held liable.'²⁴⁹

The enterprise theory appears to be a more viable approach but it has its limitations. In order to establish that the subsidiary is part of a conglomeration of entities functioning under the guidance and support of the parent company, it would be necessary to show that the parent has some form of functional or behavioural control over the subsidiary.²⁵⁰ Just like in the case of piercing the veil, requiring control can serve as a disincentive to parent companies and encourage them to distance themselves from the subsidiaries so as to avoid liability instead of taking steps to ensure that harmful practices are avoided.²⁵¹

²⁴⁸ *ibid*

²⁴⁹ Richard Meeran, 'The Unveiling of Transnationals' in Michael Addo (ed.) *Human rights and Responsibility of Transnational Corporations* (Kluwer International, 1999), 170.

²⁵⁰ Skinner (n 244), 16

²⁵¹ *ibid*, 17

3.3.4.3 The direct liability of the parent company

Rather than impute the action of the subsidiaries to the parent company of a multinational corporation, some courts have focused on the direct negligence of the parent company for failing to exercise due diligence over its subsidiaries activities where it is in a position to control such activities.²⁵² The main allegation is that the parent company breached its duty of care that it owed to those affected by the activities. In the case of *Cape v Chandler*,²⁵³ the Court of Appeal in the UK gave a ruling on the issue of parent company liability. The court stated that the recognition of the parent company's liability did not result in the piercing of the corporate veil. Cape plc was not liable for the acts of its subsidiary, but it was liable for its own failure to ensure that the working conditions were safe when all indications showed that it was in a position to do so.

The *Chandler* decision was considered in the Dutch court in *Akpan v Shell*, when it rendered its judgement against RDS for failing to prevent the oil spillage caused by its Nigerian subsidiary SPDC.²⁵⁴ Unlike in the *Chandler* decision, the *Akpan* case did not relate to an employee of the subsidiary, it related to the communities situated within the vicinity of its operations. In determining the liability of RDS, the district court found that the special relations or proximity that exists between a parent company and the employees of its subsidiary that operates in the same state, cannot be considered to be equivalent to 'the proximity between the parent company of an international group of oil companies and people living within the vicinity of its pipelines and oil facilities of its subsidiaries in other countries.'²⁵⁵ Otherwise, the duty of

²⁵² Olivier De Schutter et al, 'Human Rights Due Diligence: The Role of States' (The International Corporate Accountability Roundtable Report, 2012) <<http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf>> accessed 1 May 2019.

²⁵³ *Cape Plc v Chandler* [2012] EWCA Civ 525 (hereafter referred to as '*Cape*').

²⁵⁴ *Akpan v Shell* (n 187).

²⁵⁵ *ibid*, para 4.29.

care will be extended to a virtually unlimited group of persons in many countries.²⁵⁶ The court released RDS from responsibility for negligence.²⁵⁷

This decision has served as a setback to victims of corporate human rights violations. The test of proximity that was set based on the facts of the *Chandler* case will most likely not apply to a large number of cases where corporate violations are alleged, as interference by TNCs with the rights of communities represent a large percent of cases of corporate human rights violations.²⁵⁸ Though the *Chandler* decision is a positive one, it is the only one of its kind that has been decided on the merits.²⁵⁹ All other cases were either dismissed on technicalities or settled out of court.²⁶⁰ If there were clearly set decisions regarding direct liability of parent companies for acts and omissions of victims of corporate human rights abuse, TNCs will be more conscious of the human rights impact of their activities. In the absence of such clear decisions, victims are one more step behind in obtaining remedies for violations of their human rights.

3.3.5 Sovereignty and non-intervention

Apart from the setbacks presented by the complexities of the corporate structure, home states are faced with the principle of sovereignty and non-intervention. According to the basic tenet of the principle, a state has the prerogative to make decisions on their individual economic, social or political matters without the interference by other states.²⁶¹ As previously noted, the different TNC subsidiaries may be subject to uniform control but legally, they form separate

²⁵⁶ *ibid*

²⁵⁷ *ibid*, para 4.31

²⁵⁸ Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton & Company 2013), 23.

²⁵⁹ See *Dagi v BHP* [1995] 1 VR 428; *Gagarimabu v BHP* [2001] VSC 517 (unreported) (Supreme Court of Victoria) 27 August 2001; *Connelly v RTZ* [1998] AC

²⁶⁰ *ibid*

²⁶¹ Ian Brownlie, *Principles of Public International Law* (8th edn., Oxford University Press, 2012), 447; Antonio Cassese, *International Law* (Oxford University Press, 2005), 49. see also Article 2.1 and 2.7 of the United Nations Charter (2 October 1945) UNTS XVI.

entities upon incorporation abroad. Accordingly, in relation to their legal personality, subsidiaries operating abroad are independent from their parent companies as separate corporate bodies.²⁶² What this means is that the foreign subsidiaries are primarily subject to the legal order of the host state. Developing host states use this as a common argument in defence of their lax human rights regulations.²⁶³ As a result, home states are reluctant to regulate the conduct of their TNCs abroad as they feel that the exercise of such jurisdiction could be a direct way criticizing host state regulations and of impinging on the host state sovereignty, resulting in a strain in diplomatic relations between and among states.²⁶⁴

But it has since been acknowledged that certain internationally recognized human rights impose limits to state sovereignty, and that such matters cannot be said to belong to the exclusive national jurisdiction of the territorial state.²⁶⁵ The aftermath of the second world war which led to the adoption of the UN Charter, the Bill of Rights and subsequent human rights treaties, emphasize this fact by stressing that the way in which a state treats persons within its territory is no longer its exclusive prerogative.²⁶⁶ It is now the concern of the entire international community. This was confirmed by the ICJ in the case of *Democratic Republic of Congo v Uganda*, where it restated its opinion in the *Advisory Opinion on the Legal Consequences of the Construction of Wall in the Occupied Palestine Territory*, that human rights law may extend beyond a state's boundaries in respect of core human rights instruments.²⁶⁷

²⁶² Philip Bloomberg, (n 235), 304

²⁶³ Morimoto (n 128), 149.

²⁶⁴ In its conclusion about the extraterritoriality of the Australian Bill, the Australian Parliamentary Joint Statutory Committee stated that the Bill 'has a very real potential for offending foreign relations', (n 115) para 4.51.

²⁶⁵ Olivier De Schutter, 'Sovereignty-Plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations' (CRIDHO 2010/5) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448107> accessed 1 May 2019.

²⁶⁶ Sigrun Skogly, 'Regulatory obligations in a complex world: States' extraterritorial obligations related to business and human rights' in Surya Deva and David Bilchitz (eds.) *Building a Treaty on Business and human rights: Contexts and contours* (Cambridge University Press).

²⁶⁷ *Case Concerning the Armed Activities on the Territory of The Congo (Democratic Republic of The Congo v Uganda)* [2005] ICJ Reports 168, 216-217
Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Reports 136, paras 107-111.

Since all states are obligated to protect, respect and promote human rights and are duty bound to ensure that all persons and entities within their territory or control comply with human rights standards, it is necessary that certain laws with some extraterritorial flavour are set in place.²⁶⁸ By seeking to regulate the activities of foreign subsidiaries in host states through the adoption of extraterritorial legislation, home states are not foisting their legislation on host states themselves, rather, they are regulating the specific activities carried out by the subsidiaries so that they do not cause harm to the individuals in the host state.²⁶⁹ These sort of regulations only affect the parent company operating abroad through its subsidiary, meaning that the extraterritorial regulation of TNCs is even less extraterritorial in nature than it may first appear. Rather than being seen as criticizing host state regulations, such extraterritorial regulation should be regarded as a way of securing the rights of individuals when the host state is unwilling and unable to do so.²⁷⁰ Home state regulation is better seen as a matter of cooperation amongst states rather than a source of conflict and criticism of host state regulations.

This notwithstanding, the principle of sovereignty continues to pose an obstacle to extraterritorial regulation. Although the concept of sovereignty is not absolute, it is limited by a set of international human rights law norms. The international community agrees, for example, that torture, slavery, forced labour, and genocide form intolerable violations of international human rights.²⁷¹ These limited set of fundamental human rights norms have become part of customary international law, which all states are mandated to prevent or take steps to protect.²⁷² Unfortunately, the myriad of economic, social and cultural rights' violations

²⁶⁸ Surya Deva 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who should Bell the Cat?' 92004) 5 *Melbourne Journal of International Law*, 49.

²⁶⁹ *ibid*, 50.

²⁷⁰ *ibid*

²⁷¹ Antonio Cassese, *International Law* (Oxford University Press, 2005), 202-203.

²⁷² According to Bassiouni, 'legal literature discloses that' genocide, crimes against humanity, war crimes, piracy, slavery, and torture 'are *jus cogens*. (Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', (1996) 59 *Law and Contemporary Problems* 4, 68. A *jus cogens* norm is one which permits of no derogation and which can be modified only by a subsequent norm having that same character. Article 53 of the

that are usually attributed to transnational corporations (for example, the contamination or destruction of the environment resulting in a deprivation of the right to food, water and adequate living standards) receive far less attention.

3.4 Conclusion

The general agreement that states are obligated to protect human rights which could be threatened by the activities of TNCs faces serious challenges. The preliminary obligation rests on the territorially competent host states where the potential violations occur. Unfortunately, the power of TNCs coupled with the economic interests of host states make efficient human rights protection almost impossible. Home state regulation could offer an alternative to host state regulation, however due to the twin corporate principles of limited liability and separate legal personality, state sovereignty and the doctrine of *forum non conveniens*, home state extraterritorial regulation has been ineffective. The US Alien Tort Claims Act which was considered the most powerful transnational litigation tool has been severely limited by the decision in *Kiobel* and preceding judgements. Although the EU Regulations have abrogated the doctrine of *forum non conveniens*, serious procedural impediments prevent victims from instituting actions in EU states. Besides, it cannot be the duty of a single national jurisdictions to solve problems that concern the entire international community. States are understandably reluctant to establish this kind of jurisdiction because of the fear of placing their TNCs on a competitive disadvantage in relation to the TNCs of other states. This further explains why home states are also unable to tackle the problem human rights violation by TNCs. It is evident that the existing domestic mechanisms alone are incapable of controlling the conduct of TNCs. This has made the realization of the state's duty to protect almost impossible. A viable option

Vienna Convention on the Law of Treaties, 23 May, 1959. Examples of human rights norms amounting to *jus cogens* have also been listed by Theodore Meron, in his article titled, 'On a Hierarchy of Human Rights' (1986) 80 *American Journal of International Law* 1, 15.

that may be applied to ensure that human rights are protected is to impose regulations at the international level. This way the exact contents of the state's duty to protect will be spelt out and there will be uniform human rights standards for TNCs that will eliminate the competitive disadvantage feared by states. The international community has made attempts at setting up such standards through the adoption of various voluntary and soft law initiatives. The next chapter discusses these initiatives and examines their effect on the protection of human rights against violations resulting from corporate activities.

CHAPTER FOUR
A REVIEW OF INTERNATIONAL ACCOUNTABILITY INITIATIVES AIMED AT
REGULATING TNCS

4.1 Introduction

The circumstances leading to the inadequacy of current state-based mechanisms in addressing corporate abuse of human rights demonstrate that the state has lost some of its status as both the primary threat to human rights as well as the primary agent that can effectively protect them.¹ In the face of this reality, the international community has sought ways in which to improve the regulation of corporate activities.

The 20th century saw the introduction of the Corporate Social Responsibility (CSR) movement.² Rather than focus on the state-based indirect method of holding corporations accountable for their human rights abuse, this movements sought to place certain societal expectations and demands directly on businesses, while encouraging them to integrate such demands and expectations into their normal operational strategies.³ However, the focus on societal expectations in the international CSR initiatives present challenges as to what criteria TNCs should adopt in addressing societal demands, especially as they operate in transnational contexts and these demands would invariably differ from state to state. Following this, there has been a proliferation of a myriad codes of conduct, reporting initiatives and principles which

¹ Florian Wettstein and Sandra Waddock, 'Voluntary or Mandatory: that is not the question: linking corporate citizenship to human rights obligations for business' (2005) *6 Zeitschrift fuer Wirtschafts- und Unternehmensethik* 304-320, 305.

² *ibid*

³ There is no particular definition of CSR but all the given definitions focus on the need for business to address societal expectations. This is because of the diverse and ever-changing nature of such expectations within different natures and cultures. *Ibid*, 307; Benny Santoso, "'Just Business': Is the Current Regulatory Framework an Adequate Solution to Human Rights Abuse by Transnational Corporations?" (2017) *German Law Journal* 533-558, 536 <https://www.researchgate.net/publication/317100325_Just_Business_-_Is_the_Current_Regulatory_Framework_an_Adequate_Solution_to_Human_Rights_Abuses_by_Transnational_Corporations> accessed 20 September 2017.

have sought to provide a common baseline whose violation must be prohibited irrespective of where the violation occurs.⁴ This is said to be where the CSR initiatives and human rights intersect.⁵

There is practical consensus on the Universal Declaration of Human Rights and its related UN Documents on human rights. Apart from the fact that the UDHR is based on an explicit agreement of all but few states in the world, there is also consensus that all major cultures and moral traditions contain norms that are supportive of the idea of human rights.⁶ Thus, several CSR initiatives have adopted human rights standards as the baseline for the application of some of their provisions to corporate entities. However, the fact that these voluntary international initiatives seek to apply human rights standards contained in internationally recognised human rights documents directly to corporate entities does not attest to their adequacy in regulating corporate activities in relation to human rights.

The adequacy of a regulatory initiative rather lies in its ability to achieve the objectives for which it is established.⁷ Thus, a regulatory initiative which seeks to ensure corporate responsibility for human rights may be considered adequate or effective when it provides the necessary standards that encourage or persuade TNCs, as far as possible, to adopt human rights standards in the course of their operations, and, when it also provides appropriate sanctions or redress where the TNCs are not so encouraged.⁸ This chapter argues that the international corporate responsibility initiatives face several challenges that prevent them from meeting the adequacy criteria.

⁴ Sol Piccotto, 'Rights, Responsibilities and Regulation of International Business' (2003) 42 *Columbia Journal of Transnational national Law* 131-152, 131-132 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416026 > accessed 30 August 2017.

⁵ Florain Wettstein (n 1), 308.

⁶ Daniel Moeckli, Sngeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (2nd Edn., Oxford University Press 2014), 16; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National Regional and International Jurisprudence* (Cambridge University Press 2002), 7.

⁷ Françoise Tulkens, 'Human Rights, Rhetoric or Reality?' (2001) 9 *European Review* 2, 129.

⁸ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2014), 47.

In establishing this argument, the chapter begins with a survey of the six most prominent international initiatives, which include; the Draft United Nations Code of Conduct on Transnational Corporations (UNCTC),⁹ the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises (OECD Guidelines),¹⁰ the International Labour Organization's Tripartite Declaration of principles concerning multinational enterprises and social policy (ILO Tripartite Declaration),¹¹ the United Nations Global Compact,¹² the United Nations Draft Norms on the Responsibilities of Transnational Corporations and other business enterprises with regard to human rights (UN Norms),¹³ and the United Nations Guiding Principles for Business and Human Rights (Guiding Principles).¹⁴ Then, the specific challenges that they present will be discussed with a view to introduce the discussion on the possibility of a more viable system of accountability for corporate abuse of human rights.¹⁵

4.2 The United Nations Draft Code of conduct for Transnational Corporations

Discussions on the emergence of international regulatory initiatives concerning the human rights impacts of corporate activities usually begin with the UNs failed effort at developing an

⁹ UN Draft Code on Transnational Corporations UN Doc. E/1990/94, 12 June 1990.

¹⁰ OECD, Guidelines for Multinational Enterprises, 15 ILM 969 (1976) annex to the OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, ILM, vol. 15 967. The OECD periodically reviews and updates its guidelines. For the 2000 and 2011 reviews see, the OECD Declaration on International Investment and Multinational Enterprises 2000, reprinted in 2001, ILM, vol. 40, 237, and updated as, OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011. <<https://www.oecd.org/corporate/mne/48004323.pdf>> accessed 28 August 2017.

¹¹ ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (March 2017), <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 30 August 2017.

¹² UN Global Compact, 'Ten Principles of the UN Global Compact' available at <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> (accessed 20 September 2017).

¹³ UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4.Sub.2/2003/12/Rev.2 (30 August 2003).

¹⁴ Human Rights Council, The Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31, 21 March 2011.

¹⁵ The idea of a more viable system of accountability for corporate abuse of human rights is discussed in more detail in Chapter five.

international code of conduct for TNCs.¹⁶ In 1972, the UN Economic and Social Council (ECOSOC) requested the Secretary-General in consultation with governments, to appoint from public and private sectors a group of eminent persons to study the role of TNCs and their impact on the process of development and submit recommendations for appropriate international action.¹⁷ Based on the group's recommendations, the ECOSOC, in 1974, adopted resolutions to establish the United Nations intergovernmental Commission on Transnational Corporations and the United Nations Centre for Transnational Corporations (UNCTC) to assist the ECOSOC in dealing with the issue of transnational corporations.¹⁸ The intergovernmental commission and the UNCTC launched the creation of a Code of Conduct on Transnational Corporations, formulating various drafts over a period of fifteen years, and eventually producing its last draft in 1990.¹⁹

The 1990 Draft Code was composed of four sections. The first focused on the regulation of the activities of TNCs in host states, which included various general rules addressed to TNCs to ensure respect for the national sovereignty of the state, adherence to economic and development goals of host states, respect for human rights, and to avoid corruption, and non-interference with the host states internal affairs.²⁰ The second part concerned the treatment of TNCs and asserted certain rights of host states but also described certain protections to be accorded to TNCs, such as the right to fair and equitable treatment.²¹ The third part focused on

¹⁶ Olivier De Schutter, 'Towards a Legally Binding Instrument on Business and Human Rights' (2015) 2 CRIDHO Working Paper, 6.

¹⁷ Economic and Social Council, 'Resolutions: Economic and Social Council Official Records, 53rd Session', 2-28 July 1972, Supplement no. 1 E/5902, 4 at paragraph 1, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/NR0/763/43/IMG/NR076343.pdf?OpenElement>> (accessed 20 September 2017).

¹⁸ American Society of International Law, 'United Nations: Reports on the Impact of Multinational Corporations on the Development Process and on International Relations: Report of the Secretary-General to the Economic and Social Council' (1974) 13 *International Legal Materials* 791-869, 792-793; Economic and Social Council Resolution 1908 (LVIII), U.N. ECOSOC, 57th Session, Supplement No. 1 UN Doc. E/5570 (1974); Economic and Social Council, Resolution 1913 (LVII), U.N. ECOSOC, 57th Session, supplement No. 1, UN Doc E/5570 Add.1 (1974).

¹⁹ Draft UN Code of Conduct (n 9). For previous Drafts see, UN Draft Code of Conduct on Transnational Corporations, May 1983, 23 ILM. 626 (1984) and Draft UN Code of Conduct on Transnational Corporations, February 1 1988, U.N. ESCOR, U.N. Doc. E/1988/39/Add.1 (1988).

²⁰ *ibid*

²¹ *ibid*

cooperation amongst states in the form of exchanges of information and consultations, whilst the fourth part called on states to disseminate the code, to observe its provisions within their territories, and to report to the United Nations on their implementation.²² The UNCTC was to receive the state reports and conduct periodic assessments of the implementation of the Draft Code.²³

Although states shared a common support for the Draft Code, their interests and objectives varied with their experiences as sources or recipients of TNC investment. The developed states advocated for focused attention on provisions that would protect TNCs from discriminatory treatment or other behaviour of host states (developing states) which would be in violation of certain minimum standards, while the developing states wanted regulations that concentrated on ensuring that TNCs would be prohibited from interfering with their political independence or their national defined economic objectives.²⁴ Developing states emphasised reliance on host state national laws and regulations and resisted having the code impose constraints on host governments.²⁵ Conversely, developed states regarded the national laws of the host states as often too complex, inadequate or non-monolithic and advocated having the code refer to international law as the relevant body of law.²⁶ Regarding the conduct of TNCs, developing states pushed for detailed and mandatory rules regulating their operations, while developed states preferred more general language to which TNCs would voluntarily adhere.²⁷

A compromise on these issues could not be reached and the Draft was never adopted. By 1994, the UN significantly downgraded the intergovernmental commission and terminated

²² *ibid*

²³ *ibid*

²⁴ Olivier De Schutter, *Towards a Legally Binding Instrument* (n 16), 7.

²⁵ *ibid*

²⁶ Sean D. Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2004) 43 *Columbia Journal of International Law* 2, 404 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=627608> accessed 20 September 2017).

²⁷ *ibid*

the UNCTC.²⁸ Nevertheless, the Draft Code made a significant contribution by providing guidance for other international regulatory initiatives that followed, even outside the UN.

4.3 The OECD Guidelines

One such non-UN groups that pursued the establishment of codes to regulate the activities of TNCs is the Organisation for Economic Cooperation and Development (OECD).²⁹ The OECD which was created in 1961, consists of 35 states who have a shared commitment to democratic government and market economy.³⁰ Since 1961, the OECD has focused on building strong economies in its member states in order to ‘improve efficiency, hone market systems, expand free trade and contribute to development’ in both developed and less developed states.³¹ In furtherance of its objectives, the OECD agreed upon a Declaration on International Investments and Multinational Enterprises in 1976.³² The Declaration is package of agreements which, amongst others, consists of a set of Guidelines for multinational enterprises which was revised in 2000, 2006 and 2011.³³ The Guidelines establish standards jointly addressed by governments to multinational enterprises operating in or from adhering states to observe certain principles relating to taxation, finance, employment, industrial relations and consumer interests and the environment. In its 2000 revision, the Guidelines included provisions on human rights in its general policy section.³⁴ The provision on human rights was captured in a single sentence

²⁸ *ibid*, 405; The intergovernmental commission on transnational corporations became a commission of the United Nations Conference on Trade and Development and was renamed the Commission on International Investment and Transnational Corporations- see ECOSOC, Resolution 1994/1, Substantive session of 1994, Supplement No.1, at 16, UN Doc. E/1994/32 (1994).

²⁹ The OECD was the predecessor to the Organization for European Co-operation (OEEC), which was established to regulate American and Canadian aid under the Marshall plan for rebuilding of Europe after World War II. It has since expanded its objectives. See, Elisa Morgera, ‘An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review’ (2006) *Georgetown International Environmental Review* 751-777, 753.

³⁰ *ibid*

³¹ *ibid*

³² The OECD Declaration (1976) (n 10).

³³ *ibid*

³⁴ OECD Declaration (2000) pt1 (n 10).

which provided that TNCs should ‘respect the human rights of those affected by their activities consistent with the host governments’ international obligations and commitments.’³⁵

The 2000 revision appeared to address the problem of the complex corporate structure by calling on TNCs to ‘encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines.’³⁶ It also introduced recommendations prohibiting forced labour and had provisions on improving internal management and contingency planning for environmental impacts.³⁷ Sections on disclosure and transparency were also updated to encourage social and environmental accountability.³⁸ Additionally, it required TNCs to ‘refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environment, health, safety, taxation, financial incentives or other issues.’³⁹ This can be considered as a very useful provision as it aims to prevent TNCs from seeking special exemptions which in some cases may indirectly contribute to human rights violations from the regulatory framework in force in host states.

In spite of these provisions, the real impact of the Guidelines in the sense of making TNCs accountable for human rights abuses is doubtful. This is principally due to the lack of strong enforcement systems where TNCs do not follow the provisions of the Guidelines. It expressly states that the ‘observance of the Guidelines by enterprises is voluntary and not legally enforceable,’⁴⁰ but rather represent a political commitment on the part of OECD governments to foster such corporate conduct, as they reflect the values and aspirations of

³⁵ *ibid*, section II, para 2.

³⁶ *ibid*, section II, paragraph 10.

³⁷ *ibid*, section IV, paragraph 1 (b) (c).

³⁸ *ibid*, section V, para graphs 1 and 5.

³⁹ OECD Declaration 2017 (n 32), 14.

⁴⁰ *ibid*, 12.

OECD members.⁴¹ As of 2019, 36 of the OECD member states together with 12 non-OECD states have subscribed to the Declaration, thus, only 48 states are adherents' of the Guidelines.⁴²

The efficacy of the implementation of the provisions depend on the establishment of National Contact Points (NCPs) and the Committee on Investment and Multinational Enterprises.⁴³ However, the NCPs and Investment Committee lack any enforcement powers and merely carry out advisory, consultative, recommendatory and clarification functions.⁴⁴ The complaint against Vedanta Resources is a case in point which exemplifies the effect of the absence of enforcement systems in the Guidelines.

Vedanta Resources, a British mining company, built a refinery and planned to conduct mining operations on Niyam Dongar Mountain in Orissa, India, to feed the refinery.⁴⁵ However, the mountain was reportedly sacred for the Dongria Kondh tribe, one of the most isolated tribes in India. Its culture, identity and livelihood are inextricably tied to the mountain.⁴⁶ The complaint alleged that the Dongria Kondh tribe was not consulted in the process, and that the people's livelihoods were in danger as the operations would affect arable land and pollute the local streams.⁴⁷ Vedanta allegedly failed to consider the potential negative implications of its activities because it refused to accept that there were any.

The UK NCP made recommendations to Vedanta to bring its activities in line with the OECD Guidelines and asked that they should immediately work with the Dongria Kondh people to explore alternatives to the resettlement of the affected people. The NCP also recommended that Vedanta should include human rights impact assessment in the management of its programmes. However, several NGOs and members of the Dongria Kondh reported that

⁴¹ *ibid*

⁴² However, these 48 States include those which are home to some of the largest transnational corporations. See, OECD Website <<https://mneguidelines.oecd.org/oecddeclarationanddecisions.htm>> accessed 5 May 2019.

⁴³ (n10), 30-31.

⁴⁴ *Ibid*.

⁴⁵ OECD Watch, 'Survival International v Vedanta Resources Plc: Case Overview' (19 December 2008) available at <https://www.oecdwatch.org/cases/Case_165> (accessed 20 September 2017).

⁴⁶ *ibid*

⁴⁷ *ibid*

Vedanta had not initiated any discussion or contact with those affected by the project and has refused to alter its conduct in any way.⁴⁸ The NCP could not make Vedanta comply or cooperate with the procedures or the recommendations.⁴⁹ It is against this background that the OECD Watch concludes that ‘the vast majority of OECD Guidelines cases have unfortunately not led to any significant improvement in the respective company’s behaviour or the situation that led to the complaint’.⁵⁰

In 2011, the Guidelines were updated. Its notable improvements particularly in the area of human rights is the expansion of its recommendations on human rights. It expanded the one-liner reference to human rights to a chapter, which requires TNCs to respect human rights, have a policy commitment to this effect, carry out ‘risk-based due diligence’, and provide for legitimate processes for remediation of adverse human rights impact.⁵¹ These recommendations draw from the Special Representative of the Secretary General (SRSG) framework and the Guiding Principles and thus suffer the same potential and face the same hazards as the Guiding Principles discussed later in this chapter. The 2011 update enhanced the role of the NCP and investment Committee by requiring that the NCPs, supported by the Investment Committee, make initial assessments, offer good offices and publish results of procedures whenever disputes relating to the Guidelines ensue. However, no improvements on enforcement were made as the outcome of the procedures remain non-binding.⁵² Thus, NCPs remain helpless where their recommendations are not heeded and TNCs manifestly breach the provisions of the Guidelines.

⁴⁸ *ibid*

⁴⁹ *ibid*

⁵⁰ The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, DAFE/IME (2000) 20, 8 November 2000, 28.

⁵¹ OECD Guidelines 2011 (n 10), ‘Chapter IV Human Rights’, paragraphs 5 and 45.

⁵² In the 2011 update, the Guidelines noted that ‘it draws upon the United Nations Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and is in line with the Guiding Principles for its Implementation. Article IV, paragraph 26. The UNGPs are examined in section 4.7.

4.4 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises

Soon after the OECD Guidelines in 1976, the ILO Tripartite Declaration was negotiated between governments and employers and workers organisations.⁵³ The Declaration was adopted by the governing body of the International Labour Office on 16 November 1977, and amended in November 2000, in March 2006 and in March 2017.⁵⁴ The Declaration adopted a tripartite (government, employer, worker) structure to encourage TNCs and other stakeholders in the development of policies directed toward economic and social progress.⁵⁵ Its Preamble states that ‘multinational enterprises can...make an important contribution...to the enjoyment of basic human rights.’ Thus, it affirms the importance of human rights in the Declaration’s aims, which includes, encouraging ‘the positive contribution which multinational enterprises can make to economic and social progress...and to minimize and resolve the difficulties to which their various operations may give rise.’⁵⁶

The first paragraph of the Declaration dealing with General Policies provides that ‘all the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards.’⁵⁷ It then goes on to mention the relevant international standards to include international obligations contained in the ‘Universal Declaration of Human Rights and the corresponding International Covenants adopted by the UN General Assembly.’⁵⁸

A significant feature in the 2017 Declaration, which was absent in the 1976, 2000 and 2006 versions, was the adoption of the Guiding Principles ‘Protect, Respect, Remedy’

⁵³ ILO, ‘Tripartite Declaration’ (n 11). Previous Declarations include ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO 204th Session 16 November 1977; ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 2000, reprinted in 2002, ILM, vol. 41, 186; ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO 277th Session March 2006.

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ ILO Declaration 2017 (n 11), at 2, para 2.

⁵⁷ *ibid*, at 4, para 8.

⁵⁸ *ibid*

framework in outlining specific responsibilities for the respective stakeholders. The Declaration provided that TNCs had the corporate responsibility to respect human rights wherever they operate.⁵⁹ This, according to the Declaration would include the responsibility to ‘avoid causing or contributing to adverse impacts through their own activities’ and the responsibility to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts resulting from the operations, products or services by their business relationships even when they have not contributed to them.⁶⁰ The Declaration provided for the need for TNCs to exercise due diligence and meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the enterprise and the nature and context of its operation.⁶¹

Despite the fact that the Declaration refers to the UDHR and other relevant international covenants adopted by the General assembly, its scope is limited to labour rights.⁶² It does not deal with other important facets of human rights such as the right to life and security of persons, cultural rights and the rights to a clean environment which are often infringed in the course of TNC operations, particularly in the extractive industries.⁶³

Regarding the implementation of the Declaration, the Governing Body of the International Labour Office has the overall responsibility for the promotion of the Declaration’s principles.⁶⁴ The governments, employers and workers are required to use surveys to request data and reports from companies in order to draw better conclusions, examine policies and

⁵⁹ *ibid*, at 5, 10 (c).

⁶⁰ *ibid*

⁶¹ *ibid*, paragraph 10 (b) and (d).

⁶² The entire Declaration is focused on promotion four core labour issues: First, employment, which includes, equality of opportunity and treatment and security of employment; second, training; third, conditions of work life relating to wages, benefits and conditions of work, minimum age and safety and health; and fourth, industrial relations, including the freedom of association and the right to organise collective bargaining, consultation, examination of grievances, and the settlement of industrial disputes.

⁶³ Although the International Bill of Rights does not explicitly refer to the right to a clean environment, it could be deduced from certain rights mentioned therein. For example, Article 12 of the ICESCR, which focuses on the right to health and Article 6 of the ICCPR which addresses the right to life. See

⁶⁴ ILO Declaration 2017 (n 11), Annex II, para 1.

measures and to give effect to suggestions and changes.⁶⁵ These reports are gathered, synthesized and submitted to the Governing body for review.⁶⁶ However, the responses of the organisations and the governments reveal very little about any concrete failure on the part of the companies to respect the Declaration's provisions.⁶⁷ For example, in describing the reported behaviour of companies, the names of the companies are omitted from the survey results.⁶⁸ To illustrate this point, the entry form of the National Confederation of Dominican (CNTD) Workers is quoted:

CNTD further reports that participation by MNEs (names of MNEs given) in what were state industries but have now been privatised or deregulated has created labour problems. Unions were closed down before privatisation (names of cases in utilities sector given), or liquidated after privatisation (name of MNE and cases in agricultural manufacturing given).⁶⁹

This clearly defeats the purpose of having an implementation mechanism in the first instance as the corporation complained against is shielded, compromising the interests of the parties who brought the request.

Acknowledging that dialogue lies at the heart of the implementation of its provisions, the Declaration gives effect to the need to support dialogues involving TNCs and the representatives of the workers affected.⁷⁰ The parties may voluntarily agree to take advantage of the facilities of the Labour Office to meet and talk, without prejudice, facilitated by the

⁶⁵ *ibid*, paragraph 1 (b) and (c).

⁶⁶ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), 216.

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ ILO, Sub-Commission on Multinational Enterprises, 'Follow-up on and Promotion of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: (b) Seventh Survey on the effect given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: Summary of reports submitted by governments and by employers' and workers' organisations (Part II), ILO Doc. GB.280/MNE/1/2 (March 2001), at 347. See also Clapham (n 66).

⁷⁰ ILO Declaration 2017 (n 11), Annex II, at 23, paragraph 2.

Office.⁷¹ The process and results of the dialogue are strictly confidential and are not to be used for any binding procedure.⁷² The Governing Body may only consider requests concerning the interpretation of the Declaration.⁷³ Even so, as a rule, it is the governments of member States that may submit requests for interpretation.⁷⁴ Employers or workers' organisations may only submit requests when the governments have declined to do so, or, when the government fails to act three months after being informed by the workers' or employees organisations.⁷⁵ This would mean that the Governing Body cannot deliver decisions on infringements of the Declaration to grant relief to victims of the infringement, or shame the perpetrators of the infringement.

Thus, the ILO Declaration ends up being a mere aspirational Declaration without any legal enforceability, or even the possibility of market coercion considering its confidentiality requirements.⁷⁶ Delinquent companies may easily act contrary to the Declarations provisions and renege on agreements reached during voluntary negotiations with little or no consequences.

4.5 The UN Global Compact

In an attempt to revive the relevance and role of the UN in ensuring corporate responsibility, the United Nations Global Compact (UNGC) was launched in 2000 following the then UN Secretary-General Kofi Annan's call to business leaders to work with the UN to 'initiate a global compact of shared values and principles, which will give a human face to the global market.'⁷⁷ Unlike the previously discussed regulatory initiatives, the UNGC does not

⁷¹ *ibid*

⁷² *ibid*

⁷³ *ibid*

⁷⁴ *ibid*, at 24, para 3(5) (a).

⁷⁵ *ibid*, para 6 (a) (b).

⁷⁶ Surya Deva, *Humanising business* (n 8), 92.

⁷⁷ United Nations, 'Secretary General Proposes Global Compact of Human Rights, Labour, Environment, In Address to World Economic Forum in Davos' Press Release: SG/SM/6881 (1 February 2000) <<http://www.un.org/press/en/1999/19990201.sgsm6881.html>> accessed 22 September 2017.

established a formal code of conduct. Rather, it serves as a dialog forum among a range of actors including, the UN, state governments, businesses, civil society organisations, academics, think-tank and corporate social responsibility organisations.⁷⁸ The dialogues aim to promote mutual learning and problem solving, whilst facilitating discussions on the best business practices.⁷⁹

The underlying goal for the UNGC is to gain commitments by the business community, which is regarded as the principal driver of globalisation, to help ensure that its basic activities will move forward in ways that benefit economies and advance societal goals.⁸⁰ In furtherance of this objective, the Compact enjoins all participating companies to embrace, support and enact, within their sphere of influence, ten broadly stated principles on which it is based, and they are to report annually on the activities they had taken to ensure those principles as part of their operations in the form of ‘Communications on Progress’ (COP).⁸¹ These ten principles cover the fields of human rights, labour, environment and anti-corruption.⁸² They articulate behavioural norms that the Global Compact Organisation refer to as ‘enjoying universal consensus’, which are grounded in internationally accepted instruments, such as the Universal Declaration of Human Rights, the ILO Declaration of Fundamental Principles and the Rights to Work, the Rio Declaration on the Environment and Development, and the UN Convention against Corruption.⁸³ The first two principles, which focus on human rights, are captured in a single sentence: ‘Businesses should support and respect the protection of internationally

⁷⁸ Georg Kell, ‘The Global Compact: Origins, Operations, Challenges’ (2003) 11 *Journal of Corporate Citizenship* 35-49, 37-39 <https://www.researchgate.net/publication/309824954_The_UN_Global_Compact> accessed 20 September 2017.

⁷⁹ *ibid*

⁸⁰ UN Global Compact, ‘Our Mission’ <<https://www.unglobalcompact.org/what-is-gc/mission>> accessed 23 September 2017.

⁸¹ UN Global Compact, ‘The Communication on Progress (COP) in Brief’ available at <https://www.unglobalcompact.org/participation/report/cop> (accessed 23 September 2017).

⁸² UN Global Compact (n 12).

⁸³ UN Global Compact (n 12); Surya Deva, *Humanising Business* (n 8), 92.

proclaimed human rights and⁸⁴ ‘make sure that they are not complicit in human rights abuses. (Principle 2).⁸⁵

Initially, the Global Compact process had no mechanism to verify compliance by the participating companies with the principles that they pledged to uphold. This brought the Compact under harsh criticisms from NGOs, who were quick at denouncing the risks of ‘blue washing’.⁸⁶ However, in 2003 a Communication in Progress policy was introduced, whereby, companies participating in the Global Compact who do not communicate progress for two successive years are expelled from the UN Global Compact, and their name may be made public, which can involve significant reputational costs.⁸⁷ More importantly, the Global Compact office introduced a mechanism to entertain allegations of systemic or egregious abuse of the Compacts principles through a ‘dialogue facilitation mechanism’ between the TNC concerned and the party alleging violations.⁸⁸ Where the Compact Office considers the allegation to be non-frivolous, it will seek explanation from the concerned TNC and assist it in the adoption of measures that would ensure that its conduct is aligned with the principles of the Compact. If the TNC fails to cooperate, it is considered as ‘non-communicating’.⁸⁹ The company can also be delisted from the participating companies if, ‘based on the review of the nature of the complaint submitted and the responses by the participating company, the continued listing of the participating company on the Global Compact website is considered to be detrimental to the reputation and integrity of the Global Compact’.⁹⁰

⁸⁴ *ibid*, principle 1

⁸⁵ *ibid*, principle 2

⁸⁶ Global Policy Forum, ‘NGOs Criticize “Blue washing” by the Global Compact’ (July 4 2007) <<https://www.globalpolicy.org/global-taxes/32267-ngos-criticize-qblue-washingq-by-the-global-compact.html>> accessed 23 September 2017.

⁸⁷ UN Global Compact, ‘Integrity Measures’ <https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf> accessed 30 August 2017.

⁸⁸ *ibid*

⁸⁹ *ibid*

⁹⁰ *ibid*

The Global Compact has recorded a large increase in the number of participants from fewer than 50 in 2000 to over 13,000 as at April 2019.⁹¹ However, in spite of its largely increasing acceptance by the business community, several deficiencies limit its efficacy in terms of preventing and redressing corporate human rights abuses. The language in the Global Compact is so generally worded and vague that companies can easily circumvent them or comply with them without doing anything to protect human rights.⁹² Its principles on human rights aim to reflect the norms contained in the UDHR, yet, the Compact does little towards clarifying what the key human rights issues are for business.⁹³ It asks companies to support and respect the protection of internationally proclaimed human rights within their sphere of influence, and ensure they are not complicit in human rights violations, but does not state the exact human rights they should support and respect.⁹⁴ Presumably, the rights contained in the UDHR are not all primarily relevant to the activities of TNCs, but the Compact provides little guidance on which, if any, rights are to be prioritised. This leaves a wide margin of appreciation to companies regarding the interpretation of the principles.

Apart from its vaguely worded principles, the Global Compact does not have any stipulated standards citing reporting provisions, rather, it encourages companies to use Global Reporting Initiatives- a reporting system that is more about process than accessing performance. Companies are required to:

⁹¹ UN Global Compact, 'Our Participants' <<https://www.unglobalcompact.org/what-is-gc/participants>> accessed 15 April 2019. Nigeria has about 128 participants in the Global Compact, see UN Global Compact, 'Act Globally, Engage Locally: Nigeria' <<https://www.unglobalcompact.org/engage-locally/africa/nigeria>> accessed 15 April 2019.

⁹² Surya Deva, 'Global Compact: A Critique of UN's "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107-151,129-133 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=925692> accessed 23 September 2017.

⁹³ Justine Nolan, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?' (2010) 24 *University of Queensland Law Journal* 2, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1556442> accessed 15 April 2019.

⁹⁴ *ibid*

- Send a letter signed by the chief executive officer to the Secretary-General of the UN expressing continued support for the Global Compact and renewing the participant's ongoing commitment to the initiative.
- A description of practical actions the company has taken or plans to take to implement the Ten Principles in each of the four areas (human rights, labour, environment, anti-corruption) ...
- A measurement of outcomes.⁹⁵

Based on the company's self-assessment, each COP falls into three levels: GC Learner, which are for COPs that do not meet one or more of the performance criteria; GC Active, for COPs that meet the minimum requirements; and, GC Advanced, which apply to COPs that qualify as GC Active and also cover the company's implementation of advanced criteria and best practices.⁹⁶

As soon as participants submit the COPs, they are published on the UNGC website. This enables companies to demonstrate their efforts to support and uphold the principles contained in the Compact.⁹⁷ It is assumed that the published information would provide stakeholders with necessary information to make informed choices about the companies they interact with and, may also serve as a means of driving performance of the companies.⁹⁸

In spite of these improvements, the risk of 'blue washing' is still imminent. The COPs are designed, administered, and composed solely by the companies.⁹⁹ The UNGC allows each company to (i) select the particular issue for improvement (only one per area is required); (ii) design the metrics for measurement of progress in that area; (iii) measure movement against

⁹⁵ UN Global Compact, 'The Communication on Progress (COP) in Brief' (n 81).

⁹⁶ *ibid*

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ S. Prakash Sethi and Donald H. Schepers, 'The United Nations Global Compact: The Promise-Performance Gap' (2004)122 *Journal of Business Ethics* 2, 206.

the metrics; and (iv) write the report.¹⁰⁰ In the absence of any monitoring or review mechanism, the COPs are accepted at face value. The downsides of this system of self-reporting is exemplified by the fact that the UNGC has not so far included any complaint or criticism of a COP on its website. The COP of each company is unchallenged, thus, there are no means of knowing for sure if the Companies are adhering to the Compacts principles.¹⁰¹ Their progress reporting systems may prove to be a mere ritual or a public relations exercise.

Irrespective of the fact that the Global Compact expressly denies being a regulatory initiative, in effect it does try to regulate, using the disguise of voluntary self-regulation.¹⁰² With the introduction of the annual reporting requirement coupled with the threat of delisting, and the Global Compact office's role in addressing credible allegations of egregious or systemic abuses of the Compacts principles, the compact can hardly be said to be a purely voluntary initiative. Nevertheless, as previously noted, the reporting system without implementation mechanisms does little or nothing to improve compliance with the Compacts Principles. Even the working of the Global Compact Office shows that it takes a very cautious and conservative approach in dealing with documented abuses of Compact Principles. An example of this is the alleged complicity of PetroChina in the human rights abuses by the government of Sudan.

In 2008, a campaign of over 80 civil society groups sent a letter to the UN Global Compact Office concerning PetroChina's role as Sudan's largest oil industry partner, arguing that its financial links to the government there helped to perpetuate a human rights crisis in Darfur.¹⁰³ They demanded that the Compact should seek the company's engagement with the

¹⁰⁰ UN Global Compact, 'The Communication on Progress (COP) in Brief' (n81).

¹⁰¹ Sethi and Schepers (n 99), 206.

¹⁰² Surya Deva, *Humanising Business* (n 8), 97.

¹⁰³ Letter to UNGC regarding PetroChina Membership
<https://www.earthworksaction.org/files/publications/2008-0512-letter_on_PetroChina_and_the_UN_Global_Compact.pdf> accessed 30 August 2017.

government of Sudan to end the troubles, and if it refused, to expel it.¹⁰⁴ The Global Compact Office refrained from doing much, but more striking is its rationale for its hands off attitude. In its response the Office stated that the matters raised in the letter ‘could equally apply to a number of companies operating in conflict prone countries...PetroChina has been singled out largely because it...has recently taken steps of joining the Global Compact. Since we are a learning initiative, this is a step that should be welcomed instead of criticized.’¹⁰⁵ The Compact Office could have refrained from taking action on the allegations for several other reasons but its decision not to act because PetroChina was not the only company indulging in such conduct seems illogical, as the complaint could not have been tendered before the Global compact in respect of a non-participating company, neither is it relevant that allegations were not made against other participants.¹⁰⁶

Similarly, in June 2009, Baby Milk Action, a UK civil society organisation, laid a complaint against Nestlé, a leading advocate of the UNGC alleging that the reports posted on the UNGC Office site were misleading and that Nestlé was, in fact, responsible for egregious violations of the Compacts principles.¹⁰⁷ Baby Milk Action cited the integrity measures that accompany the principles and called for the allegations to be investigated and the possible delisting of Nestlé for bringing the GC to disrepute by using its COP as a public relations campaign to divert criticism so that violations may continue.¹⁰⁸ The Compact Office declined to review the submitted evidence and delist Nestlé, claiming that it ‘is not a mediation, dispute resolution, or adjudicative body, nor is it an enforcement agency. Rather, its integrity measures are designed to facilitate communication and dialogue’.¹⁰⁹ Baby Milk Action explained that it

¹⁰⁴ *ibid*

¹⁰⁵ UN Global Compact, ‘UN Global Compact Office Responds to NGO Letter’ (9 February 2009) <<http://webcache.googleusercontent.com/search?q=cache:nIONAUHDP8J:reliefweb.int/report/sudan/sudan-un-global-compact-office-responds-ngo-letter+&cd=10&hl=en&ct=clnk&gl=uk>> accessed 30 August 2017.

¹⁰⁶ See Deva, *Humanising business* (n 8), 99.

¹⁰⁷ Baby Milk Action, ‘Nestle, the UN Global Compact and OECD Guidelines’ <<http://www.babymilkaction.org/archives/1094>> accessed 25 September 2017.

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

had already joined other organisations to engage in dialogue with Nestlé and that Nestlé had refused to make the necessary changes. Baby Milk Action asked the UNGC Office to review the evidence submitted and its communications with Nestlé as called for under the Integrity Measures, with a view to excluding Nestlé. Arguing that it was not its role to conduct such a review, the Global Compact stated, ‘abuses of the ten principles do occur, however we believe that such abuse only indicates that it is important for the company to remain in the Compact and learn from its mistakes.’¹¹⁰

The correspondence between Baby Milk Action and the Global Compact Office demonstrate that the Office was incapable or unwilling to take any actions to stop the violations and that far from improving corporate behaviour, it was complicit in allowing violations to continue by providing legitimacy to misleading reports

To conclude, although, the Global Compact may raise awareness of issues involved in the corporate world through dialogue and learning which is an important first step, it does no more than this. In the end, it serves as little more than an instrument of rhetoric.¹¹¹

4.6 The UN Draft Norms

Following consultations from all relevant stakeholders, the UN Sub-Commission for the Promotion and Protection of Human Rights approved in Resolution 2003/16 of 14 August 2003, the set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises’.¹¹²

¹¹⁰ Ibid.

¹¹¹ David Kinley and Junko Tidaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibility for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 4, 951 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=923360> accessed 30 August 2017.

¹¹² UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (13 August 2003) UN Doc E/CN.4.Sub.2/2003/12/Rev.2.

The UN Norms presented a promising framework for establishing the accountability of TNCs for human rights abuses. Unlike some of the previous attempts at corporate accountability, the Norms were not limited to labour and/ or environmental rights, rather, they presented a comprehensive set of human rights obligations. Apart from the general obligation to ‘respect, ensure respect for, prevent abuse of, and promote human rights recognised in international as well as national law’, they listed specific obligations regarding: the right to equal opportunity and non-discriminatory treatment, the right to security of person, respect for national sovereignty and human rights and consumer and environmental protection.¹¹³

The Norms made progress over other regulatory regimes in the depth of human rights responsibilities of TNCs. As TNCs could abuse human rights in different ways, it went beyond the prevailing conventional ‘negative’ conception of TNC responsibility and imposed positive obligations on corporate entities. The UN Norms provided that even though ‘States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights’, TNCs, ‘within their respective spheres of activity and influence have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights’.¹¹⁴ The preamble of the Draft Norms provided that TNCs and other businesses, ‘as organs of society, are also responsible for promoting and securing human rights set forth in the Universal Declaration of Human Rights’, hence, TNCs and other businesses, ‘their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in the United Nations treaties and other international instruments.’¹¹⁵

¹¹³ David Weissbrodt and Muria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 *American Society of International Law* 4, 912 <https://www.researchgate.net/publication/274856538_Norms_on_the_Responsibilities_of_Transnational_Corporations_and_Other_Business_Enterprises_with_Regard_to_Human_Rights> accessed 30 August 2017.

¹¹⁴ UN Draft Norms (n13), principle 1.

¹¹⁵ *ibid*, preamble, 3rd and 4th recital.

The Draft Norms apparently adopted the view that the phrase ‘organs of society’ as contained in the UDHR incorporated TNCs as holders of human rights obligations.¹¹⁶ However, the fact remains that the UDHR was never drafted to apply directly to TNCs as the threat of TNC abuse of human rights as experienced today was not yet contemplated at the time. Hence, international human rights instruments never provided for enforcement mechanisms for when TNCs fail to observe their supposed obligations. However, the fact that there is a move towards framing human rights norms specifically directed at TNCs demonstrates a progressive step towards filling the existing gaps in the prevailing state-based international regulatory system. Thus, beyond restating existing human rights law, the Norms indicated the change required in the character of international law by deducing obligations for TNCs with reference to the existing international covenants and laying down provisions for their enforcement.

The Norms delimited the extent of TNC obligations to their ‘respective spheres of activity and influence’, but they did not provide any guidance as to what this actually means.¹¹⁷ For example, would a TNCs sphere of influence or activity include its subsidiaries and affiliates, and/or, would sphere of influence or activity of an TNC engaged in natural resource extraction extend to promoting the right to education, or the right to privacy outside the boundaries of its activity? As TNCs and human rights activists are bound to present conflicting interpretations, this aspect requires clarification.¹¹⁸

The UN Norms substituted the conventional approach of ‘should’ with ‘shall’ in terms of the standard for compliance with its provisions.¹¹⁹ This terminological change together with the provisions on implementation demonstrated a tacit acceptance that the prevailing ‘dialogue-

¹¹⁶ *ibid*, preamble.

¹¹⁷ UN Draft Norms (n13), principle 1.

¹¹⁸ This was not the first time that the term ‘sphere of influence’ had been used in a regulatory instrument as the Global Compact had relied on it at a time but eventually abandoned it in later updated versions of its Compact Principles.

¹¹⁹ UN Draft Norms (n13).

cooperation' based approach of voluntary compliance with human rights norms is proving to be inadequate.¹²⁰ Thus, in connection with adopting a 'non-voluntary' approach to compliance, the Norms proposed specific provisions for the implementation of human rights norms.¹²¹ First, it called upon businesses to adopt the UN Norms as the standards for their internal codes of conduct or rules of operation and adopt specific mechanisms for their implementation.¹²² Secondly, and in addition to asking TNCs to internalise its provisions, the UN Norms asked states to 'establish and reinforce the necessary legal and administrative framework for ensuring that the Norms' are implemented by TNCs.¹²³ Thirdly, the Norms proposed independent and transparent periodic monitoring and verification by national and international (including UN) mechanisms. Again, this was a departure from the prevailing indirect mode of implementation where the responsibility for implementation rested solely and exclusively on states. In connection with the implementation provisions, the Norms also provided for prompt, adequate and effective reparation to persons and communities adversely affected by the failure of TNCs to comply with their responsibilities under the Norms.¹²⁴

The Norms also required that TNCs ensure that their contracts or other arrangements with business affiliates incorporate its provisions.¹²⁵ It placed a direct obligation on the TNCs to ensure that the norms were so incorporated and implemented. This was a positive approach as many situations of corporate abuse involve TNC subsidiaries or business partners over which the TNC exercised considerable control or influence.¹²⁶

The UN Norms made good progress in terms of formulating and implementing corporate human rights obligations. However, a number of issues were raised by the

¹²⁰ Mahmood Monshipouri, Claude Welch, Jnr and Evan Kennedy, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' (2003)25 *Human Rights Quarterly* 4, 979-983.

¹²¹ David Weissbrodt (n 113), 915-921.

¹²² UN Draft Norms (n 13), para 15.

¹²³ *ibid*, paras 15-19.

¹²⁴ *ibid*, para 18.

¹²⁵ *ibid*, paragraph 1 and 15.

¹²⁶ Deva, *Humanizing Business* (n 8), 102.

International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE)-bodies that represent some of the largest TNCs.¹²⁷ The ICC and IOE asserted that the Norms provided an overly broad set of human rights obligations for TNCs. In this regard, particular reference has been made to paragraph 12 of the Norms which provides that TNCs shall, among others, contribute to the realisation of economic, social, and cultural rights as well as civil and political rights, ‘in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience and religion and freedom of opinion and expression’.¹²⁸ They also asserted that the imposition of legal responsibilities on business could ‘shift the obligation to protect human rights from Governments to the private sector and provide a diversion for states to avoid their own responsibilities.’¹²⁹ The Norms also frequently placed responsibilities on TNCs based on several international treaties that were signed and ratified and directed at states.¹³⁰ It appeared to expect TNCs to go through every one of the instruments to deduce their specific obligations.

Although the Norms were couched in obligatory terms, they were presented as neither voluntary nor mandatory, but non-voluntary. This was explained as a logical progressive step from soft to hard obligations, however, it created uncertainty with relation to compliance.¹³¹ Beyond the ambiguity in the distinction between mandatory and non-voluntary, the UN Norms have been criticised for having underdeveloped implementation mechanisms. Although it provides for parallel implementation both at the national and international levels, no ascertainable viable framework for such implementation is established. Rather it called on the

¹²⁷ David Weissbrodt, ‘Business and Human Rights’ in Andrew Clapham (ed.), *Human Rights and Non-State Actors* (Cheltenham: Edward Elgar Publishing, 2013), 452.

¹²⁸ UN Draft Norms (n 13), para 12.

¹²⁹ Weissbrodt (n 127), 452.

¹³⁰ On a very thorough count the text of the Norms refers to at least 56 instruments. It does not appear reasonable to expect MNCs to go through all the listed state focal instruments to ascertain their corporate human rights responsibilities. See Upendra Baxi, ‘Market Fundamentalisms: Business Ethics at the Alter of Human Rights’ (2005) 5 *Human Rights Law Review* 1, 5.

¹³¹ Weissbrodt and Kruger (n 113), 914-915.

Sub-Commission on Human Rights and other UN Bodies ‘to develop additional techniques for implementing and monitoring the Norms’.¹³²

Apart from the provision for reparations, there were no other sanctions against non-compliant corporations. Reparation is useful especially from the standpoint of the victims of the human rights abuse, but it is doubtful whether reparation on its own will be enough to deter future wrongful conduct on the part of TNCs especially as it appears to be used as a civil remedy. There is lack of clarity as to whether it is also intended to be used as a criminal sanction. Although it provided for reparation in favour of the victims of corporate human rights abuses, the Norms did not deal with the two procedural issues- *forum non conveniens* and separate legal personality that have often been misused by TNCs to prevent individuals from gaining access to remedies. The Norms’ silence on these two procedural aspects makes it very difficult for any implementation effort to deliver justice to victims, even if such mechanisms are equipped with multiple sanctions.

Generally, the Draft UN Norms promoted the agenda to clarify and elaborate on corporate human rights responsibilities, highlighted the need to move beyond state-centric regulation and emphasised the importance of implementation mechanisms. Nevertheless, its inadequacies prevented it from establishing a robust international regulatory regime of corporate human rights responsibilities. Instead of seeking to rectify its shortcomings, the Norms were heavily criticized especially among the business community. They were ultimately abandoned. However, they succeeded in placing the question of the accountability of TNCs for human rights abuses squarely on the agenda of the United Nations Human Rights community.

¹³² UN Draft Norms (n 13), paragraph 18 and 19.

4.7 UN Guiding Principles on Business and Human Rights

Following the initiative of the Sub-Commission, the Commission on Human Rights requested the appointment of a Special Representative of the UN Secretary-General (SRSG) to identify ways through which the accountability of TNCs for human rights violations may be improved.¹³³ Professor John Ruggie, who was also closely involved with the process of the UN Global Compact, was appointed as special Representative of the UN Secretary General in July 2005 and given the mandate to clarify the duties and responsibilities of States and companies in the business and human rights sphere.¹³⁴

The SRSG found that the nature of the duties under the Draft UN Norms were too wide. Consequently, he selected only the obligation to ‘protect’ with respect to States and the responsibility to ‘respect’ with reference to companies, elements from the well-established tripartite respect, protect and fulfil human rights duty typology.¹³⁵ The choice of the word ‘responsibility’ instead of ‘obligation’ was purposeful so as to denote that a breach of the responsibilities may not entail legal consequences for TNCs.¹³⁶ The SRSG began by developing the ‘Protect, Respect and Remedy Framework’ in 2008, which was built on three pillars: First, the States’ duty to protect against human rights abuses by third-parties, including companies, affecting persons within their territory or jurisdiction through the application of policies, regulation and adjudication; second, the corporate responsibility to respect human rights which is defined by social expectations, is to be achieved through the exercise of due diligence to avoid infringements on the rights of others, and; third, the improvement of access

¹³³ UN Commission on Human Rights Resolution 2005/69, ‘Human rights and transnational corporations and other business enterprises’, adopted on 20 April 2005 E/CN.4/2005/L.10/Add.17.

¹³⁴ Olivier De Schutter (n 16), 13.

¹³⁵ John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton, 2013)

¹³⁶ ‘Failure to meet this responsibility can subject companies to the courts of public opinion- comprising employees, communities, consumers, civil society, as well as investors-and occasionally to charges in actual courts’- UNHRC, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights- Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises’7 (April 2008) UN Doc A/HRC/8/5, , paragraph 54.

to remedies through the formal judicial systems, non-judicial mechanisms and company-level grievance mechanisms.¹³⁷

The Protect, Respect and Remedy Framework was unanimously adopted by the Human Rights Council and the SRSGs mandate was extended in order to develop guidelines intended to assist States and companies operationalise the Framework.¹³⁸ After six years of reports and consultations, the Human Rights Council, successor to the Commission on Human Rights, adopted a set of Guiding Principles on Business and Human Rights.¹³⁹ These Guiding Principles are now considered as the most authoritative statement of the human rights duties or responsibilities of States and corporations, adopted at the UN level.¹⁴⁰ The SRSGs activities leading up to the Guiding Principles have been characterised by broad consultations involving many different stakeholders, an approach he called, ‘principled pragmatism’.¹⁴¹ However, his pragmatic approach has been criticised as presenting ‘a minimalist take’ on the issue of corporate responsibility for human rights abuses reflected in the Guiding Principles.¹⁴² Thus, in spite of its achievements, several weaknesses can be identified in the final document.

The SRSG determinedly steered clear from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as the sole duty-bearer. This may be understood when one considers the deadlock that followed the rejection of the Draft Norms. However, the Guiding Principles’ outright dismissal of the notion of corporate duties is regrettable as it appears to be at odds with the intention that the Guiding Principles are to become ‘a common global platform for action on which cumulative progress can be

¹³⁷ *ibid*

¹³⁸ Upendra Baxi, ‘Market Fundamentalisms: Business Ethics at the Alter of Human Rights’ (2005) 5 *Human Rights Law Review* 1, 160.

¹³⁹ UNGPs (n 14).

¹⁴⁰ Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) xviii; UN Human Rights Council, ‘Human Rights, Transnational Corporations and Other Business Enterprises’ (16 June 2011) UN Doc A/HRC/Res./17/4.

¹⁴¹ Ruggie, (n 135)

¹⁴² Jagers, (n 138).

built...without foreclosing any other longer-term development'.¹⁴³ Furthermore, it is difficult to see how the states' duty to protect in Pillar 1 of the Framework for the Guiding Principles would operate without corresponding obligations on TNCs.¹⁴⁴ How can States enforce the obligation against corporations if the corporations merely have the responsibility (not obligation) to respect human rights in the first place? If international law requires that states ensure that third-parties, including TNCs, comply with binding international human rights requirements, then it means that the third parties themselves are necessarily obligated to comply with such requirements.¹⁴⁵ If third parties did not have prior obligations to individuals, 'the state's derivative responsibility to hold them accountable would be empty and meaningless'.¹⁴⁶ The state can only be expected to enforce human rights obligations that are already expressly or implicitly recognised by the international treaties themselves.¹⁴⁷

It should be noted that the state's responsibility to protect is not absolute, in the sense that it is obligated to take steps to prevent or punish human rights abuses as far as it can. Thus, if human rights abuses are committed by an TNC, but are adjudged unforeseeable or beyond the managerial capacity of the state, it would mean that the TNC, who was primarily responsible for the harm is not capable of being held to account.

The non-recognition of corporate obligations also affects the application of the third pillar of the Framework. While the Framework recognises the rights of victims of corporate abuse to have access to remedy, the non-recognition of binding legal obligations of corporations for abuse of human rights in the second pillar obscures the possibility for the victims to claim access to any legal remedy against TNCs. Access to remedy is on its own, a

¹⁴³ UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Respect, Protect and Remedy Framework' (21 March 2011) UN Doc A/HRC 17/31, paragraph 13.

¹⁴⁴ Jagers (n 138), 161.

¹⁴⁵ David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 *Business and Human Rights Journal* 2, 208.

¹⁴⁶ Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press, 2009), 285.

¹⁴⁷ Bilchitz (n 145), 208.

right in international law, but it is difficult to see how a legal remedy can be granted without the recognition of a prior legal obligation.¹⁴⁸

Apart from placing an artificial limit on the States' human rights obligations, the Guiding Principles clearly lower the current standard on the issue of extraterritorial obligations of States to control the corporations they are in a position to influence, wherever such corporations operate. The Guiding Principles provide that 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'¹⁴⁹ The Commentary to the Guiding Principles then qualifies this principle by stating that

at present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved or in support.¹⁵⁰

This statement does not, however, represent the current legal position. As has been previously discussed, the United Nations treaty bodies have repeatedly maintained that States are obligated to take steps to prevent human rights abuse by business entities that are incorporated under their laws, that have their main seat or their main place of business under their jurisdiction, or

¹⁴⁸ Bilchitz (n145).

¹⁴⁹ UNGPs (n 14), principle 2.

¹⁵⁰ *ibid*

where they can otherwise influence the corporate entities by way of legal or political means.¹⁵¹ These statements made by the UN treaty bodies were even reiterated after the Guiding Principles were endorsed.¹⁵² By adopting such a cautious approach to the extraterritorial obligations of States, the Guiding Principles may in fact be encouraging States reluctant to accept such obligations to challenge the interpretation of human rights treaty bodies, despite the support the position of these bodies received from legal doctrine and civil society, and from even the International Court of Justice itself.¹⁵³

Another area in the Guiding Principles which could be improved concerns the responsibility to respect placed on corporations. The SRSG rejected the Norms use of ‘sphere of influence’ for being vague and imprecise and used ‘due diligence’ instead.¹⁵⁴ Principle 15 provides

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:(b) A human rights due-diligence process to identify, mitigate and account for how they address their impacts on human rights.

Although it is further explained in Principle 17, the due diligence criteria remains uncertain in some important respects.¹⁵⁵ The Guiding Principles state that corporate entities should, as part

¹⁵¹ See Chapter 2, sections 2.5- 2.6 on the various statements by different human rights treaty bodies on the extraterritorial application of human rights treaties.

¹⁵² Paragraph 30 of the 2017 General Comment No. 24 of the CESCR provides that ‘the extraterritorial obligation to protect requires state parties to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities...states may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.’ (10 August 2017) E/C.12/GC/24.

¹⁵³ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136, paragraph 109; and, *Case Concerning Armed Activities on the Territory of The Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Reports 168, paragraphs 215-219.

¹⁵⁴ UNGPs (n 14), principles 15-21.

¹⁵⁵ This is said to be a reason why civil society organisations commissioned experts to clarify the content of the obligation and to unpack its operational consequences.’ –See Olivier De Schutter and Anita Ramasatry, Mark Taylor, Robert Thompson, ‘Human Rights Due Diligence: The Role of States’ (International Corporate Accountability Roundtable, European Coalition for Corporate Justice and Canadian Network on Corporate

of the due diligence component of their responsibility to respect human rights, ‘cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.’¹⁵⁶ This is indeed a major step forward as it places the responsibility of due diligence beyond the core company, down the supply chain, to include the conduct of subsidiaries and other affiliates. However, it is unclear to which extent exactly the company should accept responsibility for the human rights impacts of the activities of such affiliates. Human rights due diligence may appear to be a more workable concept than ‘sphere of influence’ because the latter concept takes as given that a particular corporation has a sphere of influence to which its responsibility extends, while due diligence is more explicitly normative and does not depend on a finding of fact but on the reality of the influence the corporation does have.¹⁵⁷ However, until the ambiguities are adequately addressed, it may remain relatively elusive and may not escape the very vagueness that led to the criticisms levelled against its predecessor.

4.8 The inadequacies of the corporate responsibility initiatives

Having highlighted the specific limitations of the six major international regulatory initiatives on corporate responsibility in relation to human rights, three general conclusions can be made. First, although their provisions on human rights address TNCs directly, they do not provide substantive rationales for their application. Second, they contain vague and sweeping human rights provisions, which offer no guidance to TNCs on how the principles are to apply in their operations. Third, the international initiatives do not provide adequate or effective mechanisms

Accountability, December 2012) <<http://humanrightsinbusiness.eu/wp-content/uploads/2015/05/De-Schutter-et-al.-Human-Rights-Due-Diligence-The-Role-of-States.pdf>> accessed 24 September 2017.

¹⁵⁶ UNGPs (n 14), principle 17(a).

¹⁵⁷ De Schutter (n 16), 16.

to monitor the proper implementation of their provisions. These general limitations will now be discussed in some detail.

4.8.1 Direct corporate human rights obligations

The importance of establishing a sound rationale for the imposition of direct international human rights obligations on TNCs in a regulatory instrument is crucial to its adequacy and acceptance. This is especially so when considering the argument that corporations are established primarily to maximise profits—a factor that was at the fore of the arguments against corporate social responsibility initiatives. Thus, any international regulatory initiative, which aims to directly regulate the activities of TNCs as they affect human rights, should provide logically sustainable and concrete rationales for doing so. The existing regulatory initiatives however, do not address this important aspect but rather offer contestable rationales.

The OECD Guidelines and ILO Tripartite Declaration offer identical justifications as to why TNCs should have human rights responsibilities. According to these initiatives, TNCs are urged to observe human rights standards in their operations because of their potential to make important contributions to economic and social progress and to resolve the difficulties to which their various operations may give rise.¹⁵⁸ These rationales have been referred to as the ‘business case’ for corporate responsibility.¹⁵⁹

There is nothing fundamentally wrong with a ‘doing well by doing good’ approach, which the business case for corporate responsibility seems to suggest. After all, ‘treating people well is conducive to productive long-term relationships, and productive long-term relationships

¹⁵⁸ OECD Guidelines 2011 (n10), 3; and ILO Declaration (n 11), paragraph 2.

¹⁵⁹ ‘In what has become known as the ‘business case for Corporate Social Responsibility’ the pitch is that a company can ‘do well by doing good’: that is, can perform better financially by attending not only to its core business operations but also to its responsibilities towards creating a better society.’ - Elizabeth C. Kurucz, Barry A. Colbert and David Wheeler, ‘The “business case” for Corporate Social Responsibility’ in Andrew Crane, et al, (eds.), *The Oxford Handbook on Corporate Social Responsibility* (Oxford University Press, 2008), 8

are conducive to profits.’¹⁶⁰ But, the question that arises is whether observing human rights standards is always conducive to maximising profits? The answer to this question has to be answered in the negative. In the UCC-UCIL incident in Bhopal, it was alleged that the safety standards in the gas plants were deliberately lowered following cost saving measures undertaken by UCC that ultimately resulted in the loss of thousands of lives. In Ecuador, Chevron purportedly used substandard equipment and defective waste disposal methods with the aim of increasing their profit margins. Of course, this resulted in severe contamination of the environment and loss of livelihood of indigenous peoples. Similar situations were alleged to have resulted from the activities of Shell in Nigeria’s Niger-Delta region.¹⁶¹

These examples demonstrate that there will often be times where a TNC can increase profits by engaging in behaviour that risks the lives of its workers and the individuals in the local communities in which they operate. It may not be realistic to focus on a business case that establishes a determinate connection between human rights and profit. Other than the fact that it may sometimes be impractical, the business case also threatens to undermine the entire fabric of human rights. As Langlois states, ‘a right is not something that can be assigned on efficiency grounds,’ it is ‘precisely an individual’s trump against the claims of efficiency’.¹⁶² Thus, any initiative that ‘attempts to place a calculable value on human with a view to encouraging some sort of trade-off between human rights and other goals’ is untenable.¹⁶³

The Global Compact and the Guiding Principles, find their rationale for corporate human rights responsibility in social expectation and the public-private partnership.¹⁶⁴ However, this will only be feasible where partnerships with the various stakeholders in society

¹⁶⁰ Chris McDonald, ‘The “complex” business case for human rights’ (Business Ethics Blog 15 May 2014) <<https://businessethicsblog.com/2014/05/15/the-complex-business-case-for-human-rights/>> accessed 24 September 2017.

¹⁶¹ For a more detailed discussion on these incidents, see Chapter 3.

¹⁶² Richard Langlois, ‘Cost-Benefit Analysis, Environmentalism and Rights’ (1982) 2 *Cato Journal* 1, 283 <<https://object.cato.org/sites/cato.org/files/serials/files/cato-journal/1982/5/cj2n1-9.pdf>> accessed 24 September 2017.

¹⁶³ Surya Deva, *Just Business* (n 8), 149.

¹⁶⁴ Global Compact (n 12) and UNGPs (n 14).

are necessary for the TNCs to achieve their own corporate objectives. The incorporation of human rights standards into the corporate system of operations would necessarily mean that TNCs would have to formulate new policies, train employees, monitor conduct, and take certain other actions- all, which would involve some extra expenditure on their part. It is unlikely that they would be inclined to conduct their operations according to societal expectations if such expectations will affect their businesses. After all, the maximisation of profit is still part of the ultimate objective of the corporation. The social expectation rationale is thus exposed to the same limitations as the business case as it places the ultimate decision on TNCs to choose whether or not it would respect internationally recognised legal rights.

Moreover, in a complex international society with varying levels of development, the social expectations will invariably differ from State to State. In fact, it was this same issue of differing expectations in developing and developed States that led to the demise of the UN Code of Conduct and the Draft UN Norms. Developing States will always focus on standards that push for the increase in foreign direct investment, while developed States will advocate for corporate friendly standards for their corporate nationals. Standards including those relating to impacts of corporate activities on health and the environment would be relegated to the background. Thus, it would be difficult to determine appropriate expectations of corporate responsibility regarding human rights.

Also, persons in States that have been subjected to long years of systematic corruption and tyrannical rule may have adapted to the status quo and may have developed low expectations concerning compliance with human rights norms. In Nigeria, for example, systemic corruption of government officials has been widely documented.¹⁶⁵ As a result of such widespread and long-term corruption, individuals within the country have developed lax

¹⁶⁵ Daniel Smith, *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria* (Princeton University Press, 2007), xii.

attitudes in relation to the harmful activities of TNCs in the oil producing regions. The agitations of the people have greatly subsided as community leaders have been silenced by large pay-outs by these government officials. Thus, the system of corruption and abuse has become the norm.¹⁶⁶ Yet, they are internationally recognised human rights norms proscribing these very situations as unacceptable despite the reduced social expectation of the people living therein. If human rights standards are accepted based on low societal expectations, then what will be obtainable would be a replication of the status quo that encourages human rights harm, rather than seeking to develop a world in which the human rights of individuals are fully protected, which is the single overarching objective of international human rights.¹⁶⁷

This objective ‘derives from the inherent dignity of the human person’, as enshrined by the basic international human rights legal documents.¹⁶⁸ These international legal documents articulate human rights from the perspectives of all individuals as beneficiaries of those rights.¹⁶⁹ The rights are not particular as to who the agents required to realise them are, instead, they call on all others to both refrain from behaviour that would infringe on the rights and to assist in their realisation.¹⁷⁰ However, early historical frameworks for the protection of human rights came up at a time when the State was generally assumed to be the only agent obligated to meet human rights claims.¹⁷¹ This was primarily due to the position the State occupied vis-à-vis individuals as the primary provider and controller of public goods, by virtue of which the State had the power and the opportunity to both promote and violate human rights.¹⁷²

¹⁶⁶ Ciara Hackett, ‘The challenge of MNCs and development: oil extraction, CSR, Nigeria and Corruption’ (2016) 2 *Journal of Human Rights in the Common Wealth* 2, 1-13 <https://pure.qub.ac.uk/portal/files/18340387/2260_3398_1_SM.pdf> accessed 26 September 2017.

¹⁶⁷ David Kinley and Junko Tidaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 931-1023, 962-963.

¹⁶⁸ Preamble to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Preamble to the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹⁶⁹ David Bilchitz, *Poverty and Fundamental Rights* (Oxford University Press, 2007), 74.

¹⁷⁰ Andrew Kuper (ed.), *Global Responsibilities. Who Must Deliver on Human Rights?* (Routledge, 2005), x.

¹⁷¹ *ibid*; International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Versoix: ICHR, 2002), 9.

¹⁷² *ibid*

Nevertheless, the early assumptions have proved to be too simplistic. Due to the wave of globalisation the situation is now more complex. The position of the State as the primary violator and promoter of human rights is not absolute as non-state actors, including multinational corporations, have acquired similar position. In the quest for foreign investment and its attendant benefits in a globalised and free market economy, States have delegated and outsourced powers and functions to TNCs. As a result, the wealth and influence of TNCs have greatly increased, dwarfing that of many States. Consequently, TNCs also have the power as well as the opportunity to both promote and threaten human rights.

The ECOSOC resolution establishing the UN Draft Code has also noted that ‘while corporations are frequently effective agents for the transfer of technology as well as capital to developing countries, their role is sometimes viewed with awe, since their size and power surpass the host country’s entire economy’ and, ‘the international community has yet to form a positive policy and establish effective machinery for dealing with issues raised by the activities of these corporations.’¹⁷³ The Draft UN Norms also hinged the need for the implementation of international human rights standards on the dual capacity of TNCs to foster economic well-being whilst at the same time causing harmful impacts on the human rights of individuals through their core business practices and operations.¹⁷⁴ Thus, if the main objective of human rights is indeed the protection of the fundamental interests of individuals, then logically, there must be binding consequences for all agents who have the capacity to impact on them.

However, rather than placing obligations on TNCs, the international initiatives were couched in voluntary terms, merely encouraging and not compelling TNCs to comply with human rights in their activities. The UN Draft Norms was the only initiative that suggested

¹⁷³ Ibid (n14) at 3; Thomas G. Weiss, ‘The UN Code of Conduct for Transnational Corporations’ in David P. Forsythe (ed.), *The United Nations in the World Political Economy* (New York; St Martin’s Press, 1989), 87

¹⁷⁴ Preamble to the Draft Norms on Transnational Corporations, (n 13).

obligations for TNCs.¹⁷⁵ As noted, it was criticised for watering down the state obligations under international law- a criticism that has been referred to as the ‘dilution argument’.¹⁷⁶ Apart from the fact that TNCs must necessarily have obligations in order for the effective application of the states’ obligation to protect, the idea that conferring international obligations on TNCs presents a shift in international law is unfounded.

Certain long-established multilateral treaties directly impose obligations on corporations. The 1969 Convention on Civil Liability for Oil Pollution Damage provides that the owner of a ship (which may be a company) shall be liable for any pollution damage caused by it.¹⁷⁷ The 1982 UN Convention on the Law of the Sea prohibits not only states but also natural and juristic persons from appropriating parts of the seabed for its minerals.¹⁷⁸

It has not been suggested that by adopting these provisions, states have diluted their own international obligations, contrarily, the drafters of these treaties have apparently considered companies to be such important international actors that in order to actualise the objectives of the treaty they had to be considered directly, in addition to states.¹⁷⁹ Thus, even if the idea of imposing direct human rights obligations on TNCs may be seen as innovating, it would not be a move that can correctly be denounced as unorthodox.

¹⁷⁵ *ibid*

¹⁷⁶ Clapham (n 66).

¹⁷⁷ International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) (BGBI, 1996 II S. 671; BGBI. 2002 II 943), article III ‘...the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.’

¹⁷⁸ UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, article 137 (1): ‘No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognised.’

¹⁷⁹ Menno T. Kamminga, ‘Corporate Obligations Under International Law’ (Submission to the Office of the United States High Commissioner for Human Rights, September 2004), 3-4.

4.8.2 The content of the human rights obligations of TNCs?

Even if international law recognises that TNCs have binding human rights obligations, the contents of these obligations are not clearly developed. As the primary objective of international human rights is to safeguard the rights of individuals, it is necessary to determine not only who must be responsible for the realisation of the objective, but what such parties are required to do must also be specified. However, the international initiatives do not sufficiently articulate the obligations of TNCs.

The ILO limits its provisions to labour rights and does not contain specific standards on many of the rights which TNCs are known to infringe.¹⁸⁰ The Global Compact enjoins corporate entities to adopt into their practices standards in the international Bill of Rights and the International Labour Convention, whilst the OECD Guidelines provide that TNCs should respect human rights ‘within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations.’¹⁸¹ However, the content and application of the human rights standards may vary from State to State. Moreover, the application of State focal human rights standards to TNCs may be problematic.

TNCs may generally not face difficulties when it comes to implementing the universal mandate contained in these international documents on the prohibition of for example, slavery, forced labour, torture or genocide to which there are internationally agreed standards on.¹⁸² However, the precise contour of several other universal human rights is likely to vary from State to State. For example, the exact scope of what constitutes the right to a clean environment, the right to health, the right to privacy, the right to fair trial or the right to fair wages as they are not universally fixed. In situations where, different standards derived from the rights are

¹⁸⁰ Ibid (n 11)

¹⁸¹ OECD Guidelines 2011 (n 10), Chapter IV.

¹⁸² Deva, Humanising business (n 8), 103.

applied by the host States certain challenges will ensue, especially where the host State lacks commitment to protect human rights or where such a State is under an oppressive regime. The existing regulatory regimes do not offer suitable solutions to these instances and rather, they further compound the problem. For example, the ILO tripartite Declaration provides that TNCs comply with the safety standards of the host country. This might result in situations where the TNC complies with minimal or no safety standards when it operates in developing States. This is precisely what happened with shell in Nigeria, UCC in Bhopal India and Chevron in Ecuador. The TNCs all operated in accordance with the host States' standards, but not in accordance with the highest standards of health, say, as prevailing in their home States.

Instead of expatiating on the nature and content of the corporate responsibility with regards to human rights, the international initiatives limit this responsibility by couching it in negative terms.

However, the SRSG in charge of drafting the Guiding Principles soon realised that couching TNC responsibilities in a purely negative nature would create an incentive for TNCs to adopt a completely 'hands-off' approach to situations where they could influence human rights harm. As a way out of this impasse, the notion of 'due diligence' was adopted. It provides as part of the corporate responsibility to respect human rights that companies should set up appropriate policies and processes 'including a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights', and to 'cover adverse human rights impacts that the business enterprise may be directly linked to its operations, products services or relationships'.¹⁸³ The recognition of the fact that TNCs are expected to identify, prevent mitigate and account for the impacts of their activities presupposes that positive obligations necessarily flow from the negative obligation to respect.

¹⁸³ UNGPs, principles 15 and 17.

The due diligence provision also presupposes that corporate responsibility may also involve situations where there is indirect involvement by companies in human rights abuses where the actual harm is caused by third parties including its affiliates, governments and other non-state actors. If the corporate responsibility to respect, as envisaged by the Guiding Principles presupposes a due diligence duty to prevent and mitigate human rights abuse by TNC subsidiaries and affiliates, then it would not be different from the states obligation to protect under international human rights law, which includes the positive obligation to prevent and punish human rights abuse by third parties. Yet, the SRSG still criticised the Draft UN Norms inclusion of positive human rights obligations for TNCs.

However, applying the full range of human rights obligations of states to TNCs would be problematic. Even though TNCs have attained prominent positions in the international community, they cannot replace the State as the primary unit of official power.¹⁸⁴ Therefore, caution needs to be taken so as not to detract from the distinctive nature of TNCs for which profit is still a significant motivation.¹⁸⁵ While TNCs can be powerful institutions in improving the realisation of international human rights, their human rights obligations, whether positive or negative need to be determined with sufficient specificity according to their distinct nature. A good starting point would be to clarify the content and application of the doctrine of due diligence. This is especially important with the increasing interaction between human rights and other areas of international law. One of such areas is international investment law, where corporate investors are increasingly being involved in BITs with host states. Such BITs ostensibly promote development but, their practical effect is the conferment of strong rights upon corporate investors. In the absence of firmly established corporate human rights obligations applicable to corporate investors, when conflicts arise between international

¹⁸⁴ Michael K. Addo (ed.), *Human Rights and Transnational Corporations-An Introduction* (The Hague: Kluwer Law International, 1999), 3.

¹⁸⁵ Bilchitz, *The Necessity for a business and human rights treaty* (n 145), 212.

investment obligations and human rights-with most statements on international human rights standards in voluntary terms, international commercial obligations are likely to trump those flowing from fundamental human rights in most cases.¹⁸⁶

4.8.3 Absence of sufficient implementation and enforcement mechanisms

Apart from the fact that the international initiatives provide contestable rationales for direct human rights responsibilities of TNCs which are not properly articulated, they do not provide mechanisms that effectively implement the standards that they enunciate. The initiatives, over rely on dialogue and cooperation between governments and TNCs to ‘encourage’ TNCs to make their standards integral to their business operations.¹⁸⁷ While dialogue and cooperation may be useful in internalising human rights in TNC operations, excessive focus on such strategy trivialises human rights. It gives the impression that human rights are not rights but are dependent upon the cooperation of TNCs.¹⁸⁸

Even where the initiatives provide for implementation mechanisms, the lack of the necessary monitoring and enforcement backing of such mechanisms renders them moot. These mechanisms are merely recommendatory, and only provide clarification where disputes arise. Thus, TNCs may flaunt the human rights standards without fear of repercussion. Moreover, in spite of the fact that all the initiatives encapsulate human rights standards that are directly applicable to TNCs, they still refer to the indirect state-centric compliance measures without addressing the major issues that they present to the individual’s ability gain access to adequate remedy.

¹⁸⁶ *ibid*

¹⁸⁷ George Kell, founding Executive Director at the UN Global Compact stated that, ‘the overall objective of the Global Compact Policy Dialogues is to create a platform that facilitates mutual understanding and joint efforts among businesses, labour and NGOs in solving key challenges of globalisation, working with governments and the UN. The objective is to both influence policy making and the behaviour of all stakeholders.’ - (n 78), 39.

¹⁸⁸ Deva, *Humanizing Business* (n 8), 116.

The principle of separate legal personality and *forum non conveniens* still present major challenges to individuals seeking redress for harm caused by TNCs. It is true that in relation to the former, the unique nature of corporations and the reason why it is established is to attain some social advantages by encouraging people to take risks, facilitate innovation and create competition.¹⁸⁹ However, if the advantages of the separate legal personality are accompanied by grave human rights harm, there should be a need for legal restrictions on companies to guard against such harms. Focusing entirely on achieving value without imposing full responsibility for a TNCs harmful actions creates a structure which is ‘pathological in the pursuit for profit,’¹⁹⁰ a result which could not have been part of the idea behind the doctrine of separate legal personality in the first instance. Similarly, it is necessary that *forum non conveniens* does not leave victims without any other recourse to another judicial forum. Without adequate access to remedies, the essence of implementation is lost.

Furthermore, and also linked to the state-focal nature of implementation, in spite of the recognition in several of the initiatives, of the fact that TNCs operate through several subsidiaries and affiliates that are linked through a complex web of interconnection and profit sharing, there are no clear pronouncements on the extraterritorial nature of the states’ obligation to protect against harmful activities of TNCs. Yet, the international initiatives do not address these pertinent issues. Instead, the Guiding Principles purport to limit already established extraterritorial obligations of home states by watering down its normative content.¹⁹¹

¹⁸⁹ Phillip I. Blumberg, *The Multinational Challenge to corporation Law: The Search for a New Corporate Personality*, (Oxford University Press, 1993), 52.

¹⁹⁰ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York: Free Press, 2012).

¹⁹¹ UNGPs (n 14) principle 2 and the accompanying commentary.

4.9 Conclusion

The failure of State based mechanisms to adequately address the issue of corporate human rights harm has made it imperative for the international community to step in to fill in the gaps. However, as this chapter has argued, the current corporate responsibility initiatives have not adequately addressed this issue. These inadequacies spring from a number of lacunae and ambiguities within their provisions which are summarised:

First, they lack a common concrete rational basis upon which corporate obligations should lie, giving room for serious criticism and challenges. Their reference to the major international human rights documents as a basis for common human rights standards applicable to TNCs may appear to be a legitimate cause, however, they fail to recognise and acknowledge the fact that these international human rights instruments were concluded at the time where TNCs had not gained the sort of influence in the international legal community as they have today. Furthermore, they lay claim to human rights standards and yet rob them of their normative content by presenting human rights norms as voluntarily applicable to TNCs.

Secondly, even where some ethically conscious TNCs may be moved to adopt the human rights standards as part of their operations, the international initiatives provide little or no direction on the nature and the extent of the application of these standards. Although it may be too much of a stretch to require that an international initiative provides detailed industry-wide or State-wide human rights obligations, it should at least provide sufficient guidelines from where TNCs or States may formulate obligations.

Thirdly, the implementation mechanisms are seriously inefficient as they have no power to ensure that TNCs conduct their operations in accordance with human rights standards. With little or no provisions on sanctions, non-compliant TNCs do not face any repercussions. A corollary of defective implementation and enforcement mechanisms is the inability of

victims of corporate abuse to claim redress for the infringement of their rights and TNCs are left to perpetrate human rights abuse with impunity.

Thus, it can be said that the current international corporate responsibility initiatives have not succeeded in adopting necessary standards to encourage or persuade TNCs, as far as possible, to adopt human rights standards in the course of their operations have also failed to provide adequate redress mechanisms where TNCs are not so encouraged. Hence, they have been inadequate.

Notwithstanding their grave shortcomings, the international corporate responsibility initiatives are not without any utility. The gaps left by the regulatory initiatives have formed the basis for renewed calls for yet another international regulatory mechanism. This time, the focus is on the establishment of an international legally binding instrument on business and human rights to fill in the gaps left by the voluntary soft law initiatives. Chapter five will consider whether such an instrument would provide any feasible solutions to the current challenges in the business and human rights sphere.

CHAPTER FIVE
FILLING IN THE GAPS? ROAD TO A BINDING INSTRUMENT ON BUSINESS
AND HUMAN RIGHTS

5.1 Introduction: The call for an international legally binding instrument on transnational corporations and other business enterprises

Previous chapters of this thesis have captured the human rights challenges resulting from the activities of TNCs, the inability and unwillingness of states to comply with their obligation to protect and the ineffectiveness of existing regulatory initiatives in filling the protection gaps. As a result of these lapses, TNCs are still left largely unregulated and victims are without adequate access to remedies for corporate related human rights abuse. Considering this, several states and civil society organisations made renewed calls for the establishment of an international instrument to go beyond the voluntary regulatory initiatives and provide legally binding rules to regulate TNCs.¹

In 2013, an alliance was formed. It included several hundred civil society organisations representing a broad spectrum ranging from human rights organisations, to workers associations, environmental and development organisations, academics and human rights activists and local groups representing victims of corporate abuse, referred to collectively as ‘The Treaty Alliance’.² The Treaty Alliance led the demand for a globally valid treaty to regulate corporate human rights responsibilities.

¹ Jens Martens and Karolin Seitz, *The Struggle for a UN Treaty: Towards global regulation on human rights and business* (Global Policy Forum, 2016), 7-8.

² Treaty Alliance, ‘Global Movement for a Binding Treaty’, <<http://www.treatymovement.com>> accessed 15 November 2018.

At the intergovernmental level, on the initiative of Ecuador, 85 countries subscribed to a statement published at the 24th session of the Human Rights Council.³ The statement recommended the drafting of a binding international instrument to regulate the activities of corporations as they affect human rights.⁴ The proposal acknowledged that soft law instruments such as the United Nations Guiding Principles (UNGPs) are a welcome development. However, it stressed that they are no more than a ‘first step’, which ‘provide only a partial answer to the pressing issues relating to human rights abuses by transnational corporations.’⁵ According to the proposal, ‘an international legally binding instrument concluded within the UN system, would clarify the obligations of transnational corporations in the field of human rights...and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies.’⁶

In response to the calls, the Human Rights Council on 26th June 2014, adopted Resolution 26/9.⁷ Resolution 26/9 established an Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to human rights (OEIGWG).⁸ The OEIGWG's mandate is to ‘elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.’⁹

³ Statement on behalf of a Group of Countries at the 24th session of the Human Rights Council, (1 September, 2013) <<https://www.business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>> accessed 15 November 2018.

⁴ *ibid*

⁵ *ibid*

⁶ *ibid*

⁷ UNHRC, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (14 July 2014) UN Doc A/HRC/RES/26/9.

⁸ ‘Open ended’ here means that the working group is open to all UN member states, states with observer status, NGO’s with the Economic and Social Council of the UN consultative states, as well as further actors such as national human rights institutions. All these actors may participate in the OWIG sessions and introduce oral and written statements in the process.

⁹ Resolution 26/9 (n 7), paragraph 1. The Resolution, however, was not adopted without objections. In a statement prior to the vote in the Human Rights Council, the US representative described the resolution as ‘a threat to the Guiding Principles.’ He announced: ‘the United States will not participate in the IGWG and we encourage others to do the same.’ US Mission to International Organizations in Geneva, ‘Proposed working group would undermine efforts to implement Guiding principles on Business and Human Rights’ (June 26 2014) <<https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement->

Resolution 26/9 was adopted with 20 votes in favour, 14 against and 13 abstentions.¹⁰

These numbers have been used to undermine the mandate contained in the Resolution as some have declared that there was no consensus to reach its adoption.¹¹ However, it is important to note that the forty-seven members of the Human Rights Council adopt resolutions either by consensus or by vote. Consensus does not mean unanimity, rather, it demonstrates the absence of a public and official opposition to an initiative.¹² At the UNHRC, consensus is a reflection of ‘a common feeling of comfort among its members, and if it is not reached, the members of the UNHRC may vote on a resolution, with a single majority needed for its adoption’.¹³ About 30 percent of resolutions are adopted by vote at the UNHRC, and they are treated the same as those adopted by consensus.¹⁴ Thus, the method of the adoption of resolution 26/9, does not detract from its mandate.

Resolution 26/9 further provided that the first two sessions of the OEIGWG were to be ‘dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument’.¹⁵ The Chairperson Rapporteur of the OEIGWG was directed to ‘prepare elements (hereinafter ‘the Elements’) for the draft legally binding instrument for substantive negotiations at the commencement of the third session’ of the

[guiding-principles-on-business-and-human-rights/](#)> accessed 15 November 2018. The European Union shared the US position and rejected the resolution on similar grounds. accessed 14 November 2018.

¹⁰ Those in favour were, Algeria, Benin, Burkina Faso, China, Cuba, Ethiopia, India, Indonesia, Cote d’Ivoire, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Republic of Congo, Russia, South Africa, Venezuela, and Vietnam. Those against were; Australia, Czech Republic, Estonia, France, Germany, Great Britain, Ireland, Italy, Japan, Montenegro, Republic of Macedonia, Romania, South Korea, and US. Those who abstained were; Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and United Arab Emirates.

¹¹ Luis Espinosa Salas, ‘The way forward for the treaty process on transnational corporations with respect to human rights’ (2017) CICICUS State of Civil Society Reports 2017, <<https://www.civicus.org/documents/reports-and-publications/SOCS/2017/essays/the-way-ahead-for-the-treaty-process-on-transnational-corporations-with-respect-to-human-rights.pdf>> accessed 15 November 2018.

¹² *ibid*

¹³ *ibid*

¹⁴ *ibid*, 2, and accompanying footnote. Apart from resolution 26/9, Human Rights Council resolution A/HRC/RES/32/2, ‘Protection against violence and discrimination based on sexual orientation and gender identity’ 30 June 2016, by 23 votes in favour, 18 against and six abstentions; and Human Rights Council resolution A/HRC/RES/31/32, ‘Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights’, adopted on 24 March 2016, by 33 votes in favour, six against and eight abstentions, have been adopted by vote and duly implemented by the UNHRC.

¹⁵ Resolution /26/9 (n 7), paragraph 1.

working group, taking into consideration the discussions held in the first and second sessions.¹⁶ A few months after the release of the Elements in September 2017,¹⁷ the OEIGWG released a ‘Zero Draft’ of the future treaty, which was deliberated on during the fourth session in October 2018.¹⁸ The Elements and the Zero Draft form the basis for negotiations on the final contents of the future binding instrument. Thus, this chapter examines their contents in order to ascertain whether they present viable prospects for closing the current protection gaps, particularly in the light of the incapacity and unwillingness of states to execute their obligation to protect.

5.2 The scope of the future binding instrument on business and human rights

A central focus of the debates during the OEIGWG sessions was the scope of future binding instrument. The determination of the scope is crucial as it sets the legal basis for the application of the contents of the entire instrument. Two major questions relating to the scope of the future binding instrument were considered. Relating to the *ratione materiae* scope of the instrument, the first question for determination was whether the future binding instrument should cover all international human rights or be limited to serious violations of human rights. In relation to its *ratione personae* scope, the question was whether the future binding instrument should apply to all types of business enterprises, or be limited to business entities with a transnational character. This section addresses the debates surrounding these questions.

¹⁶ *ibid*, paragraphs 2 and 3.

¹⁷ OEIGWG, ‘Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (29 September 2017) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 15 November 2018.

¹⁸ Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ ‘Zero Draft’ (16 July 2018) <https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf> accessed 15 November 2018.

5.2.1 *Ratione materia* scope: what rights should be covered by the future binding instrument?

The main issue for determination under the *ratione materia* scope of the future binding instrument was whether the treaty should cover all human rights or be limited to a specific set of rights. The Elements proposed that ‘the objective scope of the future legally binding instrument should cover all human rights violations or abuses.’¹⁹ This proposition was endorsed by the Zero Draft, which provided that the future instrument should extend to ‘all human rights, and those rights recognized under domestic law.’²⁰ This proposal has been the subject of criticism.

According to John Ruggie, former Special Representative of the Secretary General (SRSG), the category- ‘all human rights... has no legal pedigree’ and the ‘phrase, regarding human rights recognized under domestic law, requires elucidation of how possible tensions and contradictions between international and national standards are to be addressed...’²¹ In relation to the former category of rights, Ruggie had advised against adopting a broad interpretation. He warned that an instrument with a wide scope ‘would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places’.²² He advised that for international instruments to be successful, they must be ‘carefully constructed precision tools, addressed to specific governance gaps that other means are not reaching’.²³ Thus, he suggested that the scope of the future binding instrument should focus on ‘gross violations’,

¹⁹ Elements (n 17), paragraph 2.

²⁰ Zero Draft (n 18), article 3.2

²¹ John G. Ruggie, ‘Comments on the “Zero Draft” Treaty on Business and Human Rights’ (Business and Human Rights Resource Centre) <<https://www.business-humanrights.org/en/comments-on-the-“zero-draft”-treaty-on-business-human-rights>> accessed 15 November 2018.

²² John G. Ruggie, ‘The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty’ (Institute for Human Rights and Business, 8 July 2014), 4, <https://sites.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf> accessed 15 November 2018.

²³ John G. Ruggie, ‘A UN Business and Human Rights Treaty? An Issues Brief’ (28 January 2014), 5 <<https://www.business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>> accessed 15 November 2018.

including those that qualify as international crimes, such as genocide, slavery, forced labour and extrajudicial killings.²⁴

There is some plausibility in Ruggie's suggestion as focusing on a limited set of violations which are already firmly recognised by the international community may be easier for its legal formulation and may influence wider acceptance. However, as argued by Surya Deva in his statement as a Panellist during the OEIGWGs first session, 'there is no certainty or consensus yet about the meaning of the term "gross".'²⁵ The term 'gross' under international human rights law, is influenced by several factors, which include, but are not limited to, the type of the victims, the magnitude of the violation and the impact of the violation.²⁶ If such a broad interpretation of the term is adopted, 'the very purpose of building a consensus around selected worst forms of human rights violations might be lost.'²⁷ Moreover, the way 'gross violations' have traditionally been used in international human rights law relate to violations of civil and political rights. Yet it is a well-known fact that due to the nature of corporate activities, economic, social and cultural rights are often the first set of rights that are impacted.²⁸ After analysing over 300 reports of alleged corporate abuses, Ruggie had himself stated that 'there are few if any internationally recognized rights business cannot impact-or be perceived to impact-in some manner. Therefore, companies should consider all such rights.'²⁹ If the scope of the binding instrument is to address the governance gaps in the business and human rights

²⁴ John G. Ruggie, 'Life in the global Public Domain: Response to Commentaries on the UN Guiding Principles and Proposed Treaty on Business and human Rights' (Harvard Kennedy School, 23 January 2015), 5, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726> accessed 13 November 2018.

²⁵ Surya Deva, 'Scope of the proposed instrument: What human rights to be covered? *Remarks made at OEIWG on TNCs and other business enterprises with respect to human rights* (7 July 2015),1<<https://www.business-humanrights.org/sites/default/files/documents/IWG%20-%20Scope%20%28Deva%29.pdf>> accessed 15 November 2018.

²⁶ *ibid*, 2

²⁷ *ibid*, 2

²⁸ Chiara Macchi, 'A Treaty on Business and Human Rights: Problems and Prospects' in Jernej Letnar Cernic and Nicolas Carrillo-Santarelli (eds.) *The Future of business and human Rights, Theoretical and practical Considerations for a UN Treaty* (Intersentia 2017), 75.

²⁹ John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and human Rights' (7 April 2008) UN Doc. A/HRC/8/5, paragraph 52.

sphere, a wider scope which contemplates both civil and political rights as well as economic, social and cultural rights would have to be adopted.

This was the basis of the consensus that was built right from the first session of the OEIGWG.³⁰ Delegates reiterated the statement in the Vienna Declaration and Programme of Action that human rights are indivisible, interdependent and interrelated.³¹ Focusing on violations primarily related to civil and political rights would be to deny justice for instance, for victims of Shell's operations in Nigeria or victims of India's Bhopal disaster, whose economic, social and cultural rights were mostly impacted.³²

Considering this, there was a general agreement on the adoption of a scope that focuses on all human rights. However, in order to provide legal certainty for the operationalisation of the future treaty, the adoption of a 'minimum package' as contained in Principle 12 of the UNGPs was recommended.³³ Principle 12 recognises the business responsibility to respect at a minimum, all rights articulated in the International Bill of Human Rights (IBR) and the ILO Declaration of Fundamental Principles and Rights at Work.³⁴ The IBR includes, the Universal Declaration of Human Rights (UDHR),³⁵ the International Covenant on Civil and Political Rights (ICCPR),³⁶ and the International Covenant on Economic, Social and Cultural Rights

³⁰ UNHRC, Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises (10 July 2015) A/HRC/31/ 50, paras 62- 66.

³¹ UN General Assembly, Vienna Declaration programme of Action, 12 July 1993, A/CONF.157/23, para 5.

³² Deva (n 25), 2.

³³ UNHRC, 'The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', 21 March 2011 UN Doc. A/HRC/17/31, principle 12; UNHRC, Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (2 January 2019) UN Doc A/HRC/40/48, para 74, (hereinafter OEIGWG report).

³⁴ International Labour Organization Declaration on Fundamental Principles and Rights at Work (June 1988), available <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf> accessed 20 January 2019 UN Doc A/HRC/40/48,

³⁵ Universal Declaration of human rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

³⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

(ICESCR).³⁷ Together, these instruments cover a broad range of widely recognised and accepted rights.

However, they include provisions on general human rights that may not cater for specifically vulnerable individuals or situations that require particular attention. As noted by several delegates at the fourth session, the IGWG could draw from the Commentary to Guiding Principle 12, which explains that

Depending on circumstances, business enterprises may need to consider additional standards. For instance, [UN] instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.³⁸

Although all human rights instruments could be traced to the UDHR, ICCPR and ICESCR, due to the nature of corporate activities, specific groups of persons are more vulnerable.

In most Niger Delta communities, women are responsible for clothing and feeding the family. The women rely on farming and fishing as the few formal jobs are mostly undertaken by the men in the community.³⁹ It is no surprise that they are most affected by harmful corporate activities in the region.⁴⁰ Another set of vulnerable persons in the context of corporate activities as they affect human rights are indigenous peoples. They continue to face marginalisation,

³⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

³⁸ UNGPs (n 33), commentary to principle 12.

³⁹ Ruth Maclean, 'Toxic mud swamps fortunes of Niger Delta women years after oil spill' *Guardian* (London 19 December 2018, The Guardian.com) <<https://www.theguardian.com/global-development/2018/dec/19/toxic-mud-swamps-fortunes-of-niger-delta-women-years-after-oil-spill>> accessed 20 January 2019.

⁴⁰ *ibid*

discrimination and suffer human rights abuse. According to the Chair of the United Nations Permanent Forum for Indigenous Issues (UNPFII),

they are increasingly being displaced and challenged by major investment and development projects that are encroaching on their lands, territories and resources. When indigenous peoples stand up to protect their lands, they are faced with harassment, violence and assassination. Over the past two years, we have seen an alarming rise in the killings of indigenous human rights defenders. In many ways, indigenous peoples are facing even greater struggles and rights violations than they did 10 years ago.⁴¹

In the face of this, it is fair to say that human rights ‘require a particular “lens” and “specification” when dealing with specific groups of people’ like women, indigenous peoples and other specially affected groups of persons.⁴²

It has been suggested that in addition to the IBR and the ILO Declaration, other core human rights instruments should be included within the scope of the binding instrument.⁴³ This

⁴¹ UNPFII, ‘Statement by the Chair of the UNPFII on the 10th Anniversary of the UNDRIP’ 13 September 2017 < <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2017/09/Statement-by-the-Chair-of-the-Permanent-Forum-on-Indigenous-Issues-on-13-September-2017.pdf> > accessed 20 January 2019.

⁴² Surya Deva, ‘Scope of the proposed treaty’ in Surya Deva and David Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017), 177.

⁴³ *ibid*, 176-177; The Nine core international human rights instruments are: These are, the ICCPR, the ICESCR; the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS12; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; the Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), (adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158; the International Convention for the Protection of All Persons from Enforced Disappearances (CPED), (adopted 6 February 2007, entered into force 23 December 2010) UN Doc A/RES/61/177 ; and the Convention on the Rights of Persons with Disabilities (CPRID), (adopted 13 December 2006, entered into force 24 January 2007), A/RES/61/106.

option may be more desirable as it may provide ‘more clarity and specific guidance about the contours of specific human rights’.⁴⁴ While the rights of women and children have been captured in specific human rights treaties, the rights of indigenous peoples, which are directly and routinely impacted by corporate activities have not been codified in comparable human rights instruments.⁴⁵

In 2007, the United Nations Declaration on the Rights of Indigenous People (UNDRIP) was adopted to enshrine rights that ‘constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.’⁴⁶ Article 29 of the UNDRIP provides that ‘indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources’ and that ‘states shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discriminations.’⁴⁷ Article 10 provides that ‘indigenous peoples shall not be forcibly removed from their lands or territories,’ and ‘no relocation shall take place without free, prior and informed consent of the indigenous peoples concerned’.⁴⁸ The UNDRIP also declares that states shall provide mechanisms for prevention and redress for ‘any action which has the aim of dispossessing’ indigenous peoples of their lands, territories or resources’.⁴⁹ These provisions cover many important issues confronting indigenous peoples

⁴⁴ Deva, Scope of proposed treaty (n 42), 177.

⁴⁵ Although there are several existing international human rights law instruments which set out state obligations relating to indigenous peoples, they do not directly or adequately address human rights violations that arise in connection with corporate activity. An example is the right of indigenous peoples to Free, Prior and Informed Consent (FPIC) which is the most coherent legal acknowledgement of indigenous peoples’ legitimate decision-making authority over activities impacting their lives. This authority is characterised by the ability to approve or disapprove of activities on the land to which their peoples’ culture, identity and livelihood is intrinsically bound. FPIC is derived from the right to self-determination which is recognised as part of customary international law and contained in some core international human rights instruments, such as the ICCPR and the ICESCR (see article 1, common to the ICCPR and the ICESCR (n 36 and 37) respectively). However, these do not deal specifically with the specific challenges faced by indigenous peoples.

⁴⁶ UNGA, ‘Declaration on the Rights of Indigenous Peoples’ (2 October 2007) UNGA A/RES/61/295 (adopted by 114 votes to 4; 11 abstentions), article 43.

⁴⁷ *ibid*, article 29.

⁴⁸ *ibid*, article 10.

⁴⁹ *ibid*, article 8.

dealing with corporate activity in their territories. However, they are non-binding. The UNDRIP merely represents an authoritative statement on the rights of indigenous peoples.

Thus, it is essential that the future legally binding instrument on transnational corporations and other business enterprises captures the relevant provisions of the UNDRIP within its scope in order to ensure better protection for indigenous people. This is particularly important as the world's resources are often located on land owned or controlled by approximately 370 million indigenous peoples, who bear the brunt of a significant proportion of corporate-related human rights abuse.⁵⁰

In ensuring that individuals are adequately protected from corporate activities affecting land and resources, it is important to also recognise that the enjoyment of human rights is dependent upon an enabling environment that recognises the complexity of human rights protection. Particularly in relation to the extractive industry, corporate activities usually have a direct impact on the environment causing damage, which in turn affects the human rights of the individuals living within the given environment. For example, the oil spills and gas flaring by corporations result in pollution of land, water and air. For communities who depend on the natural environment for their livelihood this can lead to serious human rights issues affecting their rights to health, food, adequate standard of living, and life.

The duty to protect requires that states take steps towards preventing third parties from causing human rights harm.⁵¹ Given the nature of corporate violations, which invariably begin with environmental impacts and ultimately human rights harm, it is necessary that environmental regulations are set in motion to prevent potential human rights abuse.

The idea that environmental regulations should be included within the scope of the binding instrument was criticised by some delegates at the OEIGWG sessions who felt that

⁵⁰ United Nations global Compact, 'Preserve the Livelihoods of indigenous peoples' <https://www.unglobalcompact.org/what-is-gc/our-work/social/indigenous-people> accessed 20 January 2019.

⁵¹ See Chapter 2, section 2.3.1.1.

issues related to the environment were better dealt with under other UN specialised agencies and fora.⁵² Yet, the pollution and resulting human rights disasters in Bhopal, the contamination of farmlands and waterways by Shell's oil spills in Ogoni, and the Ok Tedi mine waste dumping incident and its resultant human rights impact were all attributed to either the lack of, or non-implementation of environmental regulations.⁵³ The fact remains that there is an intrinsic link between the environmental damage caused by corporate activity and human rights violations. This fact should be reflected in the future binding instrument.

Recognising the importance of environmental protection in guaranteeing the protection of human rights, the African Commission on Human and Peoples Rights stated that states' compliance with article 16 (right to health) and 24 (right to general satisfactory environment) of the African Charter on Human and Peoples rights

recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual....government compliance with the spirit of articles 16 and 24 of the African Charter must include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be

⁵² OEIWG report (n 33).

⁵³ For a full discussion of these incidents, see chapter 3, section 3.2 and the accompanying sub sections.

heard and to participate in the development decisions affecting their communities.⁵⁴

The decision by the African Commission on Human and Peoples Rights demonstrates how the implementation of environmental protection measures could directly impact on and improve the protection of human rights. In terms of formulating concrete provisions, the IGWG could draw from the Rio Declaration on Environment and Development.⁵⁵ The Rio Declaration contains important principles on the adoption of cost-effective methods to prevent environmental harm, and the need for environmental impact assessments for proposed activities that are likely to have significant adverse impact on the environment.⁵⁶ However, it focuses on environmental issues, which may or may not impact human rights. The ultimate goal for the future treaty should be the identification, prevention and mitigation of human rights harm and improving accountability of TNCs for their adverse impacts on human rights. Thus, any impact assessment in this regard should be done with international human rights law as a basis and benchmark. The IGWG may draw from the provisions of the Rio Declaration to set up a framework for which states and businesses could identify, prevent and mitigate corporate activities that impact the environment in ways that affect human rights.

5.2.1.1 All human rights recognised under domestic law

Article 3.2 of the Zero Draft did not only propose that the scope of the instrument should include all human rights, it also indicated that its scope should extend to ‘human rights recognized under domestic law’.⁵⁷ This phrase has also been criticised. It has been argued that

⁵⁴ *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria* [2002] African Commission on Human and Peoples Rights, Communication 155/96, paragraphs 51-53.

⁵⁵ UNGA, ‘Report of the Rio Declaration on Environment and Development’ Rio Declaration on Environment and Development (12 August 1992) A/CONF.151/26 (Vol. I).

⁵⁶ *ibid*, principle 17.

⁵⁷ Zero draft (n 18), article 3.2.

‘the volume and content of human rights in domestic systems vary in a variety of legal systems. Thus, business enterprises will be subject to different standards in different states, so that even human rights conscious business enterprises would be confused on the exact standards to apply in their various operations.’⁵⁸ Related to this was the criticism raised on the possible tension between international and national standards. According to Ruggie in his comment on the Zero Draft, ‘the second phrase regarding human rights recognized under domestic law, requires elucidation of how possible tensions and contradictions between international and national standards are to be addressed, as they are under the UNGPs’.⁵⁹

It should be recalled that the very reason for establishing an international regime of human rights is precisely to set an international standard to which national systems must conform.⁶⁰ Although states are free to choose their modalities for effectively implementing their international legal obligations, the goal is to bring their national law into compliance with these obligations. Thus, irrespective of the variances in rights currently recognised under domestic systems, the purpose of the future instrument is to create a general standard, which states across domestic systems must require their TNCs to undertake. This is with the view to creating a level playing field among states and TNCs, and reducing the temptation for both actors to lower their standards in order to attain a competitive advantage in global business.

The UNGPs and the OECD Guidelines both reiterate the fact that respect for international human rights is the ‘global standard of expected conduct for multinational enterprises independently of states ability or willingness to fulfil their obligations and does not diminish human rights’.⁶¹ Thus, the recognition or non-recognition of an international human

⁵⁸ OEIGWG report (n 33), paragraph 74; A similar argument was put forward during the negotiations of the UN Draft Norms, where the Norms purported to place a broad spectrum of human rights obligations on TNCs without delimiting the specific standards for their application – see chapter 4, section 4.6.

⁵⁹ Ruggie, ‘Comments on the “Zero Draft”’ (n 21).

⁶⁰ See Chapter 2 of this thesis. See also Article 27 VCLT, which provides that a state ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’- Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁶¹ UNGPs (n 32), commentary to principle 11; OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, Commentary on part IV, paragraph 36,

rights rule in a given domestic legal order does not detract from the efficacy of such a rule. The binding instrument should clarify the standards that TNCs must that in executing their obligations to protect, states must ensure that their domestic human rights regulations conform to the provisions of the future treaty.

In situations where, domestic systems have developed more advanced systems of human rights protection that present a higher standard than international human rights standards provided in the future treaty, the higher standard should be adopted.⁶² This has been reflected in several UN Conventions and other international agreements. For example, the Convention

on the Conservation of Migratory Species of Wild Animals gives the State Parties the right to ‘adopt stricter domestic measures...’ to fulfil their obligations under the convention.⁶³ Article 2 of the Framework Convention on Tobacco control encourages state parties to implement measures beyond the Convention and its protocols. It provides that parties are free to impose ‘stricter requirements that are consistent’ with the provisions of the Convention and are in accordance with international law.⁶⁴

In essence, when setting standards for the application of human rights with respect to corporate entities, the ultimate focus should be on ensuring optimum protection for human rights.

<https://www.oecd.org/corporate/mne/48004323.pdf> accessed 26 April 2019.

⁶² For example, in 2017, France instituted the French Corporate Duty of Vigilance Law. The law establishes a legally binding obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their sub-contractors and suppliers, with whom they have an established commercial relationship. (Loi no. 2017 -399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> accessed 26 April 2019. This law is regarded as one of the most advanced mandatory initiatives, which uses the human rights due diligence principle contemplated by the UNGPs to put the companies’ responsibility to respect human rights into practice.

⁶³ Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) Article XII (3)

⁶⁴ WHO Framework Convention on Tobacco Control CRC/C/GC/15

5.2.2 Ratione personae scope: what type of businesses will the future binding instrument focus on?

Debates on the *ratione personae* scope of the future binding instrument stem from a foot note in the preamble of Resolution 26/9, which explains that the Resolution applies only to business enterprises that have a ‘transnational character in their operational activities’ and excludes ‘local businesses registered in terms of relevant domestic law.’⁶⁵ The debate stemming from this footnote has been central to all the IGWG sessions. Some delegates maintained the firm position that the footnote should be applied literally. They argued that unlike local businesses, the transnational activities of TNCs pose specific challenges due to the complexity of the corporate structures, jurisdictional relations and divergent legal systems and levels of enforcement.⁶⁶ They stressed that addressing these accountability gaps posed by transnational activities is and should remain the focus of the treaty.⁶⁷ According to the Indonesian delegate

Extending the scope of the instrument to all business enterprises...will not only go beyond the mandate given by the resolution, but would mean to open a long negotiating process with uncertain outcomes. If the objective of the instrument is to address the gaps in the international legal system the negotiation

⁶⁵ Resolution 26/9 (n 7), preamble and accompanying footnote.

⁶⁶ According to the Indonesian delegate at the third IGWG session, ‘The conduct of domestic businesses, including state owned enterprises and small medium enterprises is regulated by national laws and mechanisms. Unlike domestic companies. Because of complex corporate structures and international dimensions of their operations TNCs may avoid their responsibilities for human rights violations. This is where the proposed instrument would fill in the gaps. While domestic businesses are regulated by national laws the TNCs would be regulated under the proposed instrument.’ Statement by the Indonesian delegate, 3rd OEIGWG session (23-27 October 2017) <<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>> accessed 10 May 2019.

⁶⁷ According to the South African delegate at the third OEIGWG session, ‘The aim of this treaty which we would not want to water down and weaken would be to resolve the... challenges in filling the protection gaps...and close the gaps on transnational activity.’ Statement by the South African delegate, 3rd OEIGWG session (23-27 October 2017) <<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>> accessed 10 May 2019.

must focus on the elaboration of elements regulating TNCs. Aiming at a broad scope including domestic businesses would allow us to deviate from the basic purpose of the instrument.⁶⁸

It was further argued that considering the size and influence of transnational corporations it would be a ‘travesty of justice to equate locally registered businesses with other business enterprises who evade their human rights responsibilities on jurisdictional grounds’.⁶⁹

On the other hand, others argued that the footnote in the preamble of the resolution should not be interpreted as limiting the scope of application of the future binding instrument. According to this group, business enterprises that have little or no transnational activities can and do get involved in human rights abuses that are as severe and wide spread as those caused by transnational businesses. In its oral submission during the third session, CETIM stated:

Our experience in documenting business related human rights abuses and working with affected communities in all regions of the world points to the necessity of an international instrument reaffirming that all businesses enterprises must respect human rights. Situations we investigate are often complex and involve both domestic and transnational corporations. In the past years we have investigated countless cases of corporate involvement...in human rights abuses...and environmental destruction and found that the transnational and local companies involved often operate in and benefit from a regulatory and

⁶⁸ (n 66).

⁶⁹ Statement by the South African delegate 3rd IGWG session <<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>> accessed 10 May 2019

enforcement void leaving the victims of abuse without access to remedy.⁷⁰

This statement expresses the realities of Niger Delta communities and the activities of Shell and the Nigerian National Development Petroleum Company (NNPC)- a Federal Government owned oil company.⁷¹

Since 1956, when oil was discovered in the Niger Delta region of Nigeria, several transnational oil corporations have sought and obtained concessions and exploration licences in order to operate in the region. After the indigenization policy that took effect in the 1970s, these companies were made to operate under joint venture agreements with the NNPC. The NNPC operates as majority partner, with approximately 55-60 percent stake, while the corporate multinationals have between 40-45 percent.⁷² Shell Petroleum Development Company of Nigeria (SPDC), a locally registered subsidiary of Shell is one of such companies jointly operating with the NNPC. There are a plethora of reports chronicling the massive systemic human rights harm, which have resulted from the irresponsible operations and faulty infrastructure from the NNPC-Shell consortium. The case of *Gbemre v SPDC, NNPC and the AG of the Federation of Nigeria*,⁷³ provides a clear picture of the way such partnerships operate and their impact on human rights.

⁷⁰ Statement by CETIM, 3rd IGWG session <<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>> accessed 10 May 2019.

⁷¹ Aaron Sayne et al., 'Inside NNPC Oil Sales: A case for Reform in Nigeria' (Natural Resource governance Institute, August 2015), 2 <<https://resourcegovernance.org/analysis-tools/publications/inside-nnpc-oil-sales-case-reform-nigeria>> accessed 10 May 2019.

⁷² Martin- Joe Ezeudu, 'Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court (2011) 11 *African Human Rights Law Journal* 1, 28.

⁷³ *Jonah Gbemre (for himself and representing the Iwherekan Community in Delta State) v Shell Petroleum Development Company Nigeria Limited, Nigerian National Petroleum Limited and Attorney General of the Federation* [2005] AHRLR 151 (NgHC 2005)

In *Gbemre v Shell*, Mr Jonah Gbemre brought a suit on behalf of the Iwhereken community in the Niger Delta region against the respondents for engaging in continuous gas flaring in the Iwhereken community in the Niger Delta region of Nigeria. This resulted in the poisoning and pollution of the environment, exposing the community to premature deaths and respiratory illnesses and cancer, thus, affecting the people's rights to an adequate standard of living, health and life. The victims were not interested in distinguishing whether SPDC was a transnational entity, neither were they inclined to excuse abuses they suffered from the NNPC merely because it lacks a transnational element. What they were interested in was getting redress for the violation of their human rights. This was the basis on which the case was instituted.⁷⁴

In a rare decision by the Nigerian court, it was held that the activities of the oil corporations disregarded the right to life as contained in sections 33(1) and 34(1) of the Nigerian Constitution and articles 4, 16 and 24 of the African Charter, which Nigeria has signed and ratified.⁷⁵ However, since the court's ruling, there has been no enforcement. Both NNPC and SPDC have continued to flare gas indiscriminately in the Niger Delta.⁷⁶

The *Gbemre* case demonstrates that both local and transnational corporate entities are capable of engaging in activities that result in human rights harm. To the victims, it is of no consequence whether the harm emanated from the activities of a domestic company or a transnational one. Their concern is that they receive redress for the harm.

Current voluntary initiatives appear to have considered this. For example, while the 1976 OECD Guidelines for Multinational Enterprises were focused on multinational enterprises operating in the territories of OECD states,⁷⁷ the 2000 and 2011 revisions of the

⁷⁴ *ibid*, paras,1-2.

⁷⁵ *ibid*, paras 6-7.

⁷⁶ Ifeanyi Onwuazombe, 'Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing Communities in the Niger Delta Region' (2017) 22 *Annual Survey of International and Comparative Law* 1, 20.

⁷⁷ OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, *ILM*, vol. 15 967 at 968.

Guidelines state that ‘The Guidelines are not limited at introducing differences between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct’.⁷⁸ In the same vein, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises provides that the ‘principles do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all.’⁷⁹ The 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) consolidates these normative developments by abolishing the distinction between TNCs and other business enterprises and positing that all companies have a responsibility to respect human rights.⁸⁰

For its part, the current zero draft of the Binding Instrument attempts to create a compromise between the arguments advocating for a focus on transnational corporations and those that demand accountability for all business enterprises. Mirroring the provisions of paragraph 2 of the earlier elements document, the Draft extends its scope of application to ‘to human rights violations in the context of any business activities of a transnational character.’⁸¹ Thus, rather than focussing on the nature of the business enterprise, it alludes to the transnational character of the activities of the enterprises. The Zero Draft goes on to define ‘business activities of a transnational character’ as ‘any for-profit economic activity... that takes place or involve actions, persons or impact in two or more national jurisdictions.’⁸²

⁷⁸ OECD Declaration and Decision on International Investment and Multinational Enterprises: Basic Texts, DAFE/IME (2000)20, 8 November 2000, paragraph 3; OECD Guidelines for Multinational Enterprises, 2011 <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> accessed 12 June 2018.

⁷⁹ ILO Tripartite Declaration of principles concerning Multinational Enterprises and Social Policy, March 2017, para 5 http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf accessed 12 June 2018.

⁸⁰ These Guiding Principles apply to all...business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.’ Human Rights council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011) General Principles. See also principle 11 and the Commentary and principle 14.

⁸¹ Zero Draft, article 3.1, which encapsulates the provision of Article 2 of the Elements Document.

⁸² *ibid*, article 4.2.

These innovative provisions regarding the *ratione personae* scope of the draft Instrument appears to be wide enough to cover transnational corporations as well as locally based companies that have some transnational links. However, one major problem with this definition is that businesses may attempt to exploit the term ‘transnational character’ to find loopholes to avoid liability under the binding instrument. The nature of business today is such that global transnational companies engage intimately with a range of locally based domestic companies. In many of these instances, the actions, persons acting and the impact of the actions occur within a single jurisdiction. The relationship between the NNPC and the oil corporations operating in Nigeria is a concrete example of this problem.

The NNPC under its joint venture agreements with oil multinationals in the Niger Delta, contributes to and receives benefits from the production process.⁸³ There are several reports on how they have allowed the oil multinationals to use substandard equipment and engage in harmful practices in order to reduce production costs and increase revenue at the expense of the lives and wellbeing of the communities in areas of their operations.⁸⁴ A majority, if not all of the corporate human rights abuses in the Niger Delta region result from these sort of arrangements. However, the activities of the NNPC take place within the national boundaries of the country, without any transnational links. This situation is a practical representation of one of the major arguments put forward by the European Union (EU) in the negotiation process. From the beginning of the treaty process, the EU has made its participation in the drafting process dependent on the extension of the future instruments scope to national companies. Reason being that there are many instances (just as with the NNPC joint venture agreements) where serious human rights violations result from purely domestic activities of national

⁸³ Olufemi Amao, ‘Corporate Social Responsibility, Multinational corporations and the Law in Nigeria: Controlling Multinationals in Host States’ (2008) 52 *Journal of African law* 1, 95.

⁸⁴ See Chapter 1.

companies.⁸⁵ These realities must be taken into consideration to set the grounds of what should constitute the scope of the binding instrument.

In order to address the NNPC and oil multinationals joint venture type situations, article 4.2 of the zero draft should be extended to cover business entities that are involved with goods, materials and resources that are produced or extracted not only for domestic use but for contributing supplies to markets that cross international boundaries. It should also include economic activity that takes place as a network of relationships that cross international boundaries. In order to avoid ‘fancy footwork’ which TNCs may employ to avoid this definition, it is important that the binding instrument provides for the general corporate obligation to respect human rights. In its preamble, the zero draft provides that ‘all business enterprises, regardless of their size, sector, operational context, ownership and structure *shall* respect human rights, including by avoiding causing or contributing to adverse human rights impact through their own activities...’⁸⁶ The inclusion of the word ‘shall’ is generally understood to provide mandatory flavour, indicating the existence of an obligation. However, the provision is located in the preamble, which is usually serves to provide context to the treaty and does not on its own have obligatory force. Thus, it is important that this provision is included in its general obligations section. This, together with the already established obligation of states to protect human rights abuse by third parties, including ‘all’ businesses will ensure that domestic enterprises are not exempted from responsibility under the Binding Instrument. The Binding instrument can then go on to focus on the specific jurisdictional challenges that are peculiar to transnational business entities.

⁸⁵ Ionel Zamfir, ‘Towards an international binding treaty on business and human rights’ (European Parliament Research Service ‘EPRS’ briefing paper, April 2018), 7 <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)> accessed 10 May 2019.

⁸⁶ Zero draft (n 18), article 1.

This thesis will now turn to the specific operational provisions of the zero draft that deal with the accountability of TNCs, particularly in light of the previously identified regulatory gaps.⁸⁷

5.3 The zero drafts response to the current regulatory gaps

The operational provisions of the zero draft strongly focus on the issue of access to justice and remedy for victims of business-related human rights abuse. These represent the areas where urgent action is needed to fill in the protection gaps left by previous regulatory initiatives.⁸⁸ Some of these key issues include insurmountable obstacles to obtaining justice in many host states, ambiguities related to human rights due diligence, lack of jurisdiction in home state courts over subsidiaries of TNCs, the obstacles of *forum non conveniens* and the corporate veil, and problems related to the implementation and enforcement of human rights rules.

With respect to these current gaps, the most significant proposals of the zero draft are contained in Articles 5, 9, 10.6 and 10.4, 14 as well as the Draft Optional Protocol to the zero draft. While reference will be made to other draft articles, the aforementioned will be the main focus of the following sections.

5.3.1 The duty to prevent

The first step to improving access to justice involves setting up preventive human rights mechanisms. The prevention of human rights abuse by third parties is a strong aspect of the states' obligation to protect.⁸⁹ States are required to identify and assess potential adverse human rights impact that may cause or contribute to human rights abuse. The process of identifying a

⁸⁷ See chapter 4, section 4.8.

⁸⁸ Richard Meeran, 'The "Zero Draft": Access to judicial remedy for victims of multinationals' abuse' (Leigh Day, 5 September 2018) <<https://www.leighday.co.uk/Blog/September-2018/The-Zero-Draft-Access-to-judicial-remedy-for-victi>> accessed 10 May 2019.

⁸⁹ See chapter 2, section 2.3.1.1.

potential human rights harm is on one hand to prevent it from happening, and on the other, to cease it or mitigate it when it has happened or is in the course of happening.⁹⁰

In furtherance of this preventive aspect of the obligation to protect, Article 9.1 of the zero draft sets out the obligation of states to ‘ensure in their legislation that persons with business activities of a transnational character’ that are domiciled within the states’ territory, jurisdiction or that are under their control, ‘shall undertake due diligence obligations throughout such business activities’.⁹¹ The use of the term ‘due diligence’ as it relates to commercial business entities may, however, be misleading.

Due diligence generally related to business entities involves a single process of investigation conducted by businesses to identify and manage its own commercial risks. It is a ‘one off’ and often a ‘tick box’ process.⁹² The UNGPs use the term ‘human rights due diligence’.⁹³ This was deliberately chosen as an innovative term to integrate with international human rights law. It is distinct from due diligence related to business. Human rights due diligence is an ongoing process that is focussed on the human rights impact of the business activities and not just on the business itself. Initially, it is not the risk to the business that is in focus. The risk to the business is in how it manages and prevents these human rights risks.⁹⁴ Thus, it is pertinent that the drafters of the binding instrument take these differences into consideration for the sake of clarity.

The Zero Draft specifies that the scope of the due diligence obligation extends over the activities of subsidiaries and other entities directly or indirectly controlled by the TNC and those that are directly linked to its operations, products or services.⁹⁵ This directly recalls the notion of ‘business relationship’ put forward by the UNGPs and by the OECD Guidelines,

⁹⁰ *ibid.*

⁹¹ Zero Draft (n 18), article 9.1.

⁹² Statement by Robert McCorquodale, Statement in the fourth session on business and human rights.

⁹³ UNGPs (n 33), principle 17 UNGPs

⁹⁴ *ibid.*, commentary to Principle 17

⁹⁵ Zero Draft (n 18), article 9.1.a.

which is interpreted as including the whole value chain.⁹⁶ In proposing that states have an obligation to require, by law, that their corporate entities apply due diligence standards throughout their value chain, the zero draft takes into consideration the difficulties with host state regulation. By providing a legal basis for the duty of home states to apply their domestic legislations in a way that would produce extraterritorial effect, the Zero Draft avoids any infringement on the sovereignty and territorial integrity of host states- principles that have always been put up in arguments against the extraterritorial regulation of corporate entities.⁹⁷ In keeping with the UNGPs, whose human rights due diligence provisions are premised on the corporate responsibility to respect,⁹⁸ the due diligence obligation in the Binding Instrument should be premised on the obligation of businesses to respect human rights.

Objection has been raised concerning the way the obligation to prevent is phrased in certain areas in the current draft article. The wording of Article 9.2.C provides that states parties shall ensure that their transnational corporations “prevent” human rights violations within the context of its business activities, including the activities of its subsidiaries and that of other entities under its direct or indirect control or linked to its operations...⁹⁹ This has been criticised as positing human rights due diligence as a standard of results, thereby presenting an ‘extremely tall order for any due diligence requirement (such as the UNGPs), which typically is expressed as ‘seek to prevent’, placing human rights due diligence as a standard of conduct.¹⁰⁰

Contrary to the above argument, Article 9.2.C of the zero draft is in conformity with the UNGPs. Principle 13(a) of the UNGPs provides that ‘the responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse human rights

⁹⁶ UNGPs (n 33), principle 17 (b).

⁹⁷ See the discussion in chapter 3, section 3.3.5.

⁹⁸ UNGPs (n 33), principle 15.

⁹⁹ Zero Draft (n 18), article 9.2.c.

¹⁰⁰ Ruggie, (n 21).

impacts through their own activities'. Principle 13(b) then provides that they seek to prevent and mitigate adverse human rights impacts that result from business relationships, which include entities within its value chain.¹⁰¹ It is in keeping with Principle 13 that the zero draft requires business enterprises to “prevent” human rights harm from its own activities and from those entities within its control.

However, if the scope of article 9.2.C is extended to include business relationships outside the entity’s control,¹⁰² it may unnecessarily engage the liability of businesses even where they have tenuous connections to entities within their business relationships.¹⁰³

In order to circumvent this problem, the IGWG could consider including a due diligence defence to the treaty provisions. Where a TNC can prove that it took all reasonable precautions within the circumstances and had an effective policy and procedure in place to prevent adverse human rights impact, liability may not arise.¹⁰⁴ Thus, in situations where there is an unforeseen adverse human rights impact caused by a third party, i.e., entities in the business relationship and the TNC can establish that it has conducted human rights due diligence appropriately, the business enterprises could be considered to have done all they could to prevent it. This has the effect of moving the burden of the victims to show a ‘causal connection’ or ‘business link’ to businesses who would have the burden of showing that it is serious in its implementation of effecting human rights due diligence for its own activities. It may also present and provide a business incentive for compliance with due diligence.

Other important provisions in Article 9 of the zero draft include obligations on pre and post environmental impact assessments covering the TNCs activities and that of its subsidiaries and entities under its control.¹⁰⁵ These are important additions that cover the extensive effect

¹⁰¹ UNGPs (n 33), principle 13 and its commentary.

¹⁰² Which it does not appear to do.

¹⁰³ This was the same problem with the UNGPs, which did not provide any delimiting criteria for establishing the business relationships to which the human rights due diligence obligation applied. See chapter 54 section 4.7.

¹⁰⁴ The French Corporate Duty of Vigilance Law provides for such a criterion, (n 62).

¹⁰⁵ Zero Draft (n 18), article 9 2. c.

of corporate activities especially for those operating in the extractive sector. Violations like those of Shell in the Niger Delta Region and Texaco in Ecuador may have been prevented if such environmental assessments were mandated.

The zero draft also requires that ‘meaningful consultations with groups whose rights are potentially affected by the business activities and other relevant stakeholders’ should be carried out.¹⁰⁶ This is similar to the provision of free prior and informed consent contained in the UNDRIP.¹⁰⁷ The requirement of meaningful consultations should give indigenous communities a say in what happens to their lands and property in the event of impending corporate activities that may affect such rights. However, in order for such consultations to be ‘meaningful,’ the positions expressed by individuals and communities during the consultation process need to be transparent and considered by the company when making its decisions. An important point was raised by the Mexican delegate at the fourth IGWG session on this point. He stressed that consultations and consent should be an ongoing process to avoid situations where corporations deviate from previously agreed terms in the course of their activities without the approval of the concerned individuals and communities.¹⁰⁸ This would be a good addition to strengthen the provisions of the Binding Instrument.

However, any meaningful negotiation would have to secure the interests of all the negotiating parties. It is therefore important that the drafting committee considers situations where the communities themselves withdraw previously given consent after corporate activities have commenced. Such situations may place TNCs at a disadvantaged position and could work as a disincentive in the negotiation process. Thus, the provision of free prior and informed consent should be fashioned in a way that effectively addresses all these concerns.

¹⁰⁶ *ibid*, article 9. 2.g

¹⁰⁷ UNDRIPP, article 10

¹⁰⁸ Statement by the Mexican delegate at the 4th session of the OEIGWG <<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>> accessed 10 May 2019.

Two major aspects that are crucial to the success of a corporate human rights due diligence regime are absent in the zero draft. The first is the absence of a basis for the company to mitigate or remediate adverse human rights impact. Identifying potential human rights violations on one hand helps to prevent it from happening, however, the cessation or mitigation of the harmful activity when it has already occurred is also of crucial importance.¹⁰⁹ When the company has identified that it has contributed to or caused human rights harm, it should address such harm and provide remedy or cooperate in the remediation process to prevent further abuses.¹¹⁰ Mitigation and remediation are an important element in the UNGPs and are comprehensively discussed in the OECD Guidance on Responsible Business Conduct in Relation to Human Rights Due Diligence, which were adopted by the OECD Council in May 2018.¹¹¹ The OECD Guidance sets out a due diligence framework to be used by enterprises to avoid and address adverse impacts in their operations, supply chains and business relationships. It gives corporate entities guidance on practical actions concerning embedding responsible business conduct into policies and management systems, identifying and assessing actual and potential impacts of their activities, cessation, prevention and mitigation of adverse impacts, communication on how impacts are addressed, and provision of remediation when appropriate.¹¹² The OECD Guidance provide a very good template on how draft Article 9 could be improved. If taken into consideration by the IGWG, they would provide clarity for businesses and states in implementing due diligence requirements under the Binding Instrument.

¹⁰⁹ Human rights due diligence includes a duty to prevent as well as provide remedy when the harmful act occurs. See Chapter 2, section 2.3.1.

¹¹⁰ FIDH, 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: Preliminary comment on the "zero draft" convention' (October 2018) 15 <https://www.fidh.org/IMG/pdf/fidh_preliminary_comment_vf_web_version.pdf> accessed 10 May 2019.

¹¹¹ UNGPs (n 33), Principle 17; OECD, 'Due Diligence Guidance for Responsible Business Conduct' (31 May 2018) <<https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>> accessed 10 May 2019.

¹¹² OECD Guidance, *ibid.*

Another area of concern in the Article on prevention is Article 9.5 which includes the discretion of states to exempt small and medium enterprises (SMEs) from compliance with human rights due diligence obligations. While it is acknowledged that the due diligence obligations provided by the zero draft may prove to be too cumbersome for some of these entities, leaving their exemption to the discretion of single state parties may not be the best way to overcome this. It can lead to the creation of new legal structures by transnational corporations of a series of SMEs which would undermine the purpose of the Binding Instrument. There should rather be some general uniform criteria and procedural rules set out in the Binding Instrument or by the Conference of State Parties¹¹³ in line with the principle of non-discrimination. Businesses should know that human rights due diligence is an integral part of business rather than an additional administrative burden.

Although some aspects of the provisions on prevention need further development, it holds promise for victims of corporate related human rights abuse given its establishment of home state obligations to institute domestic regulation with extraterritorial effect. However, if business enterprises do not comply with these regulations, the situation will be no different from the previous regulatory initiatives. According to article 9.4 of the zero draft, ‘failure to comply with due diligence duties shall result in commensurate liability and compensation in accordance with the articles of this Convention.’¹¹⁴ Article 10 of the draft spells out the basis for such liability.

¹¹³ Article 14 of the zero draft (n 18) proposes the establishment of a Conference of State Parties. This is discussed in more detail in paragraphs 5.3.3.2.

¹¹⁴ *ibid*, 9.4.

5.3.2 The basis for the imposition of liability in the future binding instrument as proposed by the Zero Draft

Article 10 of the Zero Draft requires all state parties to ‘ensure through their domestic laws that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights...such liability shall be subject to effective, proportionate and dissuasive criminal and non-criminal sanctions, including monetary sanctions.’¹¹⁵ The UNGPs and other regulatory initiatives on business and human rights lacked hard consequences for human rights abusers. This article provides one of the strongest impetus for a legal instrument.

With respect to civil liability, corporate entities to which the instrument applies will be liable for harm caused by human rights abuses in the context of their business activities in various circumstances, namely:

- a. to the extent it exercises control over the operations, or
- b. to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim, or
- c. to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity.

In essence, article 10 of the zero draft prescribes the parameters for establishing the connecting link between a given parent company and a subsidiary for the purpose of determining liability. It suggests that parent companies would be liable for the harm resulting from the extraterritorial acts or omissions of its subsidiaries ‘to the extent that it exercises control over their operations’, or when it has a ‘close relation’ with its subsidiary or entity in its supply chain and when its

¹¹⁵ *ibid* 10.1.

own conduct is ‘directly connected’ to the harm caused, or when the risk ‘have been foreseen or should have been foreseen’.¹¹⁶

These parameters for establishing parent company liability in relation to the wrongs perpetrated by their subsidiaries are very flexible in their definition. Their alternative application demonstrates the effort put in by the drafters to ensure that they cover all possible ways in which a company may be involved in the human rights harm caused by corporate entities. However, they may not have solved the existing difficulties with establishing such a link. There is still the problem of the parent companies deliberately relinquishing control over the activities of their subsidiaries, even in situations where they could exercise such control, so as to escape liability. Parent companies could decide to adopt a hands-off attitude to avoid ‘strong direct connections’ with their business affiliates. The difficulty for victims to prove such connections is one of the most recurrent obstacles that impede access to justice in such cases, as the necessary evidence will invariably be in the possession of the TNC in question.¹¹⁷

Article 10.4 appears to mitigate this problem by providing that ‘subject to domestic law, courts may require, where needed, a reversal of the burden of proof for the purpose of fulfilling the victim’s access to justice.’¹¹⁸ A reversal of the burden of proof is generally classified as either placing a legal or an evidentiary burden on the defendant.¹¹⁹ Legal reversals require the defendant to prove a fact which is essential to the determination of his or her innocence on the balance of probabilities. As a result, they may significantly encroach on the presumption of innocence. However, evidential reversals have been found to be compatible with the presumption of innocence because the defendant is only required to raise exculpatory evidence, leaving the prosecution with the ultimate burden of proving the defendant’s guilt

¹¹⁶ *ibid*, article 10.6.

¹¹⁷ See chapter 3, sections 3.2.2.1- 3.2.2.2.

¹¹⁸ Zero Draft (n 18), article 10.4.

¹¹⁹ Kaun Ong, ‘Statutory Reversals of Proof: Justifying Reversals and the Impact of human Rights’ (2013) 32 *University of Tasmania Law Review* 2, 253.

beyond reasonable doubt.¹²⁰ Thus, if the victims of alleged corporate human rights abuse can *prima facie* establish that they have suffered harm that results or is likely to result from the activities of a given TNC, shifting the evidential burden of proof to the defendant TNC would provide relief to the victims from getting the necessary information to prove that the TNC had control or sufficient proximity. The CESCR supports the proposal in Article 10.4 of the zero draft. It notes in General Comment 24, that, ‘shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant.’¹²¹

Nevertheless, any excitement over this provision is dampened by its vague and discretionary wording and that it is made expressly ‘subject to domestic law’.¹²² Leaving the reversal of the burden of proof to states’ discretion would greatly undermine the scale of this innovative provision. It would be more effective if the drafters make the draft article compulsory subject to standards that are set in the binding instrument in order to ensure its uniform application.

The criterion of foreseeability on the other hand builds on existing international obligations that have been restated by the UNCESCR General Comment Number 24 and has also been applied in some domestic and legislation.¹²³ It presents a more plausible way of framing the criteria for parent company liability. It would require that state parties establish the liability of parent companies for their failure to react to risks resulting from the acts or omissions of their subsidiaries that they have foreseen or should have foreseen. This way, it will be in the interest of the company to closely monitor the activities of its subsidiary in order to avoid liability or to provide an insurance against the risk of being accused of being negligent

¹²⁰ *ibid*

¹²¹ UNCESCR, ‘General Comment No. 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (10 August 2017) E/C.12/GC/24, para 45.

¹²² Meeran (n 88).

¹²³ UNCESCR, General Comment No 24 (n 121) paragraph 18; French legislation on due diligence (n 62).

in exercising oversight over the subsidiary's activities. This approach would help in sidestepping the problems posed by the separate legal personality doctrine as liability would not attach for the harm resulting from the activities of the subsidiary, but for the failure of the parent company to prevent or react to the harmful activities.

However, it is important that the drafters of the binding instrument clarify this criterion by linking article 10 to article 9.4 This is because under the foreseeability requirement, the liability of the parent company will arise from the failure to exercise due diligence in controlling the acts and omissions of their subsidiaries.¹²⁴ Obviously, 'control' still plays a part in the foreseeability requirement. However, for the purpose of the application of the foreseeability requirement, control should not be defined on a case by case basis in a bid to determine whether the parent companies have been in fact involved in formulating the policies of the subsidiary or whether they are closely involved in the operations of the subsidiary. Rather, liability should only be excluded when the parent company can show that despite their best efforts, they were unable to seek information or react to the harmful practices of its subsidiaries.¹²⁵

This mode of establishing liability could also extend to other corporate activities in the transnational process, which rely on the establishment of contractual relationships with suppliers, sub-contractors and related business affiliates. Where a company sources supplies from other countries or subcontracts parts of its production process to contractors in other states, establishing the degree of control or influence it may have over such subcontractors becomes a herculean task. Thus, it is easier and more advantageous to establish the potential liability of the subcontracting company on its obligation to ensure that it seeks to identify the human rights impacts of its policies and it prevents and mitigates such impacts accordingly.

¹²⁴ Zero draft (n 18), article 9.2.c, article 9.4 and article 10.6.c.

¹²⁵ See section 5.3.2.

This duty is not dependent on the reality of the control and influence exercised on the other corporate entities that it interacts with.

In relation to criminal liability, the Zero Draft proposes that state parties ‘provide measures under domestic law to establish criminal liability for all persons with business activities of a transnational character that intentionally, whether directly or through intermediaries, commit human rights violations that amount to a criminal offence’.¹²⁶ There are cogent reasons for establishing corporate criminal liability in the context of business and human rights. Corporate criminal liability can have a strong deterrent effect. It attracts reputational damage and costly monetary sanctions, which TNCs may not be prepared to deal with.¹²⁷ The Zero Draft, however, does not address key questions that arise with establishing the intention of corporate entities for the purpose of establishing criminal liability. For example, will the intent of any employee of the corporation be imputed to the corporate entity, or would it rather be that of an employee in a position of authority or control?¹²⁸ The zero draft leaves these questions to be determined by the different national legal systems.

Recognising that some national legal systems do not recognise criminal liability of corporate entities, the Zero Draft proposes that corporate entities should be made ‘subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions or other administrative sanctions.’¹²⁹ Although the Zero Draft’s current approach would not provide for universal standards regarding corporate criminal liability, states will be less opposed to a general obligation to provide for the criminal liability of TNCs in their national regulations.

¹²⁶ Zero Draft (n 18), article 10.8.

¹²⁷ Shane Darcy, ‘The potential role of criminal law in a business and human rights treaty’ in Surya Deva and David Bilchitz (eds), *Building a treaty on business and human rights: Context and contours* (Cambridge University press, 2017), 460.

¹²⁸ *Ibid*, 468.

¹²⁹ Zero Draft (n 18), article 10.12.

However, the Zero Draft limits the imposition of criminal liability to situations where corporate entities are involved in ‘business activities of a transnational character’. This may present some difficulty. If the scope of criminal liability is limited to business activities of a transnational character it would mean that no matter the severity of the criminal conduct (even in cases of crimes against humanity), it will not be punishable if committed by businesses acting only within one jurisdiction. This is reflective of the problems that exists with the general scope proposed in the zero draft, particularly in relation to state owned companies that act within the territorial boundaries of a state.¹³⁰

5.3.3 The implementation and enforcement of the binding instrument

5.3.3.1 Jurisdiction

An important step towards the implementation and enforcement of the proposed binding instrument is to identify the courts with competence to determine the liability of the business entities when they have allegedly breached their due diligence obligations.

The current reality in relation to access to justice for victims of corporate related abuse is that the host states on whose territory such abuses occur do not have the necessary national structures to ensure that the victims obtain adequate remedies.¹³¹ Home states which are usually the domicile of the parent companies are known to have the necessary regulatory structures to ensure remedy despite the complexity of the corporate structure and operations. Parent companies have been known to contribute to such abuses or at least make decisions that result in human rights harm in host states. The evidence of such decisions is located within the home states, where the parent companies are registered or domiciled. Moreover, assets of the

¹³⁰ See section 5.2 of this thesis.

¹³¹ Examples of such situations have been discussed in chapter 3, particularly section 3.2.2.1.

company are usually located in the home countries, making it more likely for victims of human rights abuse to gain access to remedy if they bring a claim before home state courts.

Notwithstanding the facts contained in the above paragraph, jurisdiction is considered as an expression of the state's sovereignty in international law. Thus, it has notoriously presented a doctrinal bar to the recognition of an extraterritorial obligation to protect human rights.¹³² In this connection, the critical issue has always been the determination of the jurisdiction of a state over the activities exercised by its corporate entities or their subsidiaries abroad.¹³³ With respect to the business and human rights debate, it is necessary to establish whether states have an obligation to protect human rights outside their national territory. This entails two aspects: i) whether the state has prescriptive extraterritorial jurisdiction, i.e., can states adopt legislation with extraterritorial effect and ii) whether states should allow national courts hear claims about situations that occurred abroad.

The various UN treaty bodies have repeatedly expressed the view that States human rights obligations do not stop at their territorial borders.¹³⁴ Rather, states should take steps to prevent human rights abuses committed abroad by business entities domiciled in their territories and/or jurisdiction (whether they are incorporated under their laws, or have their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the human rights obligations of host states.¹³⁵ This position on the extraterritorial reach of the states' duty to protect has been supported by the International Court of Justice itself.¹³⁶ However, no current international human law rights instrument contains an express statement on the states' obligation to protect human rights

¹³² Margot Salomon, 'The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights: An Overview of Positive Obligations to fulfil' (*EJIL Talk*, 16 November, 2012) <<https://www.ejiltalk.org/the-maastricht-principles-on-extraterritorial-obligations-of-states-in-the-area-of-economic-social-and-cultural-rights-and-its-commentary-an-overview-of-positive-obligations-to-fulfil/>> accessed 16 April 2019.

¹³³ See the discussion in chapter 2, section 2.6.

¹³⁴ This is discussed in chapter 2, sections 2.5-2.6.

¹³⁵ *ibid*

¹³⁶ See chapter 2, sections 2.4.3-2.5. for a discussion on these cases.

extraterritorially. The UNGPs have stated that the extraterritorial regulation of the activities of business entities is not a legal obligation, but that states are free to do so if they choose.¹³⁷ This has led to some form of unclarity on the issue. Perhaps a way of establishing and clarifying this obligation is to explicitly state it in the future binding international instrument.

The zero draft proposes to establish such a duty. It does so by listing certain criteria in which to establish a connection between a corporate entity and the state in order to establish jurisdiction. Article 5 of the Zero Draft focuses on adjudicative jurisdiction and clarifies the situations where states have jurisdiction over a dispute that originates from a contravention of the provisions of the instrument. Thus, clarifying the extent of the states' duty to regulate its business entities as well. Two categories of states are considered to possess jurisdiction over human rights violations covered in the draft:

- The host states where the acts or omissions occurred
- The home states where the TNC is domiciled

Since human rights abuses are more likely to occur in developing host states where there are inadequate and inefficient national regulatory structures and where access to remedies for victims is usually elusive, the home state where the TNC is domiciled will be the focus.

In defining the home state where a TNC may be domiciled, the zero draft considers four alternative criteria where the TNC has its:

1. statutory seat, or
2. central administration, or
3. substantial business interest, or
4. subsidiary agency, instrumentality, branch, representative office or the like¹³⁸

¹³⁷ UNGPs (n 33), commentary to principle 2.

¹³⁸ Most of these criteria had been suggested by human rights bodies, see, ESCR General Comment No. 24 (n 121), para 26; International Commission of Jurists, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (26 January 1997), principle 25 <<https://www.refworld.org/docid/48abd5730.html>> accessed 11 May 2019..

The enlargement of the concept of jurisdiction to include subsidiaries, agencies, instrumentalities, branches and representative office, has not been applied in the domain of international human rights law. However, such enlargement is well-known and used in other branches of law. A good example is the European Union competition law. In *De Bloos SPRL v Societe en commodite par actions Couyer*, the European Court of Justice held that the terms ‘branch, agency or other establishment’ do not refer to specific legal situations but imply:

- the secondary establishment’s dependence on the parent company, and
- the secondary establishment’s involvement in the conclusion of business transacted.¹³⁹

The ECJ has also clarified that in EU competition law, it is possible to attribute the acts of a subsidiary to the parent company when that subsidiary does not autonomously determine its conduct on the market but mostly applies the instructions given by the parent company.¹⁴⁰

Where the parent company holds all or most of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that the parent company exercises decisive influence over the subsidiary.¹⁴¹

Article 5 proposes a very expansive and flexible interpretation of domicile for the purposes of jurisdiction under the binding instrument. It puts forth a broad concept of jurisdiction based on the most recent interpretations of legal doctrine and a coherent reading of other branches of the law that may be applied. This represents a big step forward in the effort to reduce legal gaps in access to justice in cases of violations of human rights perpetrated by companies. This is especially so because instead of providing a permissive rule like the UNGPs state, it would establish a duty on states. However, in order to be effective, the future binding instrument should address the barriers to justice that are linked to the corporate veil. One way

¹³⁹ *De Bloos SPRL v Societe en commodite par actions Couyer* [1967] case number 14/76.

¹⁴⁰ *ENI Spa v European Commission*, [2011] ECJ, case no. T-39/07

¹⁴¹ *Akzo Nobel NV v Commission* [2009] ECR I-8237, para 61. This case established the principle that the Commission could impute liability to a parent company of a wholly owned subsidiary by merely proving that the subsidiary is wholly owned.

of doing this is to follow the recommendation of the CESCR in General comment No. 24 to impose a duty of care on the parent company by creating a parent-based extraterritorial regulation imposing direct liability on the parent company for its failure to prevent violations committed by companies that are part of its value chain.¹⁴² Thus, it is important that article 5 is also linked with article 9 on prevention and article 10 on legal liability.

Another issue which needs to be addressed in connection with the jurisdictional provision is the doctrine of *forum non conveniens*. The zero draft, while giving wide interpretation to jurisdiction, fails to address the issue of *forum non conveniens* that has presented a serious barrier to victims accessing justice in home states. The victims of the largest industrial disaster Bhopal, India and the thousands of people affected by Texaco's alleged complicity in human rights abuses in Ecuador were deprived access to remedy based on doctrine.¹⁴³ Yet, the zero draft proposes in article 13.2, that 'nothing in this convention entitles a state party to undertake in the territory of another state the exercise of jurisdiction and performance of function that are reserved exclusively for the authorities of that other state by its domestic law.'¹⁴⁴ This provision may create a basis for the continued use of the *forum non conveniens* doctrine.

The zero draft could explicitly recognise the *forum necessitatis* doctrine which would ensure a duty of all states to ensure that victims of corporate human rights abuses are not deprived from accessing judicial remedy. Some EU member states and Canada have already included regulations on *forum necessitatis* in their national legal systems.¹⁴⁵ These could serve as an inspiration for the future instrument to develop its own conditions for the application of the doctrine.

¹⁴² CESCR, General Comment No. 24 (n 121).

¹⁴³ See chapter 3, sections 3.3.3.1.

¹⁴⁴ Zero draft (n 18), article 13.2.

¹⁴⁵ Chapter 3, section 3.3.3.2.

There is, however, an important contribution that Article 13 of the Zero Draft appears to make. In a move to address the asymmetrical nature of trade and international investment agreements, article 13 proposes that in negotiating trade and investment agreements, states shall ensure that human rights are upheld ‘in the context of business activities by parties benefiting from such agreements.’¹⁴⁶ It further provides that states should ensure ‘that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations’ under the future binding instrument.¹⁴⁷ However, it does not give specific direction on how this can be achieved. The phrase ‘least restrictive’ is susceptible to different interpretations. This lack of certainty may create room for abuse. By states and corporate investors. As suggested by delegates in the OEIGWGs fourth session, the binding instrument should include a provision requiring states to undertake human rights impact assessments and consultations be conducted prior to entering such agreements.¹⁴⁸ This will ensure that potential human rights risks stemming from such agreements are identified and prevented.

5.3.3.2 Complaint mechanisms

The proposed introduction of extraterritorial jurisdiction, state regulations with extraterritorial effect, the clarification of procedures and forms of liability and the standards to be applied, demonstrate that the Zero Draft focuses on access to justice and remedies for victims. This is commendable. It reflects the desires of many who advocated for the creation of corporate accountability standards and what they consider as the most pressing issues in the area of business and human rights.

¹⁴⁶ Zero Draft (n 18), article 13.6.

¹⁴⁷ *ibid*, article 13.7

¹⁴⁸ OEIGWG Fourth Report (n 33), para 51.

However, in the absence of any implementation and enforcement mechanisms to ensure that these provisions are effected, the binding instrument would be no different from previous regulatory initiatives. Without an effective international remedial mechanism with investigative and sanctioning powers to ensure that corporate human rights abuses are prevented and remedied, there would be no need for a binding treaty on business and human rights.

The international institutional arrangements proposed in the zero draft to ensure the implementation of its provisions present one of the major weaknesses of the draft. Article 14 of the Zero Draft proposes a traditional treaty monitoring body, a Committee composed of a limited number of experts whose competence would be limited to:

- a. Make general comments on the understanding and implementation of the Convention based on the examination of state reports and the reports from other stakeholders.
- b. Consider and provide concluding observations and recommendations on reports submitted by state parties
- c. Provide support to state parties in the compilation and communication of information required for the implementation of the convention
- d. Submit an annual report on its activities under the convention to the state parties and the UN General Assembly
- e. To possibly recommend to the UNGA to request the Secretary-General to undertake on its behalf studies on specific issues relating to the convention¹⁴⁹

¹⁴⁹ Zero Draft (n 18) article 14.

Article 14(5) further provides for a conference of state parties which will also review implementation, including, any ‘further development’ needed to fulfil the purpose of the treaty.¹⁵⁰

The international oversight mechanism contemplated by the zero draft combines the self-reporting and non-binding review characteristics of early human rights treaties governing states, with the more recent innovation of a conference of states parties. The limitations of these state reporting systems are already well known.¹⁵¹ It is even more regrettable in the case of corporate abuses as the lack of expertise that is characteristic of Committee members of the existing treaty bodies could represent a major problem in the case of the binding instrument on business and human rights.¹⁵² This is because it relates to an inherently complex and multidisciplinary issue. Yet the drafters of the Zero Draft adopt the system without any modifications.¹⁵³

In August of 2018, Ecuador’s Ambassador released a draft Optional protocol containing provisions for a National Implementation Mechanism (NIM) and a complaints function for the Committee created under Article 14 of the zero draft.¹⁵⁴ Under the OP, the NIM will be given the authority to carry out due diligence implementation reviews.¹⁵⁵ This may potentially address an important gap in the current business and human rights regulatory framework. Current regulatory initiatives require business entities to report on their human rights performance without providing any concrete consequences for poor reporting.¹⁵⁶ The OP seeks

¹⁵⁰ *ibid*, article 14(5)

¹⁵¹ Arts and Humanities Research Council, ‘Follow-up and implementation of Decisions by Human Rights Treaty Bodies’ (10 September 2009) <<http://www.bris.ac.uk/media-library/sites/law/migrated/documents/implementationtreaty.pdf>> accessed 20 April 2019.

¹⁵² *ibid*

¹⁵³ In fact, it takes a step back because as it stands, the zero draft does not even envisage an individual complaints mechanism. An Individual Complaints mechanism is rather provided for under the Draft Optional Protocol.- Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (August 2018) <<https://www.business-humanrights.org/sites/default/files/documents/ZeroDraftOPLegally.pdf>> accessed 29 April 2019.

¹⁵⁴ *ibid*

¹⁵⁵ *ibid*, article 5.2. and 5.3

¹⁵⁶ See chapter 4, section 4.8.3.

to remedy this situation by conferring the NIM with authority to review corporate performance of their due diligence at the prompting of victims, other stakeholders and even *ex officio*.¹⁵⁷ The competence of the NIM to conduct these reviews would be quite broad. It would include visits and inspections ‘to monitor the implementation and follow up of due diligence plans or policies.’¹⁵⁸

The OP provides that the NIM ‘shall, as a minimum, have competence to request all necessary information from the State Party in whose territory the NIM operates’.¹⁵⁹ This necessarily implies that when due diligence is underway, corporate entities would naturally produce and publish reports on the internal policies, outcomes and indicators of environmental and human rights impact assessments. It presupposes that state parties actually collect or keep track of such information, which may not necessarily be the case. The OP would require the NIM to gather information but it does not indicate how the gathering of such information would prevent and remedy human rights abuse.

Another proposal that the OP makes is the recognition of the competence of the NIM to receive and consider complaints of human rights violations by victims or a group of victims, their representatives or other interested parties, with a view to reaching an amicable settlement on the matter.¹⁶⁰ The OP would permit the NIM to establish good offices to parties concerned with a view to reaching an amicable settlement.¹⁶¹ According to the OP, when such a settlement is reached, it shall discontinue the proceedings.¹⁶² The NIM is to monitor compliance by the parties of the agreement reached through an amicable settlement.¹⁶³ However, the OP does not consider situations in which solutions are not amicably met. Rather, it proposes that where the

¹⁵⁷ *ibid*, article 5.

¹⁵⁸ *Ibid*, article 5.2

¹⁵⁹ *ibid*, article 6.3.a.

¹⁶⁰ *ibid*, article 6.1.

¹⁶¹ *ibid*, article 6.4

¹⁶² *ibid*

¹⁶³ *ibid*, article 6.5.

amiable settlements are breached, the NIM should communicate to the Committee established under the treaty.¹⁶⁴ However, the rationale behind this is unclear.

The OP gives the NIM powers and competencies that overlap with existing soft law bodies and their institutions. Most notable is the overlap with the National Contact Points (NCP) for the OECD Guidelines.¹⁶⁵ Nearly two decades of experience in over 50 countries exposes the fact that the NCP system is highly flawed and often characterised by a lack of sanctions, power imbalances, conflicts of interests, and lack of independence.¹⁶⁶ The irony here is that the OP asserts that state parties ‘shall consider the Principles Relating to the Status of National Institutions for the Protection and Promotion of Human Rights (Paris Principles) when designating or establishing the NIM’.¹⁶⁷ Yet apart from its focus on conciliation and mediation, it makes no mention of other functions contained in the Paris Principles, especially the possibility of issuing binding decisions.¹⁶⁸

The OP attempts to enhance the powers of the Committee established under article 14 of the Zero Draft by proposing the institutionalisation of an individual complaints mechanism similar to what is obtainable in the committees of current human rights treaties. Yet again, it does not address its inherent problems. Amongst the many issues confronting the individual complaints system, the ability to deal with the numerous complaints brought against state parties is one major challenge. If the committees of current human rights treaties struggle to grapple with the complaints involving fewer than 200 States, how will a similar committee cope with complaints stemming from the conduct of thousands of business entities?

¹⁶⁴ *ibid*, article 6.6.

¹⁶⁵ See chapter 4, section

¹⁶⁶ *ibid*

¹⁶⁷ Article 2 OP: Principles Relating to the Status of National Institutions for the Protection and Promotion of Human Rights ‘The Paris Principles’ UNGA Res 48/134 (20 September 1993) UN Doc. A/RES/48/134.

¹⁶⁸ *ibid*.

5.4 The issue of state complicity

The OP and indeed the zero draft largely depend on the cooperation of the state parties for the implementation of the proposed provisions. States themselves engage in commercial activities and may very well be a part of the violations perpetrated by business entities. In Nigeria, for instance, all subsidiaries of foreign oil companies operate based on joint venture agreements concluded with the Nigerian National Petroleum Corporation (NNPC), typically on a 60/40 percent ratio, with the NNPC owning the higher percentage.¹⁶⁹ There are a plethora of reports on the NNPC's complicity with the foreign oil companies in perpetrating human rights violations in the country.¹⁷⁰ Such complicity is usually attributed to the unwillingness and incapacity of the states to use their national structures to implement their international human rights obligations.¹⁷¹ There is no provision in the proposed articles of the zero draft and its OP where states' complicity in corporate human rights abuses is addressed. This could very well lead to situations where victims of corporate related human rights abuse are left without recourse to remedy, defeating the purpose of a binding instrument.

It should be recalled that the incapacity and unwillingness of states to carry out their obligations to hold business entities accountable for human rights abuses is the very reason for the initiation of this entire treaty process.¹⁷² Thus, this consideration should be at the forefront of any initiative for the implementation of human rights standard in the field of business and human rights. It would be an anomaly to let business entities 'off the hook' because the states have failed to carry out their international obligations. In such situation, the only losing party are the victims in a regime where they are to be the primary focus of protections.

¹⁶⁹ Ezeudu (n 72).

¹⁷⁰ See chapter 3 for a more detailed discussion.

¹⁷¹ *ibid*

¹⁷² *ibid*

One good response to this legal conundrum would be to place direct human rights obligations on business entities. As already argued elsewhere in this thesis, the state's obligation to protect and provide remedies for corporate human rights abuse would necessarily mean that business entities have obligations to respect human rights.¹⁷³ There is no conceptual impossibility for corporations to directly acquire obligations under international law, as demonstrated by extant provisions in conventions on the law of the sea, environmental law and energy law that establish direct obligations for businesses.¹⁷⁴ Even the Elements document discussed at the IGWG third session contemplated the imposition of such direct obligations. According to the Elements 'the core of an international legally binding instrument' is the 'recognition of general obligations of TNCs and OBEs' to comply with all applicable laws and respect internationally recognised human rights.¹⁷⁵ The Zero Draft does not echo this proposal contained in the Elements. However, article 1 of the zero draft provides that businesses 'shall respect human rights'. This leaves conceptual room for the creation of direct obligations to be developed in a later protocol or, perhaps, in a later revision of the binding instrument.

It is important to note that the establishment of direct corporate obligations does not suggest that state obligations would simply 'disappear'. Multiple participants in a wrongful act may have simultaneous and coexistent responsibilities, which require each participant to respond individually for their part in the wrongful act.¹⁷⁶ Obligations of business entities are

¹⁷³ See chapter 4, section 4.7.

¹⁷⁴ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, article 137 (1) 'No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized'; International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969; entered into force 19 June 1975) 973 UNTS 3, article III 'the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident'

¹⁷⁵ Elements (n 17), 3 'General Obligations'.

¹⁷⁶ Inter American Court of Human Rights, International Responsibility for the promulgation and Enforcement of laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights). Advisory opinion OC-14/94 of 9 December 1994, Series No. 14, para 56; Application of the Convention on the Prevention and Punishment of the crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgement [2007] ICJ Reports, 43, paras 419-420.

independent of the state's acceptance of human rights obligations. They are not also contingent on the state's fulfilment of its own human rights obligations. The commentary to Principle 11 of the Guiding Principles on Business and Human Rights confirms this when it states that

the responsibility to respect human rights is a global standard of expected conduct for all Business Enterprises wherever they operate. It exists independently of states' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national law and regulations protecting human rights.¹⁷⁷

This idea is also reflected in the OECD Guidelines for multinational Enterprises, when it states that

states have the duty to protect, while enterprises should, within the framework of internationally recognised human rights, international human rights obligations of the communities in which they operate, as well as relevant domestic laws and regulations, respect human rights, avoid causing, prevent or mitigate human rights harm.¹⁷⁸

The language used in these documents signify that the failure or inability of a state to enforce relevant international human rights obligations does not mean that corporations should escape accountability for their activities that negatively impact on human rights. Hence, the inclusion of such direct obligations would only clarify what is already understood as the duty of corporations under international human rights law, when it states that corporate entities shall comply with and respect 'internationally recognised human rights wherever they operate, and throughout their supply chains'.¹⁷⁹

¹⁷⁷ UNGPs (n 33), principle 11.

¹⁷⁸ Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 29 June 2011, Chapter IV 'Human Rights'.

¹⁷⁹ Elements (n 17), para 3.2.

It is clear from the Elements and other existing instruments on international human rights, that from a conceptual point of view, human rights already envisage direct obligations for corporations. What they do not do, however, is suggest how the establishment of these obligations will be achieved as a matter of law.

In reality, the responsibility for the implementation and enforcement of the obligations contained in the instruments fall back on the state. In essence, the corporate entities do not attract international responsibility for their failure to carry out the obligations, rather it is the state that is required to do so. Thus, it is only the state can violate the obligations or incur international responsibility for a breach of the obligations.¹⁸⁰

In some domestic systems, such international agreements have no effect on private actors unless it is implemented by the national legislative branch.¹⁸¹ While in others, international agreements may have domestic legal force only where the national constitutional provisions state so.¹⁸² The primary obligations are attached to the state parties, as they are the ones who are to take steps to prohibit particular private conduct or react to violations when they occur. In these sorts of situations, including direct obligations on corporate actors in a binding instrument on TNCs and OBEs may not be very effective in improving their accountability as long as it is the state that will still be accountable for any breach of its provisions. In the face of states' unwillingness and incapacity to discharge their obligations to protect such an exercise may be in vain.

There are, however, instances where international law has held private actors responsible for breaches of international law. These are situations where the international community has established mechanisms to adjudicate on the international responsibility of

¹⁸⁰ International Convention on the Law of the Sea (n 168,) article 139 'state parties shall have responsibility to ensure that activities in the area, whether carried out by state parties, or state enterprises or natural or juridical persons which possess the nationality of states parties or are effectively controlled by them or their nationals'

¹⁸¹ Jan Klabbers, *International Law* (Cambridge University Press 2013), 289.

¹⁸² *ibid*, 290.

private actors. A good example of this is in the field of international criminal law. The Nuremberg rules, for example, provided for individual criminal responsibility for crimes against peace, war crimes and crimes against humanity.¹⁸³ The vast majority of prosecutions at Nuremberg were against state officials, some however, occurred against the managers of certain corporations implicated in Nazi activities.¹⁸⁴ The corporations themselves did not face prosecution because the tribunal possessed jurisdiction only over natural persons.¹⁸⁵ Nevertheless, it can be argued that if the jurisprudential lens through which one views the trial of the corporate managers is broadened, it could be reasonably concluded that the criminality of the corporations was recognised. Although there were no corporations in the docket at Nuremberg, the basis upon which the corporate managers were found guilty of international crimes was due to their participation in the criminal conduct of the corporations. When examining this very issue in the *Kiobel* case, Justice Leval observed that ‘in at least three of those trials, tribunals found that the corporations violated the law of nations and imposed judgement on individual criminal defendants based on their complicity in the corporations’ violations.’¹⁸⁶

The legal reasoning in the Nuremberg cases was a two-step process. For example, in the *I.G Farben Trial*, the Tribunal reached the conclusion that Farben had violated international law and then imposed liability on individual Farben executives and employees based on their complicity in Farben’s violations.¹⁸⁷ In *Krupp*, for example, the tribunal made repeated references to the collective intent of the Krupp Group, and mentioned the corporations ‘ardent

¹⁸³ Control Council Law No. 10 (December 20 1945), reprinted in 1 *Trials of War Criminals Before the Nuremberg Military Tribunals*, at xvi (1949) (hereinafter CCL No. 10 *Trials*).

¹⁸⁴ See *United States v Flick*, *United States v Krauch (the IG Farben Case)*, and *United States v Krupp*, CCL No. 10 *Trials*, *ibid*, vols. 6-9 (1950-1953).

¹⁸⁵ United Nations, ‘Charter of the International Military Tribunal- Annex to the Agreement for the Prosecution and Punishment of the Major war Criminals of the European Axis (8 August 1945) A/CN.4/5, article 6.

¹⁸⁶ *Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) at 180 (Justice Leval, J. concurring) <<http://osaka.law.miami.edu/~schnably/Kiobel-2d-Cir.pdf>> accessed 1 September 2019.

¹⁸⁷ *Ibid*.

desire' to employ slave labour in its factories.¹⁸⁸ Thus, although none of the corporations were formally declared 'criminal organisations', nor subject to the Tribunals jurisdiction, it could be argued that the judgements in the trials of the corporate executives suggest the possibility of attributing liability for international crimes to the corporations themselves, not just to their directors and other employees.¹⁸⁹

More recently, there has been an institutionalisation of the Malabo Protocol, which entrusts the (yet to be established) African Court of Justice and Human Rights with the jurisdiction to receive cases of international crimes committed by corporations.¹⁹⁰ Although the basis for its establishment and the criteria for corporate liability are unclear,¹⁹¹ the mere fact that such an instrument is being contemplated is an indication of the international community's increasing interest and attention to the possibility and need for establishing an international body capable of sanctioning erring corporate entities.

The Elements document contemplated this sort of arrangement by including a proposal for the establishment of an international court on transnational corporations to promote, implement and monitor the provisions of the binding instrument.¹⁹² Unlike the Elements, the zero draft does not contemplate any binding international enforcement mechanism. It will not create an international court where victims can sue companies or where business executives and corporations can be criminally prosecuted. It does not even as much as provide for a mechanism for sanctions via the Committee, or the NIMs proposed by the OP. The international oversight mechanisms contemplated by the zero draft and its draft optional

¹⁸⁸ *The Krupp Case* (1948), reprinted in 9 *Trials of War Criminals Before The Nuremberg Military Tribunals* 1 (1950), para 1440.

¹⁸⁹ Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced labour Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91, 112.

¹⁹⁰ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (2014) SIC/Legal/Min/7(1) Rev.1.

¹⁹¹ See Ademola Abas, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects' (2013) 60 *Netherlands International Law Review* 1, 27-50.

¹⁹² Elements Document (n 17), article 9. b.1.

protocol combine the self-reporting and non-binding review characteristic of early human rights treaties governing states, together with their flaws. This could be the price of admission for a critical mass of states to ratify the treaty.¹⁹³

The value of broad state participation may supersede the value added of an international court, especially in the face of the disappointing performance of the International Criminal Court.¹⁹⁴ The text of the zero draft should be appealing to states as it puts them in the ‘driver’s seat’ to adopt legislation of their own to meet broadly stated standards without any compulsory international oversight mechanism.¹⁹⁵ Business entities are very likely to oppose a binding instrument with mandatory human rights due diligence obligations. However, they are more likely ‘to take a fresh look’ at an instrument which reinforces a state-based approach to its implementation and enforcement.¹⁹⁶ Perhaps at this stage of the negotiations the establishment of an international enforcement mechanism may work against the general support of the treaty process. However, one important question remains. What would be the value of broad state and business participation if the states remain unwilling and unable to apply their national regulations in ensuring proper access to remedy and accountability of TNCs? Article 14.5 of the Zero Draft does well to leave open the possibility of ‘any further development’ needed to implement the treaty.

5.5 Conclusion

Following the proposals in the zero draft, the binding instrument on business and human rights will adopt an approach focused on improving access to justice and remedy for victims of human rights abuses resulting from the activities of business entities. This is commendable as the

¹⁹³ Doug Cassel, ‘At last a Draft Un Treaty on Business and Human Rights’ (The Blog of international Judicial Assistance, 2 August 2018) <<https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/>> accessed 29 April 2019.

¹⁹⁴ *ibid*

¹⁹⁵ *ibid*

¹⁹⁶ *ibid*

current gaps in the area of business and human rights stem from issues of this nature. However, the proposals made in the various articles of the zero draft need to be clarified and strengthened. The proposals relating to the *rationae materiae* and *rationae personae* scope of the binding instrument need to reflect the fact that all business entities are capable of negatively impacting the entire range of human rights. It is important that the provisions of the binding instrument are couched in such a way that business entities do not adopt clever structures in order to evade liability for their harmful actions.

The proposals requiring states to establish due diligence obligations for business entities and standards of liability are quite extensive. They may reduce the chances of business entities escaping responsibility for their conduct. However, the approach adopted in the zero draft ignores the fact that states may be complicit in corporate related abuse. It does not consider the need for legal accountability and remedies also in the context of state commercial activity. The fact that states are themselves involved in commercial activities may contribute to their unwillingness to carry out their obligations under the future treaty following the zero drafts proposals. This may affect the victims' access to justice and right to remedy, which is the focus of the current treaty process.

Without clear provisions on mechanisms that would ensure that victims are not left without recourse to remedy, what would be the value in continuing the treaty process? The value may not be capable of being statistically measured. Rather, it may be more symbolic. The binding instrument could clarify that all business entities are bound under international human rights law to respect human rights. This will settle the debates on whether or not corporations have human rights obligations, something which is still debated despite the numerous pronouncements by human rights bodies and even the ICJ recognising such obligations. In all, the proposal for a binding instrument on business and human rights demonstrates that corporations can no longer hide behind the veil of their human rights policies.

They have now come to a point where they will be subjected to binding international principles and standards which would ensure that they respect human rights and fundamental freedoms.

Moreover, the current draft gives leeway for the development and establishment of an international mechanism that could ensure the implementation of the binding instrument in the face of states' incapacity and unwillingness to execute their obligations. Indeed, all hope may not be lost.

CHAPTER 6

CONCLUSION

6.1 Conclusion

As mentioned at the outset, the main aim of this thesis was to explore whether existing regulatory frameworks offer individuals adequate protection from the negative impacts that the activities of transnational corporations (TNCs) may have on their human rights' enjoyment. Chapter 1 of the thesis began by providing a general overview of the thesis. It was noted that discussions would be focussed on the debates surrounding the regulation and accountability of TNCs, from the early human rights frameworks, to current international regulatory initiatives and then the ongoing regulatory initiative by the Human Rights Council, which set up the open-ended intergovernmental working group (OEIGWG) to establish a legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises. The thesis analyses several international and regional human rights instruments, international, regional and national case law, relevant scholarly works, as well as discussions that took place during the OEIGWG sessions. The analysis was targeted towards answering certain research questions in order to facilitate the achievement of the main aim of the thesis. This chapter now turns to these research questions to determine whether and how the current regulatory initiatives have addressed the issues surrounding the activities of TNCs as they affect human rights.

What does the states' obligation to protect entail, particularly in respect of transnational corporate entities?

It has been established that the obligation to protect entails a legal duty that is placed on states to take steps to prevent, investigate and redress human rights harm resulting from the activities of third parties- which, from the interpretations of the various human rights treaty bodies

include TNCs. The thesis acknowledges that the fact that the obligation to protect is placed on states, reflects the way and manner human rights law has developed - as affording protection to individuals against abuses by the state in which they were resident. This is because states were considered the primary entities that were in a position to greatly impact human rights. However, although TNCs and their potential impact were not contemplated at the time of the conclusion of the early international human rights law regulatory frameworks, the thesis argues that TNCs do not operate in a regulatory vacuum. Therefore, states have the obligation to use their national regulatory structures to prevent, investigate and punish human rights abuse stemming from the activities of TNCs.

Based on the interpretation of the obligation provisions of human rights treaties by their treaty bodies, the obligation to protect requires that states adopt a standard of due diligence in protecting human rights. As analysed in Chapter 2, this implies that states take positive steps by employing all measures within their power to prevent the occurrence of human rights abuses as far as they have the capacity to influence and the ability to foresee potential human rights harm. When such abuses occur, states have a duty to punish the offending TNCs and provide necessary redress to the victims of the human rights abuse.

What is the scope of the obligation to protect?

The thesis argues that the duty of the state to exercise due diligence in protecting human rights from abuses by third parties has no territorial limitation. Rather, it is based on the extent of the states' capacity to influence and its ability to foresee the negative impact of TNC activities. In support of this argument, the thesis considered the rationale behind the emergence of the international framework for the protection of human rights by examining the earliest international human rights instruments (the UN Charter and Universal Declaration of Human Rights (UDHR)). Whilst acknowledging that the drafters of the UN Charter and the UDHR

could not have contemplated the great influence that transnational corporate business actors now have on human rights, the thesis argues that the very idea behind setting up an international framework for the protection of human rights in the first place, necessarily implies an extraterritorial application of the obligation to protect. The UN Charter, which was the first international instrument that codified international human rights recognises the fact that the international protection of human rights is a common ideal which is to be achieved by ‘joint and separate international action’.¹ The drafters may not have envisaged the emergence of large corporate entities with the ability to operate across state boundaries, but they recognised the fact that the protection of international human rights could not be achieved by states acting alone. It was seen as necessary that states take joint and separate action in cooperation with one another in order to protect human rights. Thus, it is in keeping with the requirements of joint and separate action that when a state has difficulty in discharging its human rights obligation to protect within its territory, another state who is in a better position to do so may use its regulations to ensure that the rights of individuals within the former state are protected. After all, the idea for establishing an international regime for human rights was so that the protection of human rights was no longer the exclusive prerogative of the state where the human rights abuse occurred, but a matter of international concern.

The thesis argues that the ICCPR, ICESCR and other international and regional human rights treaties expanded on the ideals that were expressed in the UN Charter and the UDHR. Therefore, they could not have intended to limit the scope of the application of their human rights provisions to their national boundaries.

The thesis however, notes that most human rights law instruments that primarily focus on civil and political rights conceive human rights obligations as operating within a states' ‘jurisdiction’. It is usually argued that the scope of the application of the treaties provisions

¹ Charter of the United Nations (24 October 1945) 1 UNTS XVI, articles 55 and 56.

depends on the interpretation of the term ‘jurisdiction.’ As the thesis has previously explained, the term jurisdiction is usually used in relation to the states capacity to exercise effective control or overall control of the states’ agents or organs extraterritorially.² The thesis however, argues that as a consequence of the obligation to protect, the state is not only responsible for the actions of its organs or agents, but is also responsible for the actions of third parties when it fails to do all it can within its power to prevent and redress human rights harm by third parties. In this case, the state is not responsible for the harmful conduct itself, but for its failure to use its influence and foresight to prevent the harmful activities by the third party. Thus, similarly to the effective control or over all control requirement or the establishment of a jurisdictional link in the case of state organs and agents, the capacity to influence and the ability to foresee the potentially harmful impact are factors which link the state, though indirectly, to the extraterritorial harm.

The thesis suggests that in order to prevent a situation where several states may have the capacity to influence and ability to foresee a particular harmful situation, there should be standards for identifying a particular state with the strongest connection to the situation in question. Thus, the thesis proposes that in terms of TNC activity, the nationality principle recognised under international law could be adopted in this regard. In such a situation, the state where the parent company of the TNC is domiciled would have the responsibility of ensuring that the TNCs subsidiaries and business affiliates do not engage in activities that negatively impact human rights. This proposal follows the statement in GC No. 24 of the CESCR which provides that

States Parties are required to take the necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they are incorporated under their laws, or

² See chapter 2, section 2.5.3- 2.5.4.

have their statutory seat, central administration or principal place of business...³

The thesis acknowledges that although it is possible to make a theoretical case for the extraterritorial application of the obligation to protect, there is currently no international instrument that expressly prescribes this obligation. This has led to some challenges with the implementation and enforcement of the obligations.

What are the factors that militate against the states willingness and capacity to implement their obligation to protect?

The thesis argues that the reliance on FDI, poor national legal structures and institutionalised corruption all render host states unwilling or unable to execute their obligations to protect. Home states, which are considered to have better regulatory structures have failed in extending their own regulations abroad. It is shown that because there is no international regulatory framework that expressly places extraterritorial obligations on states, states are generally reluctant to extend their domestic regulations abroad for fear of placing their corporate nationals on a competitive disadvantage. Examples from the failed attempts of the US, UK and Canada to carry out such regulation demonstrate this reality.⁴ For instance, the US Alien Tort Claims Act which was considered the most powerful transnational litigation tool has been severely limited by the decision in *Kiobel* and subsequent judgements.

Beyond this, other procedural obstacles prevent victims from gaining access to remedy. The most prominent of which have been addressed in the thesis are - the doctrine of *forum non conveniens*, the separate legal personality of the parent company of the TNC from that of its subsidiaries and affiliates, and the issue of sovereignty and non-intervention. The thesis argues

³ UNCESCR 'General Comment No 21 on State Obligations under the ICESCR in the Context of Business Activities' (23 June 2017) UN Doc E/C.12/GC/24, paragraph 26.

⁴ See chapter 3, section 3.3.1.

that domestic regulation of both home and host states have been unable to adequately respond to these human rights challenges, leaving victims of human rights abuses without recourse to remedy. This, according to the thesis makes it necessary to look to the international level for solutions that can effectively respond to the regulatory challenges resulting from the transnational character of TNCs.

How has the international community responded to challenges involved with both host state and home state regulation?

The international community has responded to the regulatory challenges by establishing a number of regulatory initiatives to provide standards for TNCs and states in order to improve the human rights situation of individuals in relation to corporate activities. Six of the most prominent initiatives in this regard are discussed in the thesis- the Draft United Nations Code of Conduct on Transnational Corporations (UNCTC),⁵ the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises (OECD Guidelines),⁶ the International Labour Organization's Tripartite Declaration of principles concerning multinational enterprises and social policy (ILO Tripartite Declaration),⁷ the United Nations Global Compact,⁸ the United Nations Draft Norms on the Responsibilities of Transnational Corporations and other business enterprises with regard to human rights (UN

⁵ UN Draft Code on Transnational Corporations UN Doc. E/1990/94, 12 June 1990.

⁶ OECD, Guidelines for Multinational Enterprises, 15 ILM 969 (1976) annex to the OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, ILM, vol. 15 967. The OECD periodically reviews and updates its guidelines. For the 2000 and 2011 reviews see, the OECD Declaration on International Investment and Multinational Enterprises 2000, reprinted in 2001, ILM, vol. 40, 237, and updated as, OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011. <<https://www.oecd.org/corporate/mne/48004323.pdf>> accessed 28 August 2017.

⁷ ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (March 2017), <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 30 August 2017.

⁸ UN Global Compact, 'Ten Principles of the UN Global Compact' available at <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> (accessed 20 September 2017).

Norms),⁹ and the United Nations Guiding Principles for Business and Human Rights (Guiding Principles).¹⁰ The thesis argues that these international regulatory initiatives have been ineffective in regulating the activities of TNCs as they affect human rights.

The thesis argues that the adequacy of a regulatory framework is measured by its ability to achieve the objectives for which it was established. Yet, despite the establishment of the various international regulatory frameworks to ensure that TNCs incorporate human rights standards in their operations, TNCs still perpetrate human rights abuses and escape accountability for their harmful actions.

What difficulties do the current regulatory initiatives present in relation to the regulation of corporate activities and their impact on human rights?

The thesis argues that because of the voluntary nature of the current soft law initiatives, they have been unable to effectively regulate the activities of TNCs. These regulatory initiatives merely contain principles which TNCs pledge to incorporate into their internal policies and practices. They require TNCs to complete and publish reports on compliance with the standards. However, it is contended that without the necessary threat of sanctions, many TNCs will readily flaunt these requirements when they present any challenges to the corporation. Rather than placing a legal duty on TNCs to observe the standards contained in the instruments, the current initiatives rely on the social expectation that the TNCs will comply with their provisions. This, as has been demonstrated in this thesis, is usually not the case.¹¹

Ultimately reliance is on the state to ensure compliance, yet the instruments do not address the issue of the state's unwillingness or incapacity to execute its obligations. Although

⁹ UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4.Sub.2/2003/12/Rev.2 (30 August 2003).

¹⁰ Human Rights Council, The Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31, 21 March 2011.

¹¹ See Chapter 4, section 4.8.

the UN Draft norms presented prospects of giving individuals a basis to hold TNCs directly accountable for their human rights abuses, it did not clearly state how international human rights law, which is basically state centric would apply to businesses. There was no opportunity to address this issue as the idea of establishing international human rights norms that would be directly applicable to TNCs was dismissed.

The thesis argues that although the UNGPs provides guidelines for states as well as business entities with respect to their activities, and their impact on human rights, it is not without its own problems. The UNGPs present a ‘protect respect and remedy’ framework which expresses the responsibilities of corporations an expectation and not a legal obligation. Nevertheless, it provides that victims are entitled to remedy when the duty to protect and the responsibility to respect are flaunted. The thesis argues that it is not legally coherent to establish a right to remedy in the absence of a breach of an obligation. To make sense of the victims’ rights to remedy, it is pertinent that TNCs should be legally bound to respect human rights.

The thesis acknowledges that although the current regulatory initiatives place the issue of business and human rights squarely on the international agender, they still leave open, crucial regulatory gaps. They are silent on critical barriers to access to justice such as the doctrine of *forum non conveniens*, separate legal personality and the issue of sovereignty and non-intervention.

Does the zero draft of the binding instrument in its current form present any potential for the future binding instrument to remedy the current gaps in ensuring the accountability of transnational corporate entities for human rights abuses resulting from their activities?

The thesis contends that although the zero draft of the “legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises” is lacking in some critical aspects, it demonstrates potential for addressing the

current protection gaps. The zero draft provides that its main purpose is to strengthen the protection of human rights in the context of business activities of transnational character and to ensure effective access to remedy for victims of human rights abuses resulting from the activities of TNCs. Thus, it already sets itself up to address the main issues that affect the regulation of TNCs. In furtherance of its objectives, the zero draft appears to address some of the obstacles to the implementation of the obligation to protect and the impediments to victims' access to justice.

The zero draft does not expressly refer to the states jurisdiction to exercise the obligation to protect extraterritorially, however, article 9 of the draft requires states to ensure in their domestic legislation that their TNCs, which are subject to the states' jurisdiction and control, undertake due diligence throughout their business activities. Article 5 of the zero draft then defines jurisdiction based on where the TNC has its statutory seat, its central administration, substantial business interest, subsidiary, agency, instrumentality, branch, representative office or the like. This provides a wide range for the application of jurisdiction and goes beyond General Comment No 24 of the CESCR.¹² Although the zero draft does not expressly state any proposals concerning an extraterritorial obligation to protect, a combination of the proposals in article 5 and article 9 imply that there is. If states under the future binding instrument will be required to obligate the TNCs that are domiciled in their territories to exercise due diligence in their extraterritorial activities, then States will in effect regulate the extraterritorial activities of the subsidiaries and business affiliates, through the parent companies.

The zero draft in article 10, proposes that the parent company would be liable for its failure to exercise due diligence over activities of its subsidiaries and its corporate affiliates to

¹² UNCESCR, 'General Comment No. 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (10 August 2017) E/C.12/GC/24, para 31.

the extent it could control, exhibit a sufficiently close relation, have a strong direct connection or to the extent the risk has been foreseen or should have been foreseen. Thus, the thesis argues that this provision provides a way of overcoming the challenge presented by the separate legal personality obstacle. Rather than being held responsible for the harmful activities of its subsidiary, the parent company is held liable for failing to exercise due diligence under the conditions stated in article 10 of the zero draft. It is, however, recommended that the drafters of the binding instrument should ensure that in the final instrument, articles 5, 9 and 10 be expressly interlinked in order to ensure that their practical effect is apparent.

The combination of articles 5, 9 and 10 also provide a way of avoiding the problems that arise from the doctrine of sovereignty and non-intervention. The thesis argues that because states are only required to use their domestic laws to control their TNCs by requiring that they observe human rights standards in extraterritorial operations, there is no direct interference in the affairs of the host states.

However, the zero draft in article 13 provides that ‘nothing in this convention entitles a state party to undertake in the territory of another state the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other state by its domestic law.’ The thesis argues that this provides a basis for states to hold on to the doctrine of *forum non conveniens*. Thus, it is recommended that a *forum necessitatis* doctrine should be adopted to ensure that victims are not denied their rights to remedy. The general idea of *forum necessitatis* is that when an individual will experience substantial injustice in a jurisdiction that is apparently the strongest connection to the subject matter of a given dispute, an alternate jurisdiction could nevertheless entertain the matter to ensure that justice is served.

The thesis recommends that a study of the *forum necessitatis* doctrine as applied in Canada and in the EU states that practice it should be undertaken.¹³ This should be done with

¹³ See chapter 3, section 3.3.3.2.

the view of establishing general parameters for its application under the future binding instrument.

The thesis also recommends that in order to more effectively address the asymmetry in trade and international investment agreements, the provision in articles 13.6 and 13.7 should be amended to include a requirement that states undertake human rights impact assessment prior to concluding investment agreements with corporate investors. This will ensure that potential human rights abuses are detected and prevented.

In relation to its implementation and enforcement proposals, the thesis argues that this is where the zero draft is most inadequate. The zero draft combines the self-reporting and non-binding review characteristics of the current regulatory structures with the provisions of National Implementation Mechanisms and Conference of State Parties, which have no powers to enforce their recommendations. Rather the zero draft relies ultimately, on state-based implementation. The thesis recalls that the primary rationale for the call for an international legally binding instrument was the need for more effective regulation of TNC activities due to the inability and incapacity of states to exercise their obligation to protect. As earlier argued in this thesis, the success of any regulatory initiative is measured by how far it can remedy the situation that gave rise to its creation. Thus, it is pertinent that the drafters of the binding instrument consider whether it adequately responds to the gaps resulting from the states unwillingness and inability to protect.

The thesis argues that there is no theoretical or legal barrier to the establishment of international human rights obligations targeted directly at corporations. This will address situations where states fail to execute their human rights obligations and will cover all business entities, whatever legal contraptions they decide to adopt. In this regard, it is recommended that further study be conducted to determine how current state based international human rights law can be interpreted into language that corporate entities can understand and apply in their

operations. In order to ensure that TNCs follow through with their direct obligations, it is necessary that an overarching body with adjudicatory and enforcement powers is established. Such a body could be an international court, which could work independently or based on the principle of complementarity as the International Criminal Court, an arbitral tribunal, or even civil society organisations. Although it has been argued that the absence of such body in the current zero draft will attract stakeholders to the negotiating table, if the idea of an overarching implementation and enforcement body is not contemplated and eventually established, there is still the risk of TNCs escaping responsibility for their activities that result in human rights harm. Therefore, it is important that further research focuses on the most appropriate and effective means of ensuring that the provisions of the future binding instrument will be implemented and enforced.

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