The Role of Courts in Adjudicating Human Rights Violations by Transnational Corporations

A Thesis submitted to the Middlesex University in partial fulfilment of the requirements for the Degree of Doctor of Philosophy (PhD)

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October 2017

DECLARATION OF ORIGINALITY

I, **Maryam Ahmadu Mahmood,** hereby declare that this thesis is entirely my own work and that it has never been submitted for any degree or examination in any university. Where additional sources of information have been used, they have been acknowledged.

Signed:…….

Date:……

ACKNOWLEDGMENTS

First of all, I am grateful to **Almighty Allah** for creating me to complete the journey of this research. I dedicate this thesis to my beloved husband, Mahmood Ahmadu and my children for their immense sacrifices, patience, unceasing support and encouragement during the period of this research.

I wish to express my sincere gratitude to my two supervisors: Prof. Joshua Castellino and Dr Nadia Bernaz for their invaluable guidance, comment, correction and encouragement all through the process of writing this thesis. This thesis would not have been possible without their support. I am also thankful to the members of staff of the law school Middlesex University especially Prof. David Lewis and Dr Elvira Domínguez-Redondo for their valuable suggestions and recommendations.

I am profoundly thankful to my parent for their help and support. Lastly but not the least, I am highly indebted to Regina Olarewaju Ikujuni and Mr Lamin Baba for their support in the completion of the end goal of this research. I would like to place on record my sense of gratitude all whose assistance directly or indirectly proved to be a milestone in the accomplishment of this research.

ABSTRACT

In this era of globalisation, Transnational Corporations (TNCs) operated in an accountability gap that is often leaving these entities largely unregulated in the context of human rights. While globalization has facilitated growth for such entities by lowering legal, financial and technical restrictions, a failure to agree an overarching protection mechanism and the weaknesses in current protection mechanisms creates a vacuum. This vacuum primarily exists due to inadequate legal and regulatory regimes in host states that are developing countries, and who need and seek such investment; and the general difficulties concerning the weak enforceability of international law. As a consequence, TNCs could and do commit grave human rights violations while avoiding scrutiny despite the existence of a few international, regional and institutional instruments that could hold them accountable. The efforts to fill the regulatory vacuum in which TNCs function have taken the form of 'soft-law' instruments, however, their purely voluntary nature and purpose in encouraging TNCs to oblige rather than holding them legally accountable appears inadequate in promoting and protecting recognised principles of human rights law.

Under international law victims of corporate human rights abuses, just as any other types of victims, have the right to access an adequate remedy through recourse to judicial remedies where other informal or administrative remedial schemes are insufficient. Having an efficient and fair justice system in developing host states for the victims of corporate human rights abuses is key to ensuring access to an adequate remedy. The thesis aims at examining the role of various courts at international, regional and domestic level; in the intergovernmental, home, as well as in the developing host state, to remedy and punish human rights violations by TNCs. The reasoning underpinning the examination of judicial scrutiny acknowledges that such authorities are not an ideal forum for improving human rights mainly due to problems

that prevent full access to such legal remedies. However, the existence of judicial systems and effective remedies stemming from them is nonetheless believed to remain the essential, if not an effective forum based for victims seeking redress for corporate human rights abuses.

This thesis also explores the question as to adequate forum for accountability, assessing efforts made in 'home' states where the TNCs are headquartered, and in 'host' states, where they operate, and where, practice shows, many of the unremedied human rights violations persist. Although, the emphasis for host states is on potential accountability. The study uses Nigeria as case study to assess the extent of human rights violations by TNCs in developing host states, how these entities have been dealt with by the courts at domestic level, in a bid to highlight the challenges hindering access to effective remedy and justice. It proposes as a recommendation that developing countries undertake deep structural reforms, alongside vigorous involvement of several actors, including the state, related agencies, the judiciary and public interest organisations.

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CHAPTER 1
TITLE: THE ROLE OF COURTS IN ADJUDICATING HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL CORPORATIONS

1.1. Introduction

In this era of globalisation, transnational corporations (TNCs) have emerged as key actors in the world's economic, social and legal spheres. In today's world, an estimated 100,000 TNCs account for about a quarter of the world's gross domestic product (GDP).[1] Moreover, they generate a turnover which exceeds the national expenditure of many states and is as large as the national expenditure of many of the top 30 high income states with the exception of the United States of America (USA), Germany, the United Kingdom (UK), Japan and, relatively recently, China.[2] It must be acknowledged that the outlay of foreign direct investment (FDI) made by TNCs is often welcomed since it brings jobs, capital, technology and better living standards as well as derivative rights such as education, housing and health. However, these subjects will not be the focus of this study.[3] TNCs also have the ability to negatively impact on the enjoyment of human rights by a wide range of people, especially in host states that are developing countries.

For various reasons, many countries, especially developing host states, are unable to create a robust regulatory regime in which TNCs can operate, even though they may seek to regulate their activities. The attempt to regulate such entities through existing regimes often leaves a regulatory vacuum in the sphere of human rights. The perceived inadequacy of the legal instruments of developing states, in particular the inability of their courts to provide effective remedies and justice for victims of corporate human rights abuses will act as the basis for this study.

[1] UNCTAD, 'World Investment Report: Non-Equity Mode of International Production and Development' (2015), UN Doc UNCTAD/WIR2015/ 18, 184.
[2] John Mikler, *The Handbook of Global Companies* (John Wiley & Sons, 2013) 4.
[3] David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) *Virginia Journal of International Law* 931, 933.

1.2. Defining Transnational Corporations

All through this thesis the phrase 'transnational corporation' is used in preference to synonyms such as 'multinational corporation' (MNC) and 'multinational enterprise' (MNE), although various scholars interchangeably use these terms, and to distinguish between them is not within the scope of this study. Also, the thesis preferred the term transnational 'corporation' to 'enterprise'. While 'corporation' is commonly described as a single incorporated business which could have business activity overseas, the term 'enterprise' include a group of entities working toward a common goal and might comprise various forms corporate organisations, the phrases are usually employed synonymously.[1]

To ascribe a legal definition to TNC, as far as the early 1970s, the phrase 'multinational corporation' (MNC) was employed within the United Nations (UN) framework, and defined as a 'business venture which owns or controls production or service facilities in another country other than their countries of origin'.[2] The 2003 *UN Draft Norms* used the term 'transnational corporation' to mean "an entity with affiliated business operations in different countries or a cluster of business entities operating in different countries, irrespective of their legal form either in their home state or country of activity, and whether taken individually or collectively".[3] Nevertheless, the *UN Draft Norms* do not narrowed their application to TNCs but also embrace 'other business enterprises' to signify 'any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other

[1] Adam McBeth, *International Economic Actors and Human Rights* (Routledge 2010)246.
[2] ECOSOC, 'Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations' (1974), UN Doc E/5500/Rev.1, ST/ESA/6, 25.
[3] UNSUBCOM, Draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003), E/CN.4/Sub.2/2003/12/Rev.2. para 20. The UN Draft Norms were adopted in August 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights (This will be discussed in detailed later).

legal form used to establish the business entity; and the nature of the ownership of the entity'.[4]

For its part, the Organisation of Economic Cooperation and Development (OECD) uses the term 'multinational enterprise' (MNE) in its *Guidelines for Multinational Enterprises*[5] and defines it as a corporation or other enterprise created in different countries and so connected that it may organize its business activities in different ways, and where '... [o]wnership may be private, state or mixed'. [6] The International Labour Organisation (ILO) Tripartite Declaration also employs the term MNE and defines it as encompassing business entities whether public, private or mixed ownership, which own or control production, distribution, services or other facilities outside their home state.[7]

Other legal scholars have also attempt to define the term. For instance, McBeth uses the term MNE to refer to 'an aggregate of corporate entities, whatever legal form that pursue a common commercial objective across various countries, where particular components of the enterprise are in a position to control the action of the other element'. [8] Amao, describes the MNC 'as business entities with foreign origin/ seat that operate in more than one country through affiliates or subsidiary and have production or marketing facilities in these other countries.[9] These definitions can be described as broad scope characterisation of TNCs, focusing on the relationship between companies and the exercise of control among them, rather than their legal form. Inevitable defining TNCs will not be possible without some level

[4] *Ibid.*, para 21.
[5] Organisation for Economic Co-operation and Development, Guidelines for Multinational Enterprises (1976), 15 ILM 969.
[6] The Organisation for Economic Co-operation and Development (2011) OECD Guidelines part I, ch I, 4. The OECD founded array of guidelines for responsible business conduct that the adhering governments address to TNCs which operate in or from their territory (This will be discussed in detailed later).
[7] International Labour Organisation (ILO), *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006), 4th edn, ILO (ILO Declaration) para 6. The ILO Tripartite declaration is a soft law mechanism adopted in 1977 which suggested guidelines to governments, and workers' organizations and TNCs in issues concerning employment, training, conditions of work and life, and industrial relations.
[8] Adam McBeth, *International Economic Actors and Human Rights* (Routledge 2010)247- 48.
[9] Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law, Multinational Corporations in Developing Countries* (Routledge 2011) 8.

of accuracy. As a result, Muchlinski is of the view that it may be useful to show how MNEs varies from 'uninational' companies (a business enterprise incorporated and domiciled in only one country).[10]

In this thesis, the term TNC is used broadly, so as to answer the question of access to remedies for victims of corporate human rights violations. As the focus of this study is on access to judicial remedies for victims of corporate human rights violations in vulnerable positions in developing countries, the scope of the thesis is looking at any company. Indeed, to answer the question which this thesis will seek to endeavour, the distinction between affiliate and subsidiary companies and or whether the companies are limited, unlimited, private, public, uninational companies, franchise, partnership and or sole proprietorship may not be required. Nevertheless, the question of formal legal structure of company is a legitimate question for future research. Therefore, for the purpose of this study TNCs is defined as comprising companies, other business enterprise or collection of entities, irrespective of their legal form, that pursue common business objective in one or more countries either through affiliates or subsidiaries, every business having its juristic identity but in some way they may be intertwined with a centralised management system and control.

This study refers to TNCs as 'businesses', 'business entities', 'business enterprises', 'corporations' 'companies', 'private actors' and 'non-state actors' interchangeably. This is because the arguments regarding the role of courts in adjudicating human rights violations committed by these respective agents that this study presents are for the most part the same.[11]

[10] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007)7.

[11] For instance, different phrases are uses by the following scholars to refer to Transnational Corporation, Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 1-36; Nien-hê. Hsieh, 'Should business have human rights obligations' (2015)14(2) *Journal of Human Rights* 218-236; Clapham, (2006) *op. cit.,*; Alice de Jonge, *Transnational Corporation and International Law Accountability in the Global Business Environment* (Edward Elgar 2011); UNHRC, Report of the UN Special Representative of the Secretary-General on the issue of human rights and Transnational Corporations and Other Business enterprises; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (2011), A/HRC/17/ 31; Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) ; Nadia Bernaz,

1.3. Some Examples of Corporate Human Rights Violations

The significant economic powers of TNCs combined with their ability to act globally enable them to choose the place with the most advantageous conditions in which to set up business. This will often include those states offering the cheapest labour and the laxest rules for the protection of human rights – a situation which conveys substantial bargaining power to TNCs, especially with regard to developing countries.[12] As a result of the scope of their activities, victims around the world have been subjected to the harmful activities of TNCs, suffering serious physical injury, death, adverse health effects and damage to their incomes, environments and livelihoods.[13]

For example, decades of oil spills in the Niger Delta region in Nigeria have caused environmental disasters that threaten human rights, such as the rights to health, life, clean water and adequate food and housing. [14] In some cases, oil drilling and associated gas flaring in the Niger Delta have made entire villages uninhabitable. [15] Another example is the dumping of petrochemical waste by Trafigura in 2006 into the waters of Abidjan off the Ivory Coast.[16] Life, health and other human rights are stated as fundamental rights in many international human rights documents, for instance, in the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights

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'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 *Journal of Business Ethics* 493-511; Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *The Modern Law Review* 598 - 625.

[12] Bastian Reinschmidt, 'The Tort Law: A Useful Tool to Further Corporate Social Responsibility' (2013) 34(4) *Company Lawyer* 103, 103.

[13] Sarah Joseph, *Corporation and Transnational Human Rights Litigation* (Hart 2004)2.

[14] Rachel Anderson, 'Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations' (2010) 88(1) *Denver University Law Review* 183, 186.

[15] Anderson, (2010) *Ibid.*, p. 186; Among the vast of literatures on oil spills in Nigeria see, Ibaba Samuel Ibaba and John C Olumati, 'Sabotage Induced Oil Spillages and Human Rights Violation in Nigeria's Niger Delta' (2009) 11(4*) Journal of Sustainable Development in Africa* 51, 54-5.

[16] Olanrewaju A. Fagbohun, The Regulation of Transboundary Shipments of Hazardous Waste: A Case Study of the Dumping of Toxic Waste in Abidjan, Cote D'Ivoire (2007) 37 *Hong Kong Law Journal* 831, 834-836; See various articles on website of the British law firm Leigh Day & Co under 'International Claims': 'Toxic Waste Spill Victims Instruct Leigh Day & Co' (25 October 2006); 'Ivory Coast Toxic Waste Disaster Claim Issued in High Court' (10 November 2006); 'Lawyers Demand Test Result on Cote D'Ivoire Victims' (4 December 2006).

(ICESCR).[17] There are many cases which underscore the tension between business and global trade on the one hand, and the need to preserve the environment and protect host communities on the other. Nike and Gap, for example, have been accused of a long list of abuses, such as using child labour; violating their workers' rights to fair and favourable working conditions by paying unfair and inadequate wages; providing unsafe working conditions; and requiring workers to work unreasonable overtime.[18]

Similarly, some TNCs have been accused of colluding with local military units when committing gross human rights abuses, including war crimes, torture, killing, genocide and crimes against humanity.[19] One such example is the case against petroleum company Unocal.[20] The lawsuit, filed in 1996 by plaintiffs from Myanmar, stemmed from international law violations committed by the Myanmar military which provided security and other services for Unocal's pipeline. Plaintiffs claimed that Unocal aided and abetted the military's use of forced labour, torture, rape and murder in connection with the construction of an oil pipeline. The case was settled for close to $30 million and marked the first time that a US corporation paid compensation to plaintiffs under the Alien Tort Claims Act (ATCA). Such allegations have also been levelled against Shell[21] and Chevron[22] regarding their operations in Nigeria as well as against Exxon in the Aceh region of Indonesia.[23] Also in Nigeria, Pfizer has been accused of serious disregard for human life, stemming from an allegedly illegal drug experiment performed on children without the consent of their parents during a meningitis

[17] Universal Declaration of Human Rights (1948), UN Doc A/810, arts 3 & 25; International Covenant on Civil and Political Rights (1966), 999 UNTS 171, art 6; and International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3 art 11.
[18] Kinley and Tadaki, (2004) *op. cit.*, p. 933.
[19] Joseph, (2004) *op. cit.*, p. 3.
[20] *Doe v Unocal* [1997] 963 F. Supp. 883.
[21] *Wiwa v Royal Dutch Petroleum/Shell* [2000] 226 F.3d 88.
[22] *Bowoto v chevron Texaco Corp* [2004] 312 F. Supp. 2d 1229.
[23] *Doe V111 v Exxon Mobil Corp* [DC Cir 2011] 654 F.3d 11, 16.

epidemic, which resulted in the deaths of eleven children while others were left paralyzed, deaf, blind or brain-damaged.[24]

In the context of the violation of human rights, it is evident that TNCs have, in the course of their operation, violated a catalogue of civil, political, economic, social, cultural and political rights of persons as enunciated under domestic, regional as well as international human rights instruments. However, these instances of deemed responsibility for corporate human rights violations tend to be the exception rather than the norm due to a host of reasons that accumulate to prevent judicial scrutiny of the activities of TNCs in the realm of human rights. The adequacy of the judicial remedies deserves critical examination since it is one thing to provide for remedies and quite another for the remedies to be effective, considering the peculiar problems of law enforcement in developing host countries. This study argues that if human rights are to be meaningful, TNCs that commit human rights abuses must be held accountable like other perpetrators.

1.4. Statement of Problem

When TNCs commit human rights abuses, it is hoped that they will be held accountable for these violations. Since international law is primarily based on states as primary actors, despite evolutions in notions of subjecthood, it remains difficult to address TNCs directly as subjects. Before human rights responsibilities can be imposed on TNCs, they must be explicitly recognized as subjects of, or at least 'participants in', international law, capable of bearing international legal rights and duties.[25] In other words, they must possess international juristic personality.[26] As a matter of principle, the host state remains the principal holder of

[24] *Abdullahi v Pfizer, Inc* [SDNY, 2002] US Dist LEXIS 17436 at 1, (Abdullahi I); *Abdullahi v Pfizer, Inc* [2d Cir NY, 2003] *77* Fed Appx 48, 2003 US App LEXIS 20704 (Abdullahi II); *Abdullahi v Pfizer, Inc* [SDNY, 2005] 2005 US Dist LEXIS 16126 (Abdullahi III); *Abdullahi v Pfizer, Inc.*, [2d Cir 2009] 562 F.3d 163.
[25] Clapham, (2006) *op. cit.*, p.64; Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (OUP 1994) 49-50; *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ 174 WL 3.
[26] *The Barcelona Traction, Light and Power Co Ltd* Case (Belgium v Spain) [1970] ICJ Rep 105, para 70.

jurisdiction over the control and regulation of TNCs.[27] And the home states through some form of an extraterritorial tool can regulate and adjudicate the international activities of TNCs registered in their territory.[28] For the purpose of this thesis it is important to distinguish between "host" and "home" state. Thus a "host" state in the context of this thesis is most typically the developing state where a TNC conducts its operations, while the "home" state is where the TNC in question may be headquartered.

In general, international human rights law is not well-positioned to hold TNCs accountable for the human rights violations that they have committed, be they in host or home state.[29] The primary element in this is the recognition within international human rights law of states as primary duty bearers to regulate and punish corporate misconduct.[30] It remains difficult for host states to hold TNCs accountable for their human rights abuses often due to poor regulatory systems and the need to attract and maintain investment. Consequently, victims of corporate human rights abuses have increasingly utilised home state courts in seeking remedies and justice. However, suing TNCs in their home state courts for human rights they have committed abroad has not been an easy route for the victims either.

One of the central issues that will be tackled in this study is access to effective legal remedies and justice in domestic courts of developing host states for the victims of corporate human rights abuses. These host states, as the principal holders of jurisdiction over the regulation of TNCs, have become the natural duty bearers in exercising this accountability.[31] Further, the right of access to remedy for people who have suffered injuries as a result of violations of

[27] Andrew Clapham, *Human Rights Obligation of Non-State Actors* (OUP 2010) 85-90.
[28] UNHRC, Report of the United Nation Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Protect Respect and Remedy: A Framework for Business and Human Rights' (2008), A/HRC/8/5, para 19; Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 645; See also Brownlie I, *Principles of Public International Law* (7th edn, OUP 2008) 647; Olivier De Schutter, 'Extraterritorial Jurisdiction as Tool for Improving the Human Rights Accountability of Transnational Corporations' (Seminar Paper Prepared for the Office of the UN High Commissioner for Human Rights, Brussels, 2006) 29.
[29] Joseph, (2004) *op. cit.*, p.9.
[30] Zerk, (2006) *op. cit.*, p. 84.
[31] Clapham, (2010) *op. cit.*, p. 85-90.

international human rights norms by third parties including businesses is identified in various international human rights mechanisms, and is recognised as part of states' duty to protect human rights.[32] The third pillar of the *UN Guiding Principles on business and human rights* (henceforth UNGP) points out that, as part of their duty to protect human rights states should take proper steps to ensure there is an effective domestic judicial system as well as non-judicial mechanisms for victims of corporate human rights violation and to provide adequate remedies in proportion to the magnitude of the injury suffered.[33] When such violations occur, the states has to ensure fair and efficient domestic judicial systems as well as considering ways to reduce legal, practical and other relevant difficulties that could hamper access to justice.[34] In the words of the UNGP, having an effective justice system is at the core of ensuring access to remedy.[35]

However, it is difficult for victims of corporate human rights abuses to seek legal redress for their injuries in the country where the violations occurred.[36] These impediments stem from the fact that the present system of domestic law remedies of developing hosts is patchy, uncertain, often insufficient and weak. It fails victims who are incapable in many instances of access to adequate remedies and justice for the violations they have undergone due to the inefficiency of the domestic legal institutions to protect human rights.[37] For instance,

[32] Universal Declaration of Human Rights (1948) art 8; UN Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights (2011) UN Doc E/C.12/2011/1, para 5; Amnesty International, 'Injustice Incorporated Corporate Abuses and the Human Right to Remedy' (2014)16.

[33] UN Guiding Principle 25.

[34] UN Guiding Principle 26; Jennifer Zerk, Corporate Liability for gross Human Rights Abuses, Towards a Fairer and More Effective System of Domestic Law Remedies (A Report Prepared for the Office of the UN High Commissioner for Human Rights, 2013)56.

[35] UN Guiding Commentary on Principles 26; Gwynne Skinner et al, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (International Corporate Accountability Roundtable, CORE, European Coalition for Corporate Justice, December 2013)14.

[36] Marion Weschka, 'Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 *ZaöRV* 625, 628.

[37] Zerk, (2013) *op. cit.*, p. 7; Natalie L Bridgeman and David B Hunter, 'Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism' (2008)20(2) *Georgetown International Environmental Law Review* 187, 195.

indigenous people in Nigeria,[38] Sudan,[39] and Ecuador[40] suffers problems of neglect, violations human rights and environmental devastation due to natural resources extraction in their region.[41] This problem is also present in other countries in Africa,[42] Asia (Burma),[43] and South and Central America (Colombia).[44] Corporate human rights abuses are a growing social problem in the Amazon.[45] Developing countries are often preferred by corporations, attracted by lower capital and labour costs and often, crucially, the loopholes in their legislation and a relatively slow and/or ineffective legal system.[46] In the case of mining and exploration industries, companies operate in developing host state because this is where the natural resources are located. In other words companies who choose to have their products made in China because of cheaper labour costs are often driven by different motivations to those from companies who come to Nigeria because this is where the oil is.

This is coupled with the fact that TNCs in developing countries often operate in regimes with weak governance where the rule of law is absent and where the state maintains an interest in retaining good relations with corporations since they contribute to national development and

[38] Oyeniyi O. Abe, 'Utilisation of Natural Resources in Nigeria: Human RightConsiderations' (2015) 70(3) *India Quarterly* 257, 257.

[39] James Morrissey, 'Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability under the Alien Tort Statute Note' (2011) 20(1) *Minnesota Journal of International Law* 144, 148.

[40] Megan S Chapman, 'Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems' (2010)18(1) *American University Washington College of Law* 6, 8.

[41] Terminski Bogumil, 'Oil-induced Displacement and Resettlement: Social Problem and Human Rights Issue' (Research Paper, School for International Studies, Simon Fraser University, Vancouver, October 2011)2.

[42] *Ibid.*, p. 7.

[43] *Ibid.*, p. 10.

[44] Michael J Watts, 'Righteous Oil? Human Rights, The Oil Complex and Corporate Social Responsibility' (2005) 30 *Annual Review of Environmental Resources* 373, 389.

[45] Bogumil, (2011) *Ibid.*, p. 2.

[46] Olivier De Schutter et al, 'Foreign Direct Investment, Human Development and Human Rights: Framing the Issues'(2009) 3 *Human Rights & International Legal Discourse* 137, 159-60; Gwynne L. Skinner, 'Beyond Kiobel: Providing Access to Judicial Remedies for Corporate Accountability for Violations of International Human Rights Norms by Transnational Corporations in a New (Post-Kiobel) World'(2014)46(1) *Columbia Human Rights Law Review* 158,172; Brittany T. Cragg, 'Home Is Where the Halt Is: Mandating Corporate Social Responsibility Through Home State Regulation and Social Disclosure'(2010)24 *Emory International Law Review* 735, 752-5; Bridgeman and Hunter, (2008) *op. cit.*, p. 195; Tetsuya Morimoto, 'Growing Industrialisation and our Damaged Planet: The Extraterritorial Application of Developed Countries Domestic Laws to Transnational Corporations Abroad (2005) 2(1) *Utrecht Law Review* 134, 145; Chirwa, (2004) *op. cit.*, p. 26.

employment, both elements that are, understandably, high on domestic political agendas.[47] While these vested interests mean that states may not be willing to prosecute TNCs for violations, they nevertheless retain a minimal duty to ensure that victims of such violations have access to effective remedies, for example civil remedies. The failure to generate adequate processes for the scrutiny of such abuses of human rights constitutes a failure on the part of the state in upholding its duties to its citizens.[48]

To come to terms with this phenomena, various soft law initiatives, international and national in origin, have been adopted over the last two decades in order to effectively address concerns regarding human rights violations by TNCs.[49] These soft law initiatives which are purely voluntary by their nature, include declarations by international organisations such as the ILO Tripartite declaration of principles concerning multinational enterprises and social policy which suggested guidelines to governments, and workers organizations and TNCs in issues concerning employment, training, conditions of work and life, and industrial relations.[50] The Organisation for Economic Co-operation and Development (OECD) has a wide array of guidelines for responsible business conduct that the adhering governments address to TNCs which operate in or from their territory.[51] The more recently developed

[47] Aurora A. C. Teixeira and Marlene Grande, Entry Mode Choices of Multinational Companies (MNCs) and Host Countries' Corruption: A Review (2012) 6 (27) *African Journal of Business Management* 7942, 7956; Engobo Emeseh, The Niger Delta Crisis and the Question of Access to Justice, in Cyril Obi & Siri A as Rustad (edn) , *Oil and Insurgency in the Niger Delta* (Zed Books , London 2011)70; Michael Watts, 'Sweet and Sour', in Michael Watts (edn) *Curse of the Black Gold. 50 Years of Oil in the Niger Delta* (Powerhouse Books, New York, 2008)40; Uwafiokun Idemudia, 'Corporate Partnerships and Community Development in the Nigerian Oil Industry Strengths and limitations, (2007) *Markets, Business and Regulation Programme Paper* 2/2007, 20; Watts, (2005) *op. cit.*, p. 389.

[48] Natalya S Park and James P Nussbaumer, 'Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses' (2009) *Hertie School of Governance, Working Papers* 45/2009, 3.

[49] Martin Joe Ezeudu, 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Conversing the Potential role of the International Criminal Court' (2011) 11(1) *African Human Rights Law Journal* 23, 25.

[50] ILO, *Tripartite Declaration* (2006) 4th edn, ILO.

[51] OECD, *Guidelines for Multinational Enterprises* (2011).

UNGP on Business and Human Rights seeks to elaborate general principles that ought to be central in setting broad parameters within which it could be resolved.[52]

1.5. The Rationale and Significance of the Study

Many scholars have argued that economic development should not be pursued simply for its own sake.[53] For instance, De Jonge and Kinley contend that the economy should be regarded a 'means to an end – an improved quality of human life – rather than an end in itself'.[54] They submit that the TNC as a member of the international community should be viewed as an important tool for promoting human rights. The consequence of these viewpoints is that the TNC should be established and regulated in a way that best promotes and protects the realisation of international human rights norms and standards.

A large number of research studies are conducted every year which focus on the topic of liability of TNCs for human rights violations they have committed when carrying on business in countries with weak legal and regulatory institutions. However, none of them have evaluated the role of courts in adjudicating human rights violations by TNCs, nor have these studies considered in-depth how domestic courts within developing states can be strengthened to provide access to effective remedies and justice to victims of corporate human rights abuses.

The subject of accountability of TNCs for human rights violations has also been addressed by scholars.[55] For instance, the work of Bernaz revolves around setting up human rights

[52] UN Guiding Principles.

[53] Various scholars who have addressed related issues – albeit from different methodological backgrounds, asking very different questions, and coming to very different conclusions – includes Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); Clapham, (2006) *op. cit.,*; Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2002) 111 *The Yale Law Journal* 443-545.

[54] David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009) 1-3: De Jonge, (2011) *op. cit.*, p. 2.

[55] Some of the scholars that addressed issues of corporate accountability for human rights violations includes: Debosmita Nandy and Niketa Singh, 'Making Transnational Corporations Accountable for Human Rights Violations' (2009) 2 *NUJS Law Review* 75, 82; Jernej Letnar Černič and Tara Van Ho, *Human Rights and*

standards for good corporate behaviour in order to respect human rights and hold businesses and company officials accountable if abuses take place.[56] However, her work does not sufficiently consider strengthening developing host states' national legal and regulatory institutions to ensure effective remedies and justice to victims of corporate human rights violations. Besides this, victims of human rights abuses have the right under international law to access an effective remedy through recourse to judicial remedies where other remedial schemes, such as administrative remedies, are not sufficient.[57] Further, it is pointed out that having an effective and fair judicial system is key to ensuring access to an effective remedy.[58] It is the aspiration of this research to contribute to strengthening the role of domestic courts in developing host states to remedy and punish human rights violations by TNCs. Irrespective of whether they are the appropriate forum, the hypothesis is that if the domestic courts in developing host states were effectively strengthened, they have the potential to provide a way to seek for remedies for victims corporate human rights abuses based on the principle of access to justice.

Also, strengthening the judicial systems of developing host states will assist many victims of corporate human rights abuses who cannot afford to pursue their case in home state courts to have access to the court and enforce their rights. In this study chapter 3 to 5 examines the role of various courts and judicial bodies at the international, regional, intergovernmental as well

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Business: Direct Corporate Accountability for Human Rights (Wolf Legal Publishers, 2015); Sabine Michalowski, *Corporate Accountability in the Context of Transitional Justice* (Routledge 2014).

[56] Nadia Bernaz, *'Corporate Accountability for Human rights Violations in Countries in Transition' (*9 Bedford Row International Conference: Human Rights in Post-Revolution States and Human Rights at Sea, London, April 2014); Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge 2016);Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 *Journal of Business Ethics* 493-511.

[57] UNGA, 'United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2006) UN Doc A/RES/60/147, Principles 12; ECOSOC, 'United Nations Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity' UNCHR Res 2005/81, (2005) UN Doc E/CN.4/2005/102/Add.1, Principle 31 (Impunity Principles): 'Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator'.

[58] UN Guiding Principles, Commentary on Principle 26.

as home states to provide remedies and justice for victims of human rights violations by TNCs. Meanwhile, chapter 6 of the thesis highlights the potential of courts within developing host countries provide remedies for victims of human rights violations by TNCs, using Nigeria as a case study. Strengthening the role of domestic courts of developing host states will also provide an opportunity for the domestic legal and regulatory instruments to be developed and made to work effectively to prevent and punish corporate human rights abuses. By exploring the potential barriers that can arise to hamper the ability of host states to hold TNCs accountable for human rights violations they committed within their territory, the study hopes to provide an answer to the central research question: Do domestic courts within developing states (host countries) have the potential to provide ways to seek remedies for victims of corporate human rights abuses?

The thesis focuses on State responsibility and civil liability of TNCs, though the criminal liability of companies or individual corporate official is stated and discussed in the ICC and African Court of Justice and Human and Peoples Rights section in chapter three.The emphasis is on the two former because the thesis is written from the perspective of access to effective legal remedies for victims of corporate human right violation in a vulnerable position in developing countries. Wherein the states are the primary duty bearers to protect their people against corporate human rights abuses. A focus on civil liability of TNCs is optimal for this study because it potentially provides the victims with remedies through an enforceable award of damages to compensate the injury suffered and placed them in the position that they would have been if the violations had not happened. This would also serve to deter TNCs from committing future abusive conduct. Actually, in looking at the liability of TNCs for the human right violations committed in the cause of their operation both civil and criminal liabilities are of paramount importance. However an extensive examination of the potential for criminal prosecution of companies or individual corporate official for human

rights violations by TNCs is beyond the scope of this thesis, and this will become one of the limitations of this study which can be used as building block for future research in the area.

1.6. Research Questions

The research questions that drive this research can be succinctly stated as follows:

(i) Are courts in general an appropriate forum through which to seek remedies for victims of human rights abuses by TNCs?

Irrespective of a fully convincing answer to this and assuming that there will remain a residual role for courts in such disputes, the second question is:

(ii) Do domestic courts within developing states (host countries) have the potential to provide an effective way to seek remedies for victims of corporate human rights abuses?

1.7. Research Aims and Objectives

The research seeks to assess whether courts are an effective forum for resolution when it comes to seeking remedies and justice for victims of human rights abuses by TNCs. This will be addressed through examination of jurisdictional techniques of regulating TNCs under both public and private international law. The study will also seek to ascertain the extent to which international law allows states to exercise their duty to regulate TNCs in order to enforce internationally acknowledged corporate human rights standards. In this section, the study will analyse the substantive, procedural and practical hurdles that may prevent victims of human right abuses from gaining legal redress where the victims might have a cause of action.

The second part will analyse whether domestic courts of developing host states have the potential to offer a remedy to victims of corporate human rights abuses. This part of the research will analyse attempts and failures of international, regional and national legal regimes to hold TNCs accountable for human right abuses they committed; whether or not they provide the much-needed measure of accountability, taking into account litigation options for plaintiffs of corporate human rights abuses. The study will analyse the difficulties

that arise in litigating within domestic courts in host countries with particular attention paid to the extent to which two famous Nigerian cases have occurred (*Pfizer*[59] and *Shell*[60]). Special attention will be paid to the existence of legal, practical and procedural barriers whilst presenting the remedies sought and achieved for corporate human rights abuses in these cases.

1.8. The Scope of the Study

The study considers the role of courts in adjudicating human rights violations by TNCs. Hence, the arguments in this study proceed from the corporate 'liability' perspective rather than corporate 'accountability'. Although the thesis uses the terms liability and accountability interchangeably, the phrase corporate 'liability' must be clearly understood and differentiated from corporate 'accountability'. The Oxford English Dictionary is defines 'accountability' as the state of being accountable or responsible and 'accountable' as 'liable to be called to account, or to justify an action or responsibilities.[61] While liability entails a quality of being legally obliged to another or a legal duty to another which can be enforced by civil remedy or criminal punishment.[62] In essence, an injured party can take legal action before a court of law against a business entity for breach of a given legal obligation. On the other hand, accountability is a broader and liberate concept, not necessarily restricted to the effect of the breach of a confined legal duty.[63] It embraces the notion that those accountable should be answerable for the effect of their behaviour and signifies 'non-legal risks of loss of reputation,

[59] *Abdullahi 1 v Pfizer, Inc* [SDNY, 2002] US Dist. Lexis 17436 at 1; *Abdullahi II v Pfizer, Inc.,* [2d Cir NY, 2003] *77* Fed Appx 48, 2003 US App LEXIS 20704; *Abdullahi III v.* Pfizer, Inc., [SDNY, 2005] 2005 US Dist Lexis 16126.
[60] *Irou v. Shell-BP* Unreported Suit No. W/89/71 in the Warri High Court; *Chinda v Shell-BP* [1974] 2 RSLR 1; *Umudje v Shell-BP Petroleum Company of Nigeria Ltd* [1975] 9-11 SC 155; *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited, the Nigerian National Petroleum Corporation and the Attorney General of the Federation* [2005] Unreported Suit No FHC/B/CS/53/05; *Shell Petroleum Development Company of Nigeria v. Tigbara Edamkue & Ors* [2009]14 NWLR Pt 1160, 1.
[61] John Simpson and Edmund Weiner, *The Oxford English Dictionary* (OUP, 1989).
[62] *Ibid*,.
[63] Bernaz, (2013) *op. cit.*, p. 494.

denial of access to foreign markets, and shareholder dissent (not to mention plunging stock values)'.[64]

Accordingly, the study particularly seeks to examine the attempts and failures of national, regional and international legal regimes to address human rights abuses attributed to TNCs in order to analyse whether the courts in general have a role to play in providing remedies and justice for victims of human rights abuses by TNCs. The study uses Nigeria as a case study with particular attention paid to the landmark Nigerian cases of *Shell* and *Pfizer* to assess the extent of human rights violations committed by TNCs in developing host states and how these entities have been dealt with at the domestic level.[65] The Nigerian situation is utilized as a case study to demonstrate the current disparity in global responses to human right abuses.

1.9. Research Methodology

The research method for this study was primarily doctrinal.[66] The research analyses academic literature, legal jurisprudence and legislation to discover specific pieces of information that are relevant to the theme under discussion. This involved identifying, filtering, disaggregating, scrutinising and unloading the legal issues and arguments that have a bearing on each theme. A significant amount of background reading has been done in order to become familiar with the broader subject, to identify and map out issues that need further research and, perhaps more importantly, to identify gaps in the literature.

[64] Bernaz, (2013) *op. cit.*, p. 494; David Scheffer & Caroline Kaeb, 'The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counter Attack Strategy in Compliance Theory' (2011) 29 *Berkeley Journal of International Law* 334, 335.

[65] *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited, the Nigerian National Petroleum Corporation and the Attorney General of the Federation* [2005] Suit No FHC/B/CS/53/05. *Abdullahi 1 v Pfizer, Inc* [SDNY, 2002] US Dist. Lexis 17436 at 1; *Abdullahi II v Pfizer, Inc.*, [2d Cir NY, 2003] *77* Fed Appx 48, 2003 US App LEXIS 20704; *Abdullahi III v.* Pfizer, Inc., [SDNY, 2005] 2005 US Dist Lexis 16126.

[66] For more explanation on doctrinal research method see, Caroline Morris and Cian Murry, *Getting a PhD in Law* (Hart Publishing, 2011)30.

The thesis is also comparative in nature.[67] This has been done by looking at initiatives taken by some home state courts to hold TNCs accountable for human rights violations committed abroad. This will be helpful to understanding the feasibility of litigating corporate misconduct in their home state courts. In this regard, a comparison of cases litigated in the United States, the UK and the Netherlands has been undertaken. A study of the unwillingness and/or inability of developing host states to offer a remedy to victims of corporate human rights abuses, followed by examples from various developing states, have also been undertaken.

The study is also socio-legal[68] in nature as it looks beyond doctrinal matters to recognise law as a social phenomenon or the social experience of those affected by the adverse effects of TNC activities. This study inevitably addresses the political nature of law-making and legal institutions in a bid to analyse the lack of political will within some developing countries to enforce human rights against TNCs operating in their territory. This approach may assist in fostering legal reform by linking law and policy objectives and uncovering how the law actually operates in practice.

The research based itself wholly on primary and secondary sources. The primary sources of international, regional and national law include resources such as the Constitution, statutes, case law, treaties and judicial decisions. The secondary materials used were journal articles, books, periodical newspapers, magazines; conference papers/working papers, records of non-governmental organizations, internet documents, dissertations/theses and reports.

1.10. Structure of the Study

The study is divided into seven chapters. Each chapter is designed to meet the research objectives and address the research questions.

[67] *Ibid.*, p. 37.
[68] *Ibid.*, p. 34-35.

Chapter One provides a general introduction to business and human rights. This chapter presents an overview in which the study is set, as well as the impact of TNC activities on human rights. It also explains the significance of the study and other preliminary issues, the scope and the delimitations of the study, the research objectives and questions, and justifications for the research topic and the research methodology.

Chapter Two is entitled 'Transnational corporations and international human rights: law and policy'. The chapter examines the existing international instruments and normative frameworks designed to regulate the activities of TNCs and this provides background of the study. It is here that it is determined whether TNCs are subjects of international law. The chapter further examines whether the state has a duty to protect in the business and human rights sphere. The chapter also discusses various initiatives and international normative frameworks in the form of 'soft-law' instruments which have been developed to regulate the activities of TNCs. It considers their advantages and inadequacies, and the chapter proposed a legally binding mechanism for corporate accountability for human rights violations.

Chapter Three is entitled 'The role of international and regional courts and bodies in adjudicating human rights'. This chapter addresses the first aim of the study, which is to answer the question of whether courts are an effective forum for resolution when it comes to seeking remedies for victims of corporate human rights abuses. In order to do this, reference is made to the UNGP where it is recognised that the core to ensuring access to an effective remedy is having an effective and fair judicial system.[69] The UNGP explicitly recognise the effectiveness of the judicial system as the bedrock of access to the remedy pillar.[70] The chapter analyses the manner in which these TNCs have been dealt with by international and regional judicial authorities for human rights abuses they committed in the course of their operations. In terms of international courts, the chapter analyses the International Court of

[69] UN Guiding Principles Commentary on Principle 26.
[70] Gwynne Skinner et al, (2013) *op. cit.*, p. 14

Justice (ICJ) and the International Criminal Court (ICC) while at the regional level the study examines and focuses on the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), the Inter-American human rights system, and the African human rights system. The chapter examines the dynamics in these institutions, the way in which they interact and the problems they are facing. It is proposed that broadening the jurisdiction of these courts to include legal persons will provide a deterrent benefit and hold TNCs accountable for their actions and omissions. The chapter concludes by asserting the central role of the judiciary in providing remedies and justice to victims of corporate human rights violations.

Chapter Four is entitled 'Jurisdiction in international law'. This chapter analyses the bases of jurisdiction in international law. In order to properly understand the nature of jurisdiction, it begins by offering a brief definition of jurisdiction, drilling down to its normative basis. This will set the stage for a demonstration of different jurisdictional theories recognised in international law in order to understand when a state can rightly assert jurisdiction without being said to have breached international law. This examines the jurisdictional techniques under both public and private international law as far as holding TNCs liable is concerned. The chapter aims to provide an important insight into the limits of jurisdiction as it applies to the regulation of TNCs in more detail, within the scope of public and private international law.[71]

Chapter Five is entitled 'Extraterritorial home state regulation of transnational corporations'. This chapter will critically assess this emerging regulatory technique proposed or already in use by home states to control and punish their TNCs for injurious activities they committed abroad. As indicated earlier, the use of the phrase 'home state' in this study generally signifies the state of incorporation or registration of the parent company of the TNC or where

[71] See Shaw, (2008) *op. cit.*, p. 645; See Brownlie, (2008) *op. cit.*, p.299.

the parent company of the group originates.[72] The chapter examines whether states have an extraterritorial obligation to prevent and remedy human rights violations perpetrated by TNCs abroad. It tries to identify legislative attempts by some home states to regulate the conduct of their TNCs abroad in conformity with international human rights standards. The chapter considers the regulatory possibilities offered by litigation against the parent company of the transnational group in their home state courts (frequently referred to as foreign civil liability claim). In addition, it evaluates the current state of affairs in foreign liability cases and recent developments in the home states courts of TNCs. The chapter identifies substantive, procedural and practical issues affecting access to justice in the home country courts of TNCs. The importance of the role of home states in holding TNCs accountable for human rights violations they committed abroad is understood and this adds a new perspective to this study.

Chapter Six is entitled 'Host state regulation of transnational corporations'. This chapter addresses the second aim of this study, which is to answer the question of whether domestic courts within developing states (host countries) have the potential to provide effective way for victims of corporate human rights abuses to seek remedies based on the principle of access to justice. In order to do this, reference will be made to Article 8 of the UDHR which states that: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. Additionally, reference is also made to the CESCR which highlighted the importance of access to effective remedies within the domestic legal order for victims of abuses committed by companies.[73] The chapter considers the role of the host state in providing an effective remedy and justice for victims of human rights violations by TNCs operating in their territory

[72] Zerk, (2006) *op. cit.,* p. 3; Phillip I Blumberg, 'Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems' (2002) 50 *The American Journal of Comparative Law* 493, 494.

[73] CESCR, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (2011), UN Doc E/C.12/2011/1, para 5.

and the various obstacles that undermine the effectiveness of host states' regulatory regimes or judicial systems. The use of the term 'host state' in this study refers to the state in which a subsidiary business entity is established or where operations of subsidiaries of the TNCs are conducted.[74] This chapter uses Nigeria as a case study with particular attention paid to the landmark Nigerian cases of *Shell*[75] and *Pfizer*,[76] and assesses the extent of human rights violations committee by TNCs in developing host states. In doing this, the chapter examine the legal and institutional framework aimed at addressing corporate human rights violations in Nigeria, and how these entities have been dealt with at the domestic level. The existence of legal, practical and procedural barriers that undermines access to effective remedies and justice for victims of corporate human rights violations in Nigeria are also dealt with, whilst presenting the remedies sought and achieved in cases of corporate human rights abuses in Nigeria. The chapter concludes by suggesting ways of tackling these problems in order for the courts within developing host states to provide effective remedies and justice for victims of corporate human rights violations.

Chapter Seven is the conclusion. The conclusion explains the main contributions of this study to knowledge. The strengths of the research are highlighted. Recommendations which have been developed from the research are put forward, including future research, acknowledging the limitations of the study and discussing the implications of the thesis for a law, policy and practice.

[74] Zerk, (2006) *op. cit.*, p. 3.
[75] *Irou v Shell-BP* Unreported Suit No W/89/71 in the Warri High Court; *Chinda v Shell-BP* [1974] 2 RSLR 1; *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited, the Nigerian National Petroleum Corporation and the Attorney General of the Federation* [2005] No FHC/B/CS/53/05.
[76] *Abdullahi 1 v Pfizer, Inc* [SDNY, 2002] US Dist. Lexis 17436 at 1; *Abdullahi II v Pfizer, Inc.,* [2d Cir NY, 2003] *77* Fed Appx 48, 2003 US App LEXIS 20704; *Abdullahi III v.* Pfizer, Inc., [SDNY, 2005] 2005 US Dist Lexis 16126.

CHAPTER 2
TRANSNATIONAL CORPORATIONS AND INTERNATIONAL HUMAN RIGHTS: LAW AND POLICY

2.1. Introduction

One of the primary features which is instantly notable about the present economics of the world is that of globalisation, which has played a key role in reshaping the entire plane of trade and the manner in which countries and entities interact in a professional environment.[1] The expanse of the global village and the rich potencies of the emergence of a single global economic market has led to an exponential growth of transnational corporations (TNCs hereafter), at an alarming and unprecedented rate.[2] A crucial aspect that drives this growth is that these TNCs operate in the highly globalised world, with the emergence of unfathomable extent of the power they possess and are likely to possess, with regards to several important global faculties and processes.[3]

One of the key features of a TNC is that it operates in several jurisdictions across many countries, by developing a vast network of offices and plants which enable them to select the convenient environment to either defend or avoid intrusive scrutiny of the human rights impact of their operations.[4] From a note of this feature itself, it becomes clear that TNCs have become the largest and most considerable players in the field of world trade, so much so that a number of them boast of budgets that far outstrip several countries' GDP.[5] Thus, TNCs are able to influence individual nation states themselves, as they are a major contributor of employment in the developing countries. It must be acknowledged that the outlay of foreign direct investment (FDI) made by TNCs does bring jobs, capital and technology, and thus

[1] Jeffrey Davis, *Justice Across Borders* (CUP 2008) 284.
[2] Magnus Blomstrom and Ari Koko, 'Multinational Corporations and Spill overs', (1998) 12(3) *Journal of Economic Surveys* 247, 252.
[3] Brian Roach, 'Corporate Power in Global Economy' [2007] Global Development and Environment Institute.
[4] Debosmita Nandy & Niketa Singh, 'Making Transnational Corporations Accountable for Human Rights Violations' (2009) 2 *NUJS Law Review* 75, 77.
[5] UNCTAD, 'World Investment Report: Reforming International Investment Governance (2015), UN Doc UNCTAD/WIR2015 18, 184.

protects and promotes labour rights and the right to adequate living standards, along with derivative rights such as education, housing and health.[6]

However, through their extensive business activities TNCs also negatively affect the enjoyment of human rights of a wide range of people across various industries and jurisdictions, including employees, consumers and the individuals living in the place where the TNC operates.[7] When TNCs commit human rights abuses, it is hoped that they will be held accountable for these violations. Traditionally, for international human rights obligations to be imposed on entities they must be recognised as 'subjects' in international law with direct rights and duties.[8] As a matter of principle, the obvious source of corporate accountability is domestic regulations.[9] In seeking to attract foreign investment, some states have frequently been unable or unwilling to adequately regulate the activities of TNCs that operate within their territory or jurisdictions.[10]

The alleged ineffectiveness of domestic legal regimes to adequately regulate the activities of TNCs has shifted the focus to the international level. In an attempt to close the perceived 'accountability gap' and responding to frequent reports about the involvement of TNCs in the infringement of human rights, several international initiatives have been developed of different kinds aimed towards regulating the behaviour of corporate actors.

The first part of this Chapter examines whether TNCs are subjects of international law. The study will analyse the doctrine of state duty to protect in the business and human rights sphere. Although, under international legal doctrine the term used is state 'responsibility' to

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[6] *Ibid*.

[7] David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 Virginia Journal of International Law 933, 933; also, Dejo Olowu, *An Integrative Right-based Approach to Human Development in Africa* (PULP Pretoria 2009) 269.

[8] Kinley and Tadaki, *Ibid.*, p. 944-45.

[9] Alicia Grant, Global laws for a global economy: A case for bringing multinational corporations under international human rights law (2013)6(2) *Studies by Undergraduate Researchers at Guelph* 14, 14; Sarah Joseph, 'Liability of Multinational Corporations' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 613; See generally Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 645; See also Ian Brownlie, *Principles of Public International Law* (7thedn, OUP 2008) 299.

[10] This frequently inability of the Host States will be discussed extensively in Chapter 6.

protect, but in the context of the framework, Ruggie suggested, the word state 'duty' to protect to refer to state legal responsibility with regard to business and human rights.[11] On the contrary, Ruggie used the term 'responsibility' in a non-legal sense to emphasise companies only have 'responsibility' to respect human right. Hence, this study will adopt the 'duty to protect' existing within the field of business and human rights, to then take a more nuance approach to the issue of the 'state duty to protect' it citizens from abuses and violations by third parties including corporate actors. The study evaluates a number of international normative frameworks in the form of 'soft-law' instruments that have been developed to regulate the activities of TNCs that violate human rights. And lastly, the study evaluates the current international treaty initiative to regulate the activities of TNCs to respect and protect human rights. The aim of this chapter is to examine the existing international instruments and normative frameworks designed to regulate the activities of TNCs. It examines whether the existing regimes ensure adequate protection of human rights against violations by TNCs.

2.2. Transnational Corporations in International Law: Theory of Legal Subjectivity

The theory of international legal 'subjectivity' has long been something that grabs the attention of international lawyers who engage in the debate of whether or not TNCs are 'subjects of international law'.[12] These subjects have international legal personality. That is to say, they have individual rights and responsibilities under international law and have the capacity to impose those rights. [13] Historically, international law was perceived as regulating only mutual relations between sovereigns, and states remained the sole subjects of

[11] Humberto Cantú Rivera, From General 'Responsibility' to Context Specific 'Duty': The Role of The State in Ensuring Corporate Compliance with International Human Rights Law (2015) 1(1) *Revista Mineira de Direito Internacional e Negócios Internacionais* 190, 191.
[12] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 59.
[13] Kinley and Tadaki, (2004) *op. cit.*, p. 956.

international law.[14] Ever since the World War II, international instruments have bestowed international legal personality on some non-state actors. An important step was taken in *Reparations for Injuries Suffered in the Service of the United Nations (Reparations* case).[15] The ICJ was concerned with the issue of whether an international organisation, such as the United Nations (UN), had the capacity to bring an international claim against a state for damages caused to agents of the UN who suffered injuries in performing duties that were the responsibility of the state.[16] The Court was of the view that the UN was an international legal person because it acted as a legal person. The ICJ stressed that 'it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims'.[17] This relatively open-ended reasoning undoubtedly allows for changing conceptions of what is an international person. The Court held that:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.[18]

Similarly, the ICJ in its Advisory Opinion *in Legality of Nuclear Weapons* reaffirmed the *Reparations* case and found that the nature of international legal personality is flexible and subject to efficiency and the need of the community in a given situation.[19]Akin to the ICJ's opinion that because the UN acted as a legal person it possesses an international legal

[14] Jan Wouters and Anna-Luise Chané, Multinational Corporations in International Law (2013) *Working Paper* 129/2013, 6.
[15] *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ 174 WL3.
[16] *Ibid.*, p. 179.
[17] *Ibid.*
[18] *Ibid.*, p.178.
[19] *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict (World Health Organization*) [1996] Advisory Opinion ICJ Rep 66. The ICJ affirmed the international legal personality of the WHO and stated that the capacity of the organisation was limited not in the manner of a State's capacity and did not extend to a capacity to request an advisory opinion on the topic of the use of armed force and nuclear weapons. Also, the arbitration tribunal in *Texaco Overseas Petroleum Company v Libya* [1977]53 ILR 389 found Texaco to be subject of international law for the specific purpose in relation to its contract with Libya but not conferring the full international legal capacity that would be applied to a State.

personality, Clapham argued that what leads to the inevitable deduction that private actors including businesses are international legal persons is the fact that they enjoy certain legal rights, privileges, power and immunities at international level.[20] He stated that: 'We need to admit that international rights and duties depend on the capacity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity.'[21] Rather than concentrating on the international legal personality of corporate actors, Clapham suggested focusing on their rights and obligations which seem a radical departure from the debate on 'subjectivity' as it relates to the capacity of the corporate actors to enjoy rights and responsibilities.[22] Brownlie points out that international legal personality of an entity are said to appear in three contexts: capacity to make claims in respect of breaches of international law; capacity to make treaties and agreements that are valid on the international plane; and the enjoyment of privileges and immunities from national jurisdictions.[23]

Individuals and businesses such as TNCs recognised under domestic law were viewed as objects of international law or beneficiaries of international legal rights and obligations.[24] Thus, the subjectivity of corporate entities descended from the states and recognition by the powers vested in them.[25] Within state practice, the non-subjectivity of corporate actors in international law was recognised by the *Restatement of Foreign Relations* (USA), indicating that traditionally it was presumed that individuals and corporations including business entities established under the laws of a state were not regarded as subjects of international law.[26]

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[20] Clapham, (2006) *op. cit.*, p. 82; Jose E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9(1) *Santa Clara Journal of International Law* 1, 7.
[21] Clapham, (2006) *op. cit.*, p. 68-9.
[22] *Ibid*., p. 83.
[23] Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 57.
[24] *Ibid.*, p. 58-70.
[25] Wouters and Chané, (2013) *op. cit.*, p. 6.
[26] Restatement, Third, of Foreign Relations Law of The United States Part II, Introductory cmt (1987); Jose E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9(1) *Santa Clara Journal of International Law* 1, 6.

Traditionally, participants in international law have been categorised into the subjects and objects of international law.[27] Generally, states were recognised as the only subjects of international law capable of holding legal rights and duties. This propensity to restrict subject-hood has historically been reflected in international human rights law, which generally focused on individuals and states where the liability of an individual as well as entities, for violations of human rights would be established vicariously through state accountability.[28] The limit of this division into subject–object has been extensively criticised by a number of legal scholars. Zerk stated that instead of classifying participants in this way, a more positive approach would be to determine the extent to which international law recognises the existence of various types of participants in the international legal framework.[29] Higgins argued that the idea of subjects and objects of international law has "no credible reality and functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable restriction."[30] In her view, under international law there are only participants and no subject–object dichotomy. Individuals, states and private actors including TNCs are all regarded as participants of international law.[31]

Clapham is of the same view but goes further by describing the concept of 'subjectivity' under the title 'subjects as prisoners of doctrine'.[32] Clapham regards the traditional usage of the notion of 'subjects of international law' as partly incomplete and often inadequate.[33] Rather than 'subjects', he focuses on the concept of 'limited international legal personality of TNCs'. As observed by Clapham, the issue is that international legal personality has been

[27] Clapham, (2006) *op. cit.*, p. 64.
[28] Kinley and Tadaki, (2004) *op. cit.*, p. 937.
[29] Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 74.
[30] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 49.
[31] *Ibid.*, p. 50.
[32] Clapham, (2006) *op. cit.*, p. 59-63.
[33] *Ibid.*, p. 59-62.

entangled with the complex idea of 'subjectivity' and a similar question of ascriptions of statehood under international law.[34]

The responsibilities of TNCs have been affirmed by some multilateral agreements such as the *International Convention on Civil Liability for Oil Pollution Damage*[35] and the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* [36] which directly imposes obligations on private actors including businesses.

Furthermore, TNCs have the capacity to enforce their rights under certain international and regional investment mechanisms. For instance, the *International Center for the Settlement of Investment Disputes* (ICSID), [37] a body created by the World Bank, empowers businesses to file a dispute to the ICSID for binding arbitration. Moreover, under the *North American Free Trade Agreement* (NAFTA),[38] businesses are allowed to bring a claim and seek damages against the government of another NAFTA state for breach of their right to unhindered, extraterritorial trade through the Agreement's private dispute-settlement instrument.[39] Other tribunals include the *Iran-United States Claims Tribunals,* [40] the *United Nations Compensation Commission*[41] and the *United Nations Seabed Dispute Chamber*[42].

Under human right law, corporate actors possess the rights such as right to fair trial, rights to privacy, freedom of expression and rights to property. The *European Convention on Human Rights* also allows corporate actors to bring claims to the *European Court of Human Rights*.[43]

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[34] Clapham, *Ibid.*, p. 59; *Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ 174 WL3.
[35] International Convention on Civil Liberty for Oil Pollution Damage (1969), 973 UNTS 3. art 1, para 2.
[36] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (1993), Europ TS No 150, art 2, para 6.
[37] Convention on the Settlement of Investment Dispute between State and National of Other States (1965), 575 UNTS 159.
[38] North American Free Trade Agreement (1993), 32 ILM 289 and 605 (NAFTA).
[39] *Methanex Corp v United States of America* [2005] 44 ILM 1345 UNCITRAL (NAFTA).
[40] Iran-United States Claims Tribunals (1981), 20 ILM 223.
[41] UNSC, United Nations Compensation Commission (1991), UN Doc. S/RES/687.
[42] United Nations Convention on the Law of the Sea (1982), 1833 UNTS 3.
[43] Clapham, (2006) *op. cit.*, p. 81. Clapham refers to the case of *Agrotexim and Others v Greece* [1995] 330-ECtHR, Appl. No. 14807/89. The Strasbourg Court interpreted the concept of 'non-governmental organisations', regarded as possible victims of violations of the rights stipulated in the Convention, as extending to legal persons more broadly, hence also corporations.

The *European Court of Human Rights* in some cases recognises a legal person as an appropriate plaintiff that can file a complaint. For instance, in the celebrated case of *The Sunday Times v United Kingdom*, the first applicant was Times Newspapers Ltd.[44]

Thus, TNCs are somewhat beneficiaries of certain rights and responsibilities such as the right to sue and be sued, the right to enter into a legal relationship, the right to property, and the ability to assert or accept legal responsibility in a judicial or quasi-judicial forum.[45] They are also viewed as enjoying rights under foreign investment law, comprising the right to compensation in the event of expropriation and non-discriminatory treatment against national firms. [46] However, from these recognised conditions for achieving international legal personality, the presently still prevalent opinion among legal scholars is that TNCs cannot be regarded as subjects of international law *per se* in the sense of being conferred with international legal obligations to promote the enjoyment of human rights.

2.3. The Duty to Protect – Obligations on the State to Regulate Transnational Corporations under International Law

In seeking to attract foreign investment, host countries – which are more often than not developing countries – see weak human rights standards as providing them with a competitive advantage.[47] Based on their vast economic and political powers, TNCs can directly influence the enjoyment of human rights in the places where they operate, for example,[48] by violating labour rights such as using child or forced labourers;[49] permitting

[44] [1979] ECtHR, Ser A No 30.
[45] Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (OUP 1993) 209-10; Tania Voon, Multinational Enterprises and State Sovereignty under International Law (1999) 21 Adelaide Law Reviews 219, 247; Kinley and Tadaki, (2004) *op. cit.*, p. 956.
[46] Merja Pentikäinen, 'Changing International "Subjectivity" and Rights and Obligations under International Law Status of Corporations' (2012) 8(2) *Utrecht Law Review* 145, 148.
[47] Nandy and Singh, (2009) *op. cit.*, p. 77.
[48] Kinley and Tadaki, (2004) *op. cit.*, p. 933. United Steel Workers and International Labor Rights Fund, 'Coca-Cola (Coke) to be Sued for Human Rights Abuses in Colombia' (Press Release, 19 July 2001).
[49] *Flomo v Firestone Natural Rubber Company* [7th Cir 2011] 643 F.3d 1013 1015; *Doe 1 v Nestle USA Inc* [9th Cir 2014] 766 F 3d 1013.

unfavourable working conditions and inadequate wages;[50] or by polluting the environment and thus endangering the rights to life, food, health and the adequate standard of living of the people.[51] They can also indirectly violate human rights by colluding with government authorities to commit human rights abuses for a business advantage or assisting state authorities engaged in human rights violations by providing infrastructure and financial support.[52]

When TNCs commit human rights abuses, it is hoped that they will be held accountable for their violations. One of the main 'responsibilities' of a state under international and indeed even under most domestic law, is to protect its citizens against human rights abuses.[53] A state may be held responsible for either being complicit or failing to exercise due diligence to prevent the activities of TNCs that violates human rights.[54] In the *Chorzow Factory* case,[55] the *Permanent Court of International Justice* (PCIJ) explicitly affirmed that it is not just a doctrine of international law but also a broad perception of law that any breach of an engagement would give way to an obligation to make adequate reparation.[56] The Court was of the view that 'reparation is therefore the essential complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself'.[57] Also, the

[50] See *Sinaltrainal v Coca-Cola Co* [11th Cir 2009] 578 F.3d 1252.
[51] See for example the cases of *Sequihua v Texaco* [1994] 847 F Supp 61; *Jota v Texaco* [SDNY 1996] 945 F Supp 625, 627; *Jota v Texaco Inc* [2d Cir 1998] 157 F.3d 153, 158-61. The Hague District Court, [2013], LJN BY9845 (re oil spill near Goi); The Hague District Court [2013], LJNBY9850 (re oil spill near Oruma); The Hague District Court, [2013] LJN BY9854 (re oil spill near Ikot Ada Udo).
[52] Such allegation has been levied in the following cases, *Doe v Unocal Corp Unocal* [1997] 963 F Supp 883; *Wiwa v Royal Dutch Petroleum/Shell* [2000] 226 F.3d 88; *Presbyterian Church of Sudan v Talisman Energy, Inc* [2nd Cir 2009] 582 F.3d 244; *Doe* VIII *v Exxon Mobil Corp* [DC Cir 2011] 654 F.3d 11, 26; *Kiobel v Royal Dutch Petroleum, Co* [2013]133 S Ct 1659.
[53] Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 1, 11; International Law Commission(ILC), 'Commentary- Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), UN Doc A/56/83.
[54] Hugo Grotius, 'De Jure Belli ac Pacis' (Paris, 1625) cited in, Humberto Cantú Rivera, 'From General "Responsibility" to Context Specific "Duty": The Role of The State in Ensuring Corporate Compliance with International Human Rights Law' (2015) 1(1) *Revista Mineira de Direito Internacional e Negócios Internacionais* 190, 192.
[55] *Case Concerning the Factory at Chorzów (Germany v Poland) (Merits)* [1928] PCIJ (ser A) No 13.
[56] *Ibid., p.* 29.
[57] *Ibid,.*

ICJ in the *Corfu Channel* case stated that the existence of a general responsibility to protect other subjects of international law includes the application of due diligence to guarantee such protection.[58] While analysing the Convention on genocide (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case) in 1996, the ICJ reaffirmed that position by ruling that the responsibility to protect includes not just duties for protection and reparation for acts that breach the sovereignty of other states but also the norms of customary international law.[59]

Although, the term state 'responsibility' to protect human rights, has traditionally been used under international law, however, as indicated earlier. Ruggie in the context of the UNGP/Framework used the term state 'duty to protect' to stress the idea of a legal obligation of states with regards to business and human rights. Conversely, the term 'responsibility'is thus used in a non-legal sense to highlight TNCs and other business enterprises only have 'responsibility' to respect human right, which means 'do not cause injury' and refrain from perpetrating human rights violations. This duty to protect obliges state to take positive steps through legislative, administrative or judicial means as well as to exercise due diligence to protect its people against human rights violations that may be committed within its jurisdiction by third parties including businesses.[60] Under this orthodox state-centred approach, human rights norms are enforced on corporate actors only at the municipal level but the states may be held responsible for breach of human rights if they fail to regulate the activities of TNCs that operate under or within their territory. The required standard is for the state to exercise 'due diligence' to protect against and to provide sufficient damages for actions and omissions of a private party.

[58] *The Corfu Channel* Case (*United Kingdom of Great Britain and Northern Ireland v People's Republic of Albania*) [1949], 2 ICJ Rep 4, p. 2-23.
[59] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) [2007], Unreported, ICJ, para 430.
[60] Chirwa, (2004) *op. cit.*, p. 11; Zerk, (2006) *op. cit.*, p. 84; Rivera, (2015) *op. cit.*, p. 191.

Various international and regional human rights instruments are legally binding on states that ratify them, directly or indirectly enjoining duties on states to regulate the activities of private actors including business entities. Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR) requires states parties to take all necessary steps, either by legislation, judicial, administrative or other means, to ensure all individuals within its jurisdiction are protected, not just against breaching the rights in the Covenant by its agents but also against human rights violations committed by private actors.[61] The provisions of the ICCPR suggest that the failure to take necessary steps or to exercise due diligence to prevent, punish, investigate or remedy injuries that have occurred leads to infringement of ICCPR rights by state parties.[62] Moreover, the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* require states to have a duty to protect in order to ensure that private actors including business entities within their jurisdiction do not violate the economic, social and cultural rights of its citizens.[63] Similarly, the *Human Rights Committee* (HRC) which monitors implementation and compliance of the ICCPR by states parties with this instrument has recognised in its General Comment 16 that states have a duty to protect its peoples against unlawful attacks and arbitrary interference with their rights to privacy, family, home or correspondence by natural and legal persons.[64]

Several other international mechanisms which comprise both civil and political rights as well as economic, social and cultural rights acknowledge the duty of states to protect human rights within the private sphere.[65] Leading regional human rights instruments have also recognised

[61] International Covenant on Civil and Political Rights (1966) 999 UNTS 171.
[62] *Ibid.*, art 2(2).
[63] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), para 18 (Maastricht Guidelines). Although not legally binding, the Maastricht Guidelines have been influential in the interpretation of economic, social and cultural rights.
[64] UN Human Rights Committee, General Comment No 16: 'Article 17, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (1988), HRI/GEN/1/Rev.9 (Vol. I).
[65] See for example UN Committee on the Elimination of Discrimination against Women (CEDAW), 'General Recommendation 19, Violence Against Women' (1992) UN Doc A/47/38, para 9; UN Declaration on the Elimination of Violence against Women, UNGA Res 48/104 of 20 December 1993, UN Doc A/RES/48/104, art

the duty of states to protect and respond to abuses and violations perpetrated by private actors, including corporations, and to regulate the private sphere. For instance, the *European Convention on Human Rights* obliges states parties to 'secure to everyone within their jurisdiction of the rights and freedom recognised under Section I of the Convention'.[66] While employing a different phrasing, the *European Convention* essentially adduces the twofold obligation placed upon the state: to respect human rights and protect from abuse by third parties irrespective of the capacity of the perpetrator – whether acting as state official or as an individual or corporate entity.

This duty to protect has equally been recognised by the *American Convention on Human Rights* where it requires contracting states to 'respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'.[67] In fact, the *Inter-American Court of Human Rights* through the case of *Velásquez Rodríguez v Honduras*[68] provided a key decision on the positive duties of states under the American Convention on Human Rights. The Court highlighted that a state can be held responsible for violation of international human rights committed in the private sphere if the state failed to exercise 'due diligence' to prevent and respond to the violation occurring within its territory.[69] In the opinion of the Court, the duty to prevent violation of human rights includes:

> …all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.[70]

1; UN Committee on the Elimination if Racial Discrimination 'General Recommendation 20 on Article 5 of the Convention: 'Non-Discriminatory Implementation of Rights and Freedoms' (1996), UN Doc. A/51/18; UN Human Rights Committee, General Comment No 10: 'Article 19 Freedom of Expression' (1983).

[66] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, As Amended by Protocols Nos. 11 and 14 (1950), 213 UNTS 221, art 1.

[67] American Convention on Human Rights (1969), 1144 UNTS 123, art 1 (1).

[68] [1988] Inter-Am Court HR (ser C) No 4; see genrally, Chirwa, (2004) *op. cit.*, p. 14.

[69] *Ibid.*, para 172.

[70] *Ibid.*, para 175.

It can be observed that the underlying principles of the Inter-American Court's statement on the state's 'duty to protect' human rights reflect some general principles of international law as recognised in the aforesaid *Corfu Channel* case heard by the ICJ. That states should take responsibility to ensure the protection of other subjects of international law, including through the exercise of due diligence to prevent violations and respond it.The Inter-American Court also construed such principles in view of international human rights law in order to build the basis on which most of the Inter-American human rights case law will be created and developed. While there is no related provision in the *African Charter on Human and Peoples' Rights*, the duty of the state to protect has been construed in *Commission Nationale des Droits de I'Homme et des Libertes v Chad* by the *African Commission on Human and Peoples' Rights* (African Commission) in the following way: 'Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders'.[71]

Thus, it can be submitted that the duty of states to protect its people from human rights abuses by third parties including business entities may be referred to as part of the 'international responsibility' of states.[72] Therefore, through the principle of duty to protect, the state has a responsibility to hold corporate actors accountable for violations of international human rights norms and failing to do so may lead to a breach of human rights treaties by the states themselves.

In practice, not all states have the capacity or will to effectively regulate the activities of TNCs that operate within their territory. This applies, in particular, to developing host

[71]African Commission, Communication [1995] No 74/92 para 22. In this case, the African Commission was confronted with claims against Chad of molestation of journalists by undisclosed people; and assassinations, disappearances and torture during the civil war between security operatives and other individuals. The African Commission found Chad to be in violation of the African Charter for, along with, refusing to provide adequate security and stability in the country.

[72] African Commission Communication [1995] *Ibid.*,; Also, *Velásquez Rodríguez v Honduras* [1988] IACtHR (ser C) No 4, para 172.

countries which rely heavily on foreign investment.[73] This inability or unwillingness of developing states is frequently the effect of various issues such as a weak legal regime, public corruption, lack of strong enforcement mechanisms, economic difficulties, non-independence of the judiciary and a lack of capacity to implement a human rights norm.[74] By contrast, home countries might be reluctant to hold their companies accountable for human rights violations they committed extraterritorially as doing so might put their corporations at a competitive disadvantage with their counterparts.[75] These issues will be discussed extensively in chapters 5 and 6. These issues increasingly weaken the ability of states to create a robust regulatory instrument at the national level. The next section evaluates various international soft law initiatives aimed at enforcing the human rights responsibility of TNCs.

2.4. Standard Setting of Human Rights Responsibility of Transnational Corporations through International Soft Law Mechanisms

In an attempt to regulate the activities of TNCs, several international organisations and NGOs have initiated policies, strategies, codes, determinations, regulations, reports, charters and draft documents of different kinds aimed at restricting the behaviour and impact of corporate actors and actions.[76] These initiatives have largely taken the form of 'soft-law' instruments which are voluntary in nature. Besides international and intergovernmental attempts to develop soft laws, various voluntary codes of conduct and self-regulations initiatives were

[73] Chirwa, (2004) *op. cit.*, p. 26.
[74] Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law, Multinational Corporations in Developing Countrie*s (Routledge 2011) 45; Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4*) The Modern Law Review* 598, 599-600; Chirwa, (2004) *op. cit.*, p. 26.
[75] Chirwa, (2004), *op. cit.*, p. 33; McCorquodale and Simons, (2007), *op. cit.*, p. 600.
[76] This encompasses the International Labour Organisation (ILO), the Organisation for Economic Cooperation and Development (OECD); the International Confederation of Free Trade Unions (ICFrU); the Food and Agriculture Organisation of the UN (FAO) 1995; the UN Conference on Trade and Development (UNCTAD) and the Economic and Social Council of the UN (ECOSOC).

also designed by companies to regulate themselves.[77] The codes of conduct are a voluntary policy statement, standard and or guidelines that TNCs initiate to abide by to promote good corporate behaviour, so as to avoid infringement on peoples in the cause of their operation.[78] It is not the purpose of this study to examine the emerging codes of conduct regulatory regimes and initiatives.

In what follows, this section surveys the various international initiatives and frameworks concerning their ability to regulate the activities of TNCs that infringe on people's rights. The study is limited to the following corporate responsibility initiatives and frameworks: the *UN Draft Code on Transnational Corporations*; the Organisation of Economic Cooperation and Development (OECD) *Guidelines for Multinational Enterprises*; the ILO *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*; and the *United Nations Global Compact*; the *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, and the *United Nations Guiding Principles on Business and Human Rights*.

2.4.1. United Nation's Draft Code on Transnational Corporations

Notable among these international instruments was an attempt by the UN Economic and Social Council (ECOSOC) to establish a permanent body, the UN Commission on Transnational Corporations (CTC) in 1974, and the United Nations Centre on Transnational

[77] Michael A. Santoro, 'Beyond Codes of Conduct and Monitoring: An Organizational Integrity Approach to Global Labor Practices' (2003) 25 *Human Rights Quarterly* 407, 410-11; Adelle Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct'(2001)8(1) *Indiana Journal of Global Legal Studies* 401, 411; Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law'(2004) *Center for Human Rights and Global Justice Working Paper* 1/2004 58.

[78] Sean D Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 *Columbia Journal of Transnational Law* 389, 392-3. Nancy L Mensch, 'Codes Lawsuits or International Law, How Should the Multinational Corporation be Regarded with to Respect of Human Rights '(2006)14 Miami *International and Comparative Law Review* 243, 250.

Corporations (UNCTNC).[79] The Centre and the Commission were tasked with the drafting of an inclusive code of conduct for TNCs, producing a series of drafts over the period of fifteen years, with the last draft in 1990.[80] The 1990 draft code was intended to play an important part in the facilitation of transnational socio-economic cooperation and a mechanism to increase the contributions of TNCs to economic development goals and objectives and to reduce the negative impact of the activities of these entities on human rights.[81] The 1983 and 1990 draft codes recognised some rights of TNCs but they also stressed the need for TNCs to conform to the laws of the country in which they operate, abide by their economic policies and avoid meddling in the internal political affairs of the host state.[82]

The 1990 version further requires investors to respect human rights and fundamental freedoms in the country in which they operate.[83] It also administers wide-ranging responsibilities including ownership and control, conformity with domestic economic and developmental goals, refraining from corruption activities, competition and restrictive business practices, transfer pricing and taxation.[84] Furthermore, TNCs must disclose to the public of the host country, coherent corporate information on the organisation, guidelines, activities and entire operations, encompassing financial as well as non-financial matters.[85] Despite the huge investment made into it, the draft code was never finalised as a legal

[79] UN Department of Economic and Social Affairs, 'The Impact of Multinational Corporations on Development and International Relations' (1974), UN Doc E/5500/Rev.1, ST/ESA/6, UN Sales No. E.74.II.A.5, 6-12; John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 820; Patricia Feeney 'Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda' (2009) 6(11) *Sur International Journal of Human Rights* 160, 162.

[80] UN, ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1983) UN Doc E/1983/17/Rev 1; ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1988), UN Doc E/1988/39/ Add 1; ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1990), UN Doc E/1990/94.

[81] UN ECOSOC, 'Proposed Text of the Draft Codes' (1990) *Ibid*.,; Helen Keller, Corporate Codes of Conduct and Their Implementation: The Question of Legitimacy (Springer 2008) 9.

[82]UN ECOSOC, Proposed Text of the Draft Codes' *Ibid*.

[83] *Ibid*.,; See also, Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (2nd edn, Hart Publishing 2012)27.

[84] UN ECOSOC, 'Proposed Text of the Draft Codes' (1990) *Ibid*., para 20-43.

[85] *Ibid.*, para 44.

device.[86] Ultimately, the draft code itself did not reach a UN imprimatur and has not been embraced by TNCs.[87] Thus, the draft code was only used as a 'springboard' for codes that followed.[88]

2.4.2. The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises

In contrast to the UN's failed attempts, the Organisation for Economic Co-operation and Development (OECD) established a non-binding guideline to regulate the conduct of TNCs in 1976.[89] The document was revised in 2000[90] and 2011[91]. The OECD document has been described as the leading international policy-creating instrument in the field of business and human rights as well as the only international initiative directed specifically at companies.[92] As part of these 1976 document the OECD adopted a policy commitment on foreign investment and TNCs which offers a set of guidelines for responsible business behaviour for all TNCs operating in or from OECD member states.[93]

The Guidelines were aimed at ensuring TNCs operate in accordance with government policies and cooperate with the local community of the place where they operate in order to improve the international investment climate and promote the impact of sustainable

[86] Feeney, (2009) *op. cit.*, p. 162; Tagi Sagafi-Nejad & John H Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Indiana University Press 2008)122; Katarina Weilert, 'Taming the Untamable? Transnational Corporations in United Nations Law and Practice' (2010) 14 Max *Planck Yearbook of United Nations Law* 445, 463.
[87] Murphy, (2005) *op. cit.*, p. 405; Alice de Jonge, *Transnational Corporation and International Law Accountability in the Global Business Environment* (Edward Elgar 2011) 29.
[88] Keller, (2008) *op. cit.*, p. 9.
[89] OECD Declaration and Decisions on International Investment and Multinational Enterprises (1976), 15 ILM 969. The OECD periodically reviews and occasionally revises the guidelines. For the current guidelines, see OECD Declaration and Decisions on International Investment and Multinational Enterprises (2011) (OECD Guidelines).
[90] OECD, 'Guidelines for Multinational Enterprises' (2000), OECD Doc DAFFE/IME/WPG 20.
[91] OECD, 'Update of the OECD Guidelines for Multinational Enterprises' (2011).
[92] Nadia Bernaz, et al 'Guidance on Business and Human Rights: A Review' (Report for the Equality and Human Rights Commission, 2011) 10.
[93] OECD Guidelines for Multinational Enterprises' (1976) *Ibid.*,; Murphy, (2005) *op. cit.*, p. 409.

development made by TNCs.[94] The OECD Guidelines clearly stress that the recommendation cannot be enforced legally and businesses are required to observe them voluntarily.[95] They provide principles and guidelines for responsible business behaviour in accordance with applicable laws and internationally recognised standards.[96]

The revised 2011 version of the OECD Guidelines expanded the scope of rights covered, by referring to 'internationally recognised rights' as well as the international human rights obligations of countries where they operate alongside exercising 'risk-based due diligence' in their business operations.[97] The Guidelines further incorporate a chapter on employment and industrial relations with a section which prohibits all forms of discrimination in the workplace or promotion of personnel, including respecting the right of their employees to be represented by trade unions as well as containing other protections for labourers on the abolition of child and forced labour.[98] The Guidelines also stressed internal environmental management and contingency planning for environmental effects.[99] On disclosure and transparency, the Guidelines have been updated in harmony with improved social and environmental accountability standards.[100] Also, Guidelines address the issue of corporate structure by urging TNCs to consider the impact of their operations on their various stakeholders, including suppliers and subcontractors, in order to apply principles of good corporate behaviour in line with the Guidelines.[101]

The Guidelines are implemented and promoted through the work of the National Contact Points (NCPs) and the Investment Committee which are to be established by participating members in line with the current revised version.[102] The NCP should be created according to

[94] OECD Guidelines (2011), Annex 1 of the Guidelines; Wouters and Chané, (2013) *op. cit.*, p. 18.
[95] OECD Guidelines, (2011) Part 1, On Concepts and Principles.
[96] *Ibid.*, Part 1, § II, para 1.
[97] *Ibid.*,; Subedi, (2012) *op. cit.*, p.41.
[98] OECD Guidelines, (2011) *Ibid.*, Part I, § V.
[99] *Ibid.*, Part I, § VI.
[100] *Ibid.*, Part I, § III.
[101] *Ibid.*, Part I, § II, para 13.
[102] *Ibid.*, Part II.

the core criteria of visibility, accessibility, transparency and accountability. [103] Each participating state is directed to establish a NCP that is charged with the mandate of promoting the guidelines, answering inquiries and resolving issues in particular during the process of application. The responsibility of the NCP is to consider complaints lodged by individuals or companies against TNCs that have breached the OECD Guidelines of a country.[104] In such situations, the NCP will provide a medium for discussion offers good offices and consult with other concerned NCPs parties if necessary, to adequately resolve the issues raised. [105] It then resolves the matter between the parties through conciliation or mediation and probably offers recommendations in accordance with the Guidelines. [106] If required, they are assisted by the Investment Committee which also offers recommendations in line with the Guidelines.[107] The decision of the NCP is not binding and the names of the businesses involved are usually not disclosed in order to safeguard sensitive business information.[108]

NCPs are governmental bodies and can be structured in different ways. For instance, the Canadian NCP is led by the Ministry of Foreign Affairs and International Trade while the Italian NCP is exclusively within the Ministry of Economic Development[109] and the UK NCP is presided over by the Department for Business, Innovation and Skills (BIS) in collaboration with the Department for International Development (DFID) and the Foreign and Commonwealth Office (FCO).[110] One example of a case filed under the OECD Guidelines was a complaint lodged by the NGO Forum for Environment and Development through the Norwegian NCP against a Norwegian based enterprise in 2005. The complaint alleged that

[103] *Ibid.*, Part II, Procedural Guidance, § 1.
[104] *Ibid.*, Part II, § 1, Implementation Procedures of the OECD Guidelines for Multinational Enterprises.
[105] *Ibid.*, Part II, Procedural Guidance, para C.3.
[106] *Ibid.*, § 1, para B.
[107] *Ibid.*, para C (d).
[108] *Ibid.*, para C.3.
[109] 'Corporate Accountability for Human Rights Abuses A Guide for Victims and NGOs on Recourse Mechanisms' (*International Federation for Human Rights [FIDH]* 2010). 351.
[110]Bernaz et al, (2011) *op. cit.*, p. 10.

the corporation had violated the provisions of chapter 2, paragraph 2 of OECD Guidelines by becoming involved in the activities of Guantanamo Bay, a prison based in Cuba that violated international human rights norms. The NCP addressed the issue through mediation between the NGO and the company. After the consultations, although the firm claimed that its offer was unsuccessful as the official reason, it desisted from the Guantanamo Bay project.[111]

As a mechanism to regulate the activities of TNCs, the OECD Guidelines have a number of drawbacks. In cases of human rights abuses perpetrated by TNCs, such issues are considered by the NCPs which are commonly formulated within government bodies which encourage international trade and investment, and have lessor concern over human rights.[112] Another major drawback for the NCPs is that where any given company is found to have breached the Guidelines, there exists no enforcement instrument established by the OECD states to guarantee implementation of the NCPs' recommendations.

2.4.3. International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO Tripartite *Declaration of Principles concerning Multinational Enterprises and Social Policy* is a soft law instrument adopted in 1977 by the Governing Body of the International Labour Organization after tripartite negotiations between workers' and employers' organisations and state governments. It was revised in 2000 and 2006.[113] The ILO Declaration sets out guidelines for governments, employers and employees organizations and

[111] OECD Watch (Newsletter, June 2006) 4 <http://www.oecdwatch.org/publications-en/Publication_3043> accessed 9 February 2016; Natalie L Bridgeman and David B Hunter, 'Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism' (2008) 20(2) Georgetown International Environmental Law Review 187, 214.

[112] Natalya S Pak and James P Nussbaumer, 'Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses' (Hertie School of Governance Working Papers, 45/2009) 13.

[113] ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006), 4th edn, ILO, (Hereinafter, ILO- Tripartite Declaration Declaration) <http://www.ilo.org/empent /Publications/WCMS _094 38 6/lang--en/index.htm> accessed 1 February 2016. In 1977, however, the ILO Governing Body adopted a tripartite (government, employer, worker) Declaration of Principles to guide MNCs and other stakeholders in the development of policies directed toward social progress.

TNCs on issues concerning employment, training, conditions of work and life, and industrial relations.[114]

In respect of human rights protection, the Declaration is limited to the area of labour standards. TNCs and other stakeholders are required to observe policies that promote equal opportunity; security of employment; collective bargaining in employment; wages and conditions of work; training; adequate health and safety standards; freedom of association; abolition of child labour; elimination of all forms of forced or compulsory labour; and policies that preclude arbitrary dismissal, strikebreaking, and other unfair practices.[115] In doing so, the Declaration calls for TNCs and other parties concerned not only to give due consideration to domestic laws and local practices but also to respect the *Universal Declaration of Human Rights* and other related international covenants,[116] the ILO's Constitution [117] as well as a wide-ranging number of ILO conventions and recommendations.[118] However, the Declaration is not legally binding as its established guidelines and recommendations are voluntary.[119] The Declaration does not contain any provision regarding monitoring and reporting to prove compliance with the ILO conventions and recommendations.[120] However, there is a procedure which requires TNCs and other stakeholders to respond to queries regarding application of the Declaration. The Declaration envisages periodic surveys in order to monitor the usage of the Declaration by TNCs and

[114] ILO, Tripartite Declaration (2006) *Ibid.,* para 7.
[115] *Ibid,*.
[116] Universal Declaration of Human Rights (1948), UN Doc A/810; International Covenant on Civil and Political Rights (1966), 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3.
[117] Constitution of the ILO (1919) 15 UNTS 35.
[118] ILO, Tripartite Declaration (2006) *Ibid.,* para 8; A list of such conventions and recommendations is appended to the declaration.
[119] ILO, Tripartite Declaration (2006) para 7; Marion Weschka, 'Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 ZaöRV 625, 646.
[120] De Jonge, (2011) *op. cit.*, p. 30; Murphy, (2005) *op. cit.*, p. 406.

other stakeholders.[121] A summary and an analysis of the replies obtained from members of the ILO Declarations are transmitted to the ILO Governing Body for action.[122] In cases of differences over the meaning/application of the Declaration, the parties may send a request to the ILO Governing Body for an interpretation of its provisions.[123] Although the disagreements evolve out of particular events, the procedure is non-judicial: it is a fact-finding process and 'does not grant for the public shaming of TNCs'.[124] Moreover, the procedure has been used in a manner that makes it almost worthless. For instance, in 1992, the *International Union of Food Agriculture, Hotel and Restaurant Catering Tobacco and Allied Workers' Association (IUF)* submitted an application to the Committee on Multinational Enterprises based on paragraphs 1, 2, 8 and 45 of the Declaration to determine whether or not PepsiCo company, a TNC functioning in Burma, had by selecting to operate in a country with serious human rights violations put itself in a situation where it could not properly observe the principles of the Declaration. The application was rejected by the Committee on the basis that it was critical and that it was not appropriate to link investment and human rights or the labour union record of a country. The Committee stated that the situations that applied to the procedure were those concerning labour standards or the interpretation of the Declaration.[125] Overall, the Declaration appears to provide some guidance for the behaviour of TNCs but its relevance has been undermined by its weak enforcement procedure. Therefore, in practice the Tripartite Declaration has had little effect.

[121] ILO, 'Procedure for the Examination of Disputes Concerning the Application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by Means of Interpretation of its Provisions' (adopted by the Governing Body of the International Labour Office at its 232nd Session (Geneva, March 1986); Amao, (2011) *op. cit.*, p. 30.
[122] ILO, 'Procedure for the Examination of Disputes Concerning the Application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by Means of Interpretation of its Provisions' (adopted by the Governing Body of the International Labour Office at its 232nd Session (Geneva, March 1986).
[123] ILO, 'Procedure for the Examination of Disputes Concerning the Application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by Means of Interpretation of its Provisions' (adopted by the Governing Body of the International Labour Office at its 232nd Session (Geneva, March 1986).
[124] Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171, 183.
[125] IUF Case [1992] GB.254/MNE/4/6.

2.4.4. The United Nations Global Compact (UNGC)

The next important effort at the UN level to devise a code with which to control the conduct of TNCs after the failure of the UNCTC was the United Nations Global Compact (UNGC or GC). The UNGC initiative was introduced in 1999 by UN Secretary-General Kofi Annan at the World Economic Forum in Davos, Switzerland and was formally launched in 2000.[126] Currently, it has about 12,000 formal participants from over 130 countries, making it the biggest non-binding corporate accountability initiative globally.[127] The GC is a voluntary 'soft law' policy initiative which enjoins not only businesses but also other actors including NGOs, organized labour, UN agencies and governments to respect and promote ten universally recognised principles in the areas of human rights, labour rights, the environment and corruption through a variety of instruments, such as dialogue, learning and projects.[128] While the UN *Draft Code on Transnational Corporations*, the ILO Tripartite Declaration and the OECD Guidelines discussed above are somewhat more detailed than the GC, its main aim should be viewed in another way as it calls upon TNCs to join in programmes that promote social and economic growth.[129]

The first two principles focus on human rights. Companies are required to support and respect the protection of internationally proclaimed human rights and ensure that they are not involved in activity that affects the enjoyment of human rights.[130] Notwithstanding, Principles 3 to 6 largely deal with labour rights by which participant corporations are required to uphold all core labour standards, including freedom of association and collective bargaining, abolition of forced and compulsory labour, elimination of child labour and

[126] United Nations, Global Compact Homepage.
[127] *Ibid*,.
[128] *Ibid*,.
[129] Murphy, (2005) *op. cit.*, p. 411.
[130] United Nations Global Compact, 'The Ten Principles of the UN Global Compact.

elimination of all forms of work discrimination.[131] Principles 7 to 9 seek to promote environmental rights, and Principle 10 focuses on corruption including extortion and bribery.[132] The ten principles enshrined in the text of the GC were drawn from the *Universal Declaration on Human Rights*,[133] the ILO 1998 *Declaration on Fundamental Principles and Rights at Work*,[134] the *Rio Declaration on Environment and Development*,[135] and the *UN Convention Against Corruption*.[136]

In order to participate in the GC all companies need to do is send a letter to the UN Secretary-General stating their commitment to the ten principles and to then evidence the implementation of the principles into their daily operations.[137] Further, the participating companies are expected to report publicly on their implementation in annual reports or similar public sites. Also, the progress of participating companies will be posted annually on the GC website.[138]The GC is a voluntary initiative and not a regulatory mechanism. It is not subject to any monitoring and enforcement of company compliance.[139] Even though participating companies must send a report to the UN which is then made public, there is no legal duty placed upon the companies to do so.[140] Instead of granting binding legal standing, the GC is thus 'designed to induce corporate change and to promote good corporate behaviour and stimulate innovative solutions and partnerships'.[141]

2.4.5. The United Nation Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

[131] *Ibid,*.
[132] *Ibid,*.
[133] Universal Declaration of Human Rights (1948) *op. cit,*.
[134] ILO, 'Declaration on Fundamental Principles and Rights at Work' (1998), 37 ILM 1233.
[135] Rio Declaration on Environment and Development, U.N. Conference on Environment and Development (1992), UN Doc A/CONF.151/5/Rev. 1, 31 ILM 874.
[136] United Nations Convention against Corruption (2003), UN Doc, A/58/422.
[137] De Jonge, (2011) *op. cit.*, p. 32.
[138] UN Global Compact, 'Frequently Asked Questions: How Do Companies Participate in the Global Compact?'.
[139] Murphy, (2005) 4 *op. cit.*, p. 412.
[140] *Ibid,*.
[141] UN Global Compact, 'Frequently Asked Questions, *Ibid.,;* Murphy, (2005) *op. cit.*, p. 412.

The *UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights* (UN Norms) were adopted in August 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights.[142] The Draft Norms assert that, although the responsibility for the promotion and protection of human rights lies primarily with the state, TNCs also have such obligations.[143] The Draft Norms then set out a broad range of human rights obligations which TNCs are required to observe. They include the right to equal opportunity and non-discriminatory treatment,[144] the right to security of persons,[145] specific rights of workers (in the areas of remuneration which ensures an adequate standard of living, the elimination of forced or child labour,[146] and collective bargaining), respect for national sovereignty (such as refraining from bribery as well as the respect for a whole range of economic, social and cultural rights and civil and political rights),[147] obligations with regard to consumer protection,[148] and obligations with regard to environmental protection, for instance complying with relevant national and international laws.[149]

The Draft Norms also attempt to go beyond a voluntary initiative in seeking to introduce an effective implementation procedure.[150] Within this, TNCs are required to incorporate, disseminate and implement the norms in their internal policies of operation and into their contracts with third parties such as suppliers, contractors, subcontractors' distributors and

[142] UNSUBCOM, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003), UN Doc E/CN.4/Sub.2/2003/12/Rev.2, by the UN Sub-Commission Resolution on the Promotion and Protection of Human Rights (2003), UN Doc, 2003/16, E/CN.4/Sub.2/L.11, 52.
[143] UN Draft Norms, (2003) *Ibid.*, para 1.
[144] *Ibid.*, para 2.
[145] *Ibid.*, para 3-4.
[146] *Ibid.*, para 5-9.
[147] *Ibid.*, para 10-12.
[148] *Ibid.*, para 13.
[149] *Ibid.*, para 14.
[150] Upendra Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 5 *Human Rights Law Review* 1, 5; David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, (2003) 97 *The American Journal of International Law* 901, 901.

licensees.[151] The Norms further assert that TNCs shall be subject to periodic reporting duties regarding measures taken for full implementation of the protections stated in the Norms.[152] Also, the norms require transparent monitoring and verification of TNC application of the norms by the UN as well as the use of both new and existing international and national monitoring instruments.[153] For their part, states are called upon to establish the necessary legal and administrative framework to ensure the implementing of the Norms.[154] In case of a violation of the UN Norms, TNCs would be required to provide victims with precise, effective and sufficient damages.[155]

While the Norms were well received by a lot of human rights groups, major international business organisations have strongly opposed it. Some of the criticism made include the fact that the binding approach embraced by the UN Norms could also be moving away from voluntary efforts and focusing on imposing simple minimum human rights standards on businesses.[156] Also, imposing on TNCs human rights standards directed to states might bring about diversion for states to circumvent their obligations and a dilution of sovereignty.[157] Unfortunately, due to vigorous criticism, The UN Norms were abandoned and never adopted by the United Nation General Assembly.[158] Ruggie of the Kennedy School of Government at Harvard University, who was appointed in 2005 by United Nations Secretary-General as the

[151] UN Draft Norms, (2003) *op. cit.*, para 15.
[152] *Ibid.*, para 15.
[153] *Ibid.*, para 16.
[154] *Ibid.*, para 17.
[155] *Ibid.*, para 18.
[156] Geoffrey Chandler, 'Joint Views of the International Chamber of Commerce (ICC) and International Organization of Employers (IOE) on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (*Business and Human Rights Resource Centre*, 1 April 2004) < https://business-humanrights.org/en/joint-views-of-the-ioe-icc-on-the-un-human-rights-norms-for-business > accessed 06 January 2017.
[157] Larry Catá Backer, 'On the Evolution of the United Nations Protect-Respect-Remedy Project: The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 *Santa Clara Journal of International Law* 37, 46; Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: A Requiem (2012) 17(1) *Deakin Law Review* 5, 32.
[158] UN Commission on Human Rights, 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' (2004), UN Doc E/CN.4/2004/L.11/Add.7; Murphy, (2005) *op. cit.*, p. 407-8; Keller, (2008) *op. cit.*, p. 16.

Special Representative of the (SRSG) on the issue of business and human rights,[159] in his 2006 interim report also criticised the Draft Norms as simply transferring existing state-centred international human rights laws to corporate actors, an assertion which has 'little authoritative basis in international law – hard, soft, or otherwise'.[160]

2.4.6. Ruggie's 2008 'Protect, Respect, Remedy' Framework and the Guiding Principles for the Implementation of the Framework 2011

In 2005, after the failure and the controversy generated by the Draft Norms, the UN Commission on Human Rights asked the UN Secretary-General to designate a Special Representative on the issue of human rights and transnational corporations and other business enterprises (hereinafter SRSG).[161] The SRSG was tasked with elucidating the role of states in their effective regulation of TNCs with respect to human rights along with corporate responsibility and accountability with regard to human rights. It was also to make appropriate recommendations of best practices to both states and TNCs.[162] This task was assigned to John Ruggie, one of the instigators of the GC and foremost critic of the Draft Norms.

Three years of broad mapping of international standards and practices and consultations with different stakeholders across the globe acted as the basis for the making of recommendations during the second phase.[163] In June 2008, Ruggie put forward a policy framework on business and human rights to the United Nations Human Rights Council. The framework is based on three pillars: the state's duty to protect against corporate human rights abuses, the corporate

[159] UNHRC, Human Rights and Transnational Corporations and other Business Enterprises (2005), UN Doc. E/CN.4 /2005 /L.87.
[160] UNHRC, John Ruggie, Interim Report of the UN Special Representative on Business and Human Rights (2006), UN Doc E /CN.4/2006/97 para 60; De Jonge, (2011) *op. cit.*, p. 41; David Kinley et al, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Company and Securities Law Journal* 30, 38.
[161] UNCHR, Human Rights and Transnational Corporations and Other Business Enterprises (2005), UN Doc E/CN.4/RES/2005/69.
[162] *Ibid.*, para 1(a), (b) and (e).
[163] Wouters and Chané, (2013) *op. cit.*, p. 15.

responsibility to respect human rights, and the need for effective remedies for victims of human rights abuses (Protect, Respect and Remedy Framework or Ruggie Framework).[164]

The first pillar of this Framework adopted the settled position in international law that states are the primary duty bearers to protect against human rights abuses perpetrated by third parties including TNCs.[165] The state is required to legislate, regulate, prevent, investigate, adjudicate, punish and redress human rights abuses.[166] This is based on the assumption that international human rights law by itself is not binding on private actors including businesses but that states, and particularly the states where TNCs are registered, are under an international obligation to ensure such corporations do not infringe human rights when operating locally or in a foreign country.[167] In spite of these restrictions in the duty of states to protect human rights, the Framework relied more upon this regulatory mechanism and failed to look to other more efficient accountability frameworks that do not suffer from the problem of a state-centred regulatory approach.[168]

In order to separate the responsibilities of states and corporations, the second pillar of the Framework focuses on the responsibility of companies to act with due diligence and respect all internationally recognised human rights. The Framework requires that businesses do not infringe on the rights of others and take necessary measures to address harms when they occur.[169] The SRSG explained that business enterprises currently lack obligations to respect human rights under international law but that, nevertheless, states have an obligation to

[164] UNHRC, Report of the United Nation Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Protect Respect and Remedy: A Framework for Business and Human Rights' (2008), A/HRC/8/5; Bernaz et al, (2011) *op. cit.*, p. 12; Nicola Jägers, 'UN Guiding Principles on Business and Human Rights Making Headway towards Real Corporate Accountability' (2011) 29(2) *Netherlands Quarterly of Human Rights* 159, 160; Michael K Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 *Human Rights Law Review* 133, 134.
[165] UNHRC, Protect Framework (2008).
[166] *Ibid,*.
[167] Bernaz et al, (2011) *op. cit.*, p. 12.
[168] Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9(2) European Company Law 101, 103.
[169] UNHRC, Responsibility Framework (2008).

ensure such businesses incorporated within their countries do not infringe human rights.[170] The corporate responsibility Framework is considered to be one of the first international initiatives that apply to companies with regard to their relationships with third parties wherever they operate either at home or abroad.[171] Finally, the third pillar requires both the states and companies to guarantee and ensure an effective remedial instrument for the victims of human rights abuses through judicial and non-judicial methods. [172] Although the effectiveness of recommended remedies remains uncertain, the pillar of the Framework is commendable for acknowledging different implementation instruments and schemes which ought to be engaged to make TNCs accountable for human rights violations.

Furthermore, in 2008, Ruggie's mandate was extended by the Human Rights Council to 'operationalise' the 'Protect, Respect and Remedy Framework'. Eventually, in 2011, he issued a final report entitled the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework ((hereinafter referred to as the "Guiding Principles", the "Ruggie Guidelines" or the "Ruggie Framework" interchangeably).[173] These three pillars are exhibited through 31 principles that featured the major obligations and responsibilities of governments and business enterprises and include precise recommendations for their operationalisation. Ruggie in his report clearly indicated that the aim of the Guiding Principles is not to establish any new human rights obligations for companies. He specifically stated that:

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards

[170] UNHRC, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Further Steps Towards the Operationalization of the "Protect, Respect and Remedy" Framework for Business and Human Rights' (2010), A/HRC/14/27.
[171] *Ibid,*.
[172] UNHRC, Respect Framework (2008) *op. cit,*.
[173] UNHRC, Report of the UN Special Representative of the Secretary-General on the issue of human rights and Transnational Corporations and Other Business enterprises; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (2011), A/HRC/17/ 31, (UN Guiding Principle).

> and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template.[174]

The Principles clearly set out that the responsibility does not evolve directly from international human rights law; it is an expected standard of behaviour that the society has for all businesses enterprises.[175] The Guiding Principles require business entities to ensure in the course of their operations that they respect internationally recognized human rights 'at a minimum', specifically those expressed in the International Bill of Human Rights and the International Labour Organization's *Declaration on Fundamental Principles and Rights at Work* which includes the eight ILO core Conventions.[176] In order to respect human rights, the Guiding Principles require TNCs to act with due diligence to recognise and avoid violating the rights of others in the course of their operations, and address the harms that do occur.[177] In order to achieve these objectives, the Guiding Principles recommended that companies adopt a policy statement to meet their responsibility to respect human rights which is communicated by internal and external experts, business associates and other relevant business stakeholders.[178] Where appropriate, a business enterprise should carry out human rights impact assessments and include the results in their business processes. In doing so, they should rely on both internal and external expertise and other potential relevant groups.[179] The Guiding Principles propose that businesses should 'track the effectiveness of their response and integrate on their human rights records'.[180]

Although the Framework and Guiding Principles are intended to apply to all businesses across the globe and not only TNCs as specified in the Principles (regardless of size), how an enterprise administers this responsibility will differ based on the size and structure of the

[174] UN Guiding Principle 14.
[175] *Ibid.*, Principle 11.
[176] *Ibid.*, Principle 13.
[177] *Ibid.*, Principle 14.
[178] *Ibid.*, Principle 15.
[179] *Ibid.*, Principle 17-19.
[180] *Ibid.*, Principle 20- 21.

operation as well as the magnitude of the human rights violations they commit.[181] According to the Principles, this responsibility ought to be 'ongoing, considering that the adverse human rights effect may evolve over time as the company's operations and operating system change'.[182]

On 16 June 2011, the Framework and the Guiding Principles were unanimously endorsed by the UNHRC. The endorsement is the first of its kind in that the UNHRC and its agencies had adopted a normative text on how the human rights responsibility of TNCs can be regulated in international law.[183] Meanwhile, Ruggie pointed out that the UNHRC's endorsement of the Guiding Principles marked 'the end of the beginning' of a long-standing process.[184] This endorsement has been regarded as an authoritative broad standard for avoiding and addressing corporate human rights violations arising out of their operations. Similarly, the OECD in its 2011 summit without delay took up and endorsed the Guiding Principles.[185] These are thus reflected in the 2011 OECD Guidelines revised edition.[186] In the same vein, the European Commission strongly supported this endorsement and stated that they would 'serve as an important reference for the EU's renewed policy on corporate social responsibility'.[187] Also, a number of individual TNCs have publicly articulated their support for the Guiding Principles. For instance, General Electric Company declared that the Guiding Principles 'helped to clarify the distinct interrelated roles and responsibilities of states and business entities in this area' and that they would 'no doubt serve as a lasting beacon for businesses entities seeking [to] grow their service and product offerings while respecting

[181] *Ibid.*, Principle 14.
[182] *Ibid.*, Principle 16.
[183] Jens Martens, 'Corporate Influence on the Business and Human Rights Agenda of the United Nations' (2014) *Working Paper, Brot für die Welt/Global Policy Forum/MISEREOR Aachen/Berlin/Bonn/New York*, 18.
[184] John G Ruggie, 'A UN Business and Human Rights Treaty?' (*Harvard John F Kennedy School of Government, Issues Brief, 28 January* 2014) 5.
[185] Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48(1) *Texas International Law Journal* 34, 49-50; Michael K Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 *Human Rights Law Review* 133, 143.
[186] OECD Guidelines (2011) *Ibid.*, Part I, § II.
[187] Blitt, (2012) *op. cit*,. p.51; Addo (2014), *op. cit*,. p.141.

human rights'.[188] For its part, the Coca-Cola Company 'strongly endorsed' the Guiding Principles and called them 'a foundation and flexible framework for companies like ours'.[189] The Council in its resolution on the Guiding Principles also established two bodies within the UN: a Working Group and a Forum on Business and Human Rights.[190] The Working Group is charged with the mandate of promoting the effectiveness and inclusive dissemination and implementation exclusively of the Guiding Principles globally through capacity building, information exchange, country visits, and regular discussions with all relevant stakeholders.[191] The Working Group comprises five independent professionals of balanced geographical representation appointed by the Council for a three year term. The Forum on Business and Human Rights should, under the guidance of the Working Group, deliberate over developments and difficulties in the implementation of the Guiding Principles and promote dialogue and support on issues associated with business and human rights, including challenges encountered in specific sectors, place of operation or in relation to particular rights or groups as well as recognising good practices.[192]

In recent times, the Working Group has tried to inspire states to consider their duty to the 'Protect and Remedy' Framework under the Guiding Principles more broadly by engaging in the adoption of National Action Plans (NAPs).[193] The UN Working Group 'strongly inspires all government to develop, legislate and update a NAP as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights'.[194] These NAPs are important to provide guidance for all States to enunciate priorities and organise the

[188] Martens, (2014) *op. cit*,. p.16.
[189] *Ibid*,.
[190] UNHRC, Resolution 17/4, 'Human Rights and Transnational Corporations and other Business Enterprises' (2011), A/HRC/RES/17/4, paras 6 and 12.
[191] *Ibid.*, paras 6.
[192] *Ibid.*, paras 12.
[193] UN Office of the High Commissioner of Human Rights (OHCHR), 'State National Action Plans; National Action Plans, Business and Human Rights Resource Center' <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> accessed 11 February 2016.
[194] *Ibid*,.

implementation of the Guiding Principles, and to effectively exercise due diligence in order to promote their obligation to protect human rights. The first countries to produce such action plans were the United Kingdom and the Netherlands in 2013.[195] In both countries, the development of the NAP was allocated to the foreign ministries, a sign that the attention was both on business management and outbound behaviour. Several other countries that produced their own NAP were Denmark, Finland, Italy, Spain, Lithuania, Sweden, Norway and Colombia.[196] Some states, including Germany and the USA, are in the process of developing their NAPs.

A number of countries are also in the process of creating their NAP or committed to doing so, comprising Argentina, Azerbaijan, Belgium, Chile, Czech Republic, Guatemala, Greece, Ireland, Jordan, Malaysia, Mauritius, Mexico, Mozambique, Myanmar, Portugal, Slovenia and Switzerland.[197] Other states in which either the NHRI or civil society group are calling for the establishment of a NAP include Ghana, Indonesia, Kazakhstan, Nigeria, Republic of Korea, South Africa, Tanzania and the Philippines.[198]

From the above discussion, it can be argued that the UNGPs offers a possibility for business enterprises to operate in a socially responsible way by remedying as well as regarding the effect of their activities on wider stakeholders. It is clear from the title that the Guiding Principles do not seek to establish a binding international legal instrument or enforce obligations on companies.[199] The drawbacks and non-binding legal nature of the Guiding Principles have been widely criticised by many human rights NGOs for not doing enough to adequately regulate the activities of TNCs that violate human rights. For instance, the FIDH had in fact called on the UNHRC not to endorse the UN Guiding Principles because they did not perceive them as an appropriate instrument for the protection against corporate human

[195] *Ibid,.*
[196] *Ibid.,*
[197] *Ibid,.*
[198] *Ibid,.*
[199] UN Guiding Principles.

rights violations.[200] They are of the view that the 'road towards accountability is still a long way ahead'; the Guiding Principles has not provided to the means to advance towards a legally binding international instrument to control TNCs but instead largely depends on voluntary measures by companies.[201] According to Human Rights Watch (HRW), the UNGP has failed to create an authoritative global corporate responsibility standard as proposed by some.[202] Instead they offer in respect of a 'sliding scale' based on corporate size and their location.[203] In the UNGP, it states that 'one size does not fit all when it comes to means for implementation'.[204] The NGO also accused the UNHRC of ignoring calls from many NGOs for the establishment of an instrument that would ensure the Guiding Principles are actually put into operation by companies and governments. HRW further stated that the endorsement of the Guiding Principles by the UNHRC signified nothing more than an 'endorsement [of] the status quo: a world where companies are encouraged, but not obliged, to respect human rights'.[205]

Similarly, Amnesty International have condemned the Guiding Principles for failing to effectively address abusive business practices, and proposed mandating rather than only suggesting acting with due diligence, thus effectively avoiding and remedying human rights abuses when they do occur both territorially and extraterritorially through judicial and non-

[200] 'UN Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies' (*International Federation for Human Rights [FIDH]*,17 June 2011) <http://www.fidh.org/UN-Human-Rights-Counciladopts- Guiding-Principles> accessed 11 February 2016. The International Federation for Human Rights (FIDH) is an umbrella group representing over 150 human rights groups across the world.

[201] *Ibid*,.

[202] 'United Nation Human Rights Council: Weak Stance on Business Standards' (*Human Rights Watch,* 16 June 2011) <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standard> accessed 30 March 2015.

[203] Blitt, (2012) *op. cit*,. p. 43.

[204] UN Guiding Principles, Introduction to the Guiding Principles. 'While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises.' para 15.

[205] 'United Nation Human Rights Council: Weak Stance on Business Standards' (*Human Rights Watch,* 16 June 2011).

judicial means.[206] Amnesty International also blamed the Council for not providing its Working Group on business and human rights with the mandate to assess and evaluate the efficacy of implementing the 'Protect, Respect and Remedy' Framework and the Guiding Principles. According to Amnesty, without a robust mandate the Working Group will not be able to take appropriate measures to ensure greater transparency and improved legal protections.[207] More so, the *UN Draft Code on Transnational Corporations*, the *OECD Guidelines*, the *ILO Declaration, the GC* and *The UN Draft Norms* cannot be relied upon as valid instruments to impose human rights responsibility on TNCs. Also, the Draft UN Code and UN Norms were all abandoned, and this has created a vacuum regarding international initiatives to regulate the activities of TNC.[208]They are generally not binding and they involve only voluntary recommendations. Moreover, their capacity as soft-law to regulate the activities of TNCs for good corporate citizenship has not been utilised as there is no provision made under all these mechanisms to precisely criticise TNCs that operate outside of the regulatory framework. The next section evaluates the current international treaty initiative to regulate the activities of TNCs to respect and protect human rights.

2.5. Current Treaty Initiative

The call for a binding international treaty to regulate TNCs has been heard since the 1970s.[209] However, real efforts to do this have only been apparent since 1990 with the adoption of the proposed UN Draft Code of Conduct for Transnational Corporations[210] which was followed

[206] Public Statement, 'Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses' (*Amnesty International*, 2011) 2.
[207] *Ibid*,.
[208] David Kinley & Rachel Chambers 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) *Human Rights Law Review* 447, 456.
[209] Keller, (2008) *op. cit*,. p. 8; UN ECOSOC, 'Proposed Text of the Draft Code (1990) *op. cit*,.; UNSUBCOM, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) *op. cit*,.
[210] UN ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1990) *op. cit*,.

by several other unsuccessful efforts.[211] In recent times the attempt to hold TNCs accountable for abuses of human rights has taken on a new dimension. Since Ecuador's renewed effort, heated debates between advocates and critics of a binding treaty have dominated discussion on business and human rights. On 26 June 2014, the UNHRC adopted a proposal submitted by Ecuador asking for the creation of an open-ended Intergovernmental Working Group (IWG) within the UNHRC to create a treaty that imposes an international legal obligation on TNCs and other business enterprises with regard to human rights.[212] As specified by its name, the mandate of the IWG is to establish a binding international legal framework to control the activities of TNCs and other business enterprises with regard to human rights and to grant necessary protection, justice and effective remedies for the victims of human rights abuses.[213] The UNHRC accepted a second proposal put forward by Norway to the existing Working Group (WG) which was supported by forty-four co-sponsors from all over of the world. Norway's proposal mandated the existing WG to discuss with member states how victims of corporate human rights abuses can get access to effective remedies through judicial and non judicial means and to present a report at the Council's 32nd session in June 2016.[214]

In addition to Ecuador, the resolution was co-sponsored by South Africa, Bolivia, Cuba and Venezuela. Member states of the UNHRC were also divided on the resolution to create an IWG for a business and human rights treaty: twenty states voted for it, fourteen voted against while thirteen states abstained from voting.[215] A greater number of the African Group voted in favour as did the Arab Group, China, India, Indonesia, Pakistan, Philippines, Sri Lanka,

[211] UNSUBCOM, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) *op. cit,*.
[212] Doug Cassel, 'Treaty Process Gets Underway: Whoever Said It Would Be Easy?' (*Business & Human Rights Resource Centre* 12 July 2015) <http://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy> accessed 18 March 2016.
[213] UNHRC, Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights (2014), A/HRC/ 26/L.22/Rev.1
[214] 'Binding Treaty, UN Human Rights Council Sessions' (*Business and Human Rights Resource Centre*). <http://business-humanrights.org/en/binding-treaty> accessed 11 February 2016.
[215] *Ibid,*.

Kyrgyzstan, Namibia, Nicaragua, Morocco, Peru, Russia and Vietnam.[216] The Ecuadorian proposal has also been endorsed by about 600 non-governmental organizations (NGOs) from international and regional organizations and social movements which formed a 'treaty alliance', referring to itself as a 'global movement for a binding treaty'. The alliance affirmed that: 'Now is the time to join the chorus of global civil society calling for new strong international law and send the right message that powerful corporations must not violate human rights'.[217]

Although some NGOs criticised the expulsion of domestic companies' envoys of the civil society alliance were euphoric.[218] Apart from the sponsors, all Latin American countries including Brazil abstained from the resolution. States, including the EU Members, also criticised the exclusion of domestic companies.[219] South Korea and Japan also voted against the resolution and even China who endorsed the resolution did not provide strong reason for its support.[220] China's voted based on the "understanding": that the creation of treaty on business and human rights is a complicated issue. China added that variations subsist among countries regarding their legal, economic, and enterprise system. Also, their historical and cultural background differs. China also emphasised that is essential to carry out a comprehensive survey of the negotiation process it and to be gradual, broad, and open to reaching consensus.[221]

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[216] *Ibid,*.

[217] *Ibid,*. Some of the groups involved include: CETIM, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans International, Friends of the Earth International and the Transnational Institute,CIDSE, IBFAN-GIFA, Indonesia Global Justice, International Commission of Jurists, Legal Resources Center, PAN AP, Transnational Institute, TUCA.

[218] It is notable that the foremost international human rights organizations including Amnesty and Human Rights Watch did not join the alliance, reflecting doubts about the timing and efficacy of the Ecuador proposal.

[219] 'Binding Treaty, UN Human Rights Council Sessions' *Ibid,*.

[220] Vote on Draft Resolution -Elaboration of an international legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" submitted by Ecuador, South Africa/HRC/26/L.22/Rev.1 Vote Item:3 - 37th Meeting 26th Regular Session Human Rights Council (26 Jun 2014) The original speech of Chinese at 00:22:15-00:24:00. < http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-humanrightscouncil/3643474571001?term=human%20rights%20 council&sort=date.#full-text

[221] Vote on Draft Resolution -Elaboration of an international legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" submitted by Ecuador, South

Nevertheless, some advocates for a business and human rights treaty were of the view that a binding international legal instrument would ensure uniform application of human rights norms across jurisdictions for all TNCs, regardless of where they operate.[222] This level playing field could improve legal predictability and stability over the huge deviations in the enforcement of human rights standards across jurisdictions. Furthermore, those pursuing a treaty also articulated their displeasure over the persistent and widespread corporate human rights violations, the lack of effective prevention and remedy for the victims of such abuses and the inability to hold them accountable.[223] Bernaz, though not in support of a treaty on business and human rights and who regarded the treaty as 'necessary but insufficient in itself', argued for the inclusion of corporate criminal liability for international crimes in the treaty because the larger part of corporate human rights violations perpetrated are not considered international crimes but need to be urgently addressed.[224]

Some have proposed a treaty on business and human rights that could compel states to discharge their duty to protect people against corporate human rights violations along with introducing sanctions and legal liability for companies that fail to act responsibly.[225] A treaty could explicitly set out what the state duty to protect entails in the framework of corporate operations including with respect to the liability of the parent company. They argued that the

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Africa/HRC/26/L.22/Rev.1 Vote Item:3 - 37th Meeting 26th Regular Session Human Rights Council (26 Jun 2014) The original speech of Chinese at 00:22:15-00:24:00.

[222] Surya Deva, 'The Human Rights Obligations of Business: Reimagining the Treaty Business' (Workshop on Human Rights and Transnational Corporations, Geneva, 11-12 March 2014) 6; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016)1(2) *Business and Human Rights Journal* 203, 208.

[223] 'Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and the Cons' Workshop and Public Debate, Notre Dame Law School (*Business and Human Rights Resource Centre*, 14 May 2014).

[224] Nadia Bernaz, 'Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient' (*Business and Human Rights Resource Centre*, 21 October 2015) <http://business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-rights-treaty-necessary-but-insufficient> accessed 21 March 2016.

[225]Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016)1(1) *Business and Human Rights Journal, Amnesty International* 41, 44; Amnesty International, 'Amnesty International Urges Government to Participate in "Constructively and in Good Faith" in Inter-govt. Working Group on Proposed Binding Treaty' (*Business and Human Rights Resource Centre* 22 June 2015) <http://business-humanrights.org/en/amnesty-intl-urges-govts-to-participate-constructively-and-in-good-faith-in-intergovt-working-group-on-proposed-binding-treaty> accessed 21 March 2016.

adoption of the UNGPs in 2011 by the UNHRC was a major achievement in the long-standing battle over business and human rights but in reality governments and companies have not done much to implement the Guiding Principles and corporate lobbyists have tried to ensure that the Principles remain purely voluntary.[226] Generally, they have not done enough to promote ideas such as human rights due diligence in domestic law nor have they taken adequate steps to confiscate the existing, and now renowned, obstacles to remedy.[227]

A treaty should oblige both home states and host states to enact legislation to make corporate human rights due diligence mandatory along with introducing measures to hold companies accountable if they fail to act responsibly – the consequence of which would oblige companies to exercise due diligence in respect of those operations. For example, in the case of Shell's Bodo oil spill (which will be discussed later in the study) which devastated thousands of livelihoods in the Niger Delta region of Nigeria, a treaty might have required Nigeria and Shell's home states to ensure more robust human rights due diligence from Shell at first instance.[228]

Nonetheless, some have argued against a binding legal framework on business and human rights, stating that a treaty may be unnecessary and superfluous. Esdaile, although supporting the need to ensure corporate actors are legally accountable for human rights violations they committed in the course of their operations, has strongly opposed a binding treaty on business and human rights. He has expressed doubts over the standpoint of TNCs as well as states and predicted the negative effects of negotiating a treaty on business and human rights. Esdaile has argued in favour of the political and legal possibility of binding legal rules on business

[226] Gabriela Quijano, 'Parent Company Liability: Could Discussions Around a Treaty Prompt States to do What They Have So Far Resisted?' (Business and Human Rights Resource Centre) <http://business-humanrights.org/en/parent-company-liability-could-discussions-around-a-treaty-prompt-states-to-do-what-they-have-so-far-resisted> accessed 21 March 2016.

[227] *Ibid*,.

[228] Salil Shetty, 'Treaty on Business and Human Rights is Necessary to Make Business Live up to their Responsibility says Amnesty International' (*Business and Human Right Resource Centre* 22 January 2015) <http://business-humanrights.org/en/treaty-on-business-human-rights-is-necessary-to-make-businesses-live-up-to-their-responsibilities-says-amnesty-intl> accessed 15 March 2015; Salis Shetty, 'Corporation have Rights, Now we Need a Global Treaty on their Responsibility' *The Guardian* (UK, 21 January 2015).

and human rights. He has pointed out that a treaty on business and human rights is politically unlikely with the enormous economic power TNCs have over states. He has stated that developing countries which rely heavily on investment by TNCs often do not have effective systems and institutions to regulate TNCs, and developed countries have in the past shown little or no interest in a binding treaty that would upset TNCs which are, in many instances, headquartered in their territory.[229] He has also contended that a treaty on business and human rights would not be legally feasible considering the broad range of rights it must try to cover. Esdaile has argued that any treaty on business and human rights binding states would need the support of the UNHRC and it is very possible that many state envoys to the HRC would not support the idea. Even TNCs themselves will lobby against any legally binding and enforceable rule that would affect their business operations. In the same way, he projected that irrespective of its prospect, initiating a treaty negotiation process would 'face the very real possibility of ending up with a watered-down set of rules, a treaty with few ratifications, and in the process create much hostility to the prospect of binding rules on business and human rights'.[230] Esdaile states that while the Guiding Principles do not offer an exclusive solution, the existing patchwork of rights and remedies could be used prudently on both the national and international stage in order to hold TNCs accountable for human rights violations they committed in the course of their operations, including the right to effective remedy.[231]

Furthermore, Bernaz, who perceived the Guiding Principles to be 'a formidable instrument to induce change', is largely opposed to a treaty on business and human rights.[232] Bernaz based

[229] Chris Esdaile, 'Towards a Legally Binding Treaty on Human Rights and Multinational Companies' (Leigh Day, December 2013) <https://www.leighday.co.uk/Blog/December-2013-(1)/Towards-a-legally-binding-treaty-on-human-rights> accessed 31 March 2015.
[230] *Ibid,.*
[231] *Ibid,.*
[232] Nadia Bernaz, 'Does the World Need a Business and Human Rights Treaty?' (*Business and Human Rights Resource Centre* 28 May 2014) <http://business-humanrights.org/en/binding-treaty/event-by-business-human-rights-resource-centre-univ-of-notre-dame-may-2014> accessed 12 February 2016.

her argument on two reasons. She first contended that business and human rights conceal a very extensive ground that touches upon different areas of law operating within a complex framework. She pointed out that adopting a business and human rights treaty setting out principles that do not recognise this complexity might be at variance with the existing international legal regime and thus difficult to implement.[233] Secondly, Bernaz expressed her concern on the effectiveness and feasibility of a business and human rights treaty regarding some complex legal issues such as the duty-bearers, limit and extraterritoriality. She highlighted that a treaty on business and human rights would apparently follow the orthodox international law paradigm, a device to be ratified by the states, by which they are required to effect changes in their domestic law and practices and possibly monitor its implementation.

Bernaz also maintained that a treaty may contain a quasi-judicial instrument through which victims of corporate human rights violations could lodge a claim against a given state for failing to regulate their companies.[234] She argued that instituting an action directly against businesses is unlikely using treaty process and can create a formidable obstacle for the victims and NGOs. Regarding the way forward, Bernaz recommended amending the Rome Statute of the International Criminal Court to enable the exercise of jurisdiction over business enterprises. In the long run, rather than negotiating a treaty on business and human rights, Bernaz proposed manoeuvring within the existing international human rights law and focusing more deeply on state duty to regulate operations of businesses at both a domestic and international level through the adoption of laws with extraterritorial effects as stated by Ruggie in his commentary of the UNGP. [235]

Ultimately, creating a binding treaty on business and human rights might not mean asking corporate actors to join a league that has been the sole preserve of States, given that treaty

[233] *Ibid,.*
[234] *Ibid,.*
[235] *Ibid,.*; See also, Nadia Bernaz, 'American Society of International Law Business and Human Rights Roundtable, Washington DC' (Rights *as Usual*, 31 March 2016). <http://rightsasusual.com/> accessed 20 February 2016.

could focus on the responsibility of States rather than creating direct obligations for companies.[236] This innovation would create a huge problem for the international human rights legal framework since international human rights law does not impose obligations directly on private actors including businesses. Although there has been some success under international investment law, for the most part previous efforts to impose obligations on companies have proven abortive.[237] It is of some concern as to how the global community will now make a binding instrument on business and human rights succeed in the paradigm shift. Moreover, it is important to determine whether the international legal institutions have jurisdiction to make TNCs directly liable for the misconduct they commit. Indeed, currently it is not just the ICC and the ICJ that lack jurisdiction over TNCs, even regional human right courts and treaty bodies such as the UNHRC which is responsible for the promotion and protection of human rights across the world are also ill-equipped to control, supervise and ensure the TNCs are accountable for breaches of human rights.

2.6. Conclusion

It has been contended in this chapter that the investment made by TNCs can promote economic and technological development, enhancing better enjoyment of human rights and living conditions in a given society. Then again, TNCs through their business operations have the ability to commit serious human rights violation.[238]The existing means of imposing accountability on TNCs for their misconduct are defective.

Under international human rights law, the state bears the 'duty to protect' its citizens against human rights violation by third parties including TNCs, whereby they are required to take measures to regulate and control the private sphere either through judicial or non-judicial

[236] International Covenant on Civil and Political Rights (1966) *op. cit*,.; Maastricht Guidelines (1997) op. *cit*,. para 18.
[237] *Reparations for Injuries Suffered in the Service of the United Nations* [1949] Advisory Opinion ICJ 174, 179; *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ (ser A) No 13; *Barcelona Traction, Light and Power Co (Second Phase) (Belgium v Spain)* [1970] ICJ Rep 3.
[238] Kinley and Tadaki, (2004) *op. cit*,. p. 933; also, Olowu, (2009) *op. cit*,. p. 269.

means. [239] When such violations occur states are required to act with due diligence to investigate, prosecute and punish such actions and provide effective remedy for the victims.[240] However, national legal regimes have often failed to effectively regulate the activities of TNCs that operate within their jurisdiction. Also the resort to international law has faced difficulties that attracted extensive debates concerning the international legal subjectivity of TNCs, preoccupied with the question of the rights and obligations of entities under international law. Nevertheless, TNCs are still not recognised as subjects of international law. As has been illustrated, international law increasingly grants certain rights and duties upon companies thereby giving them international legal personality through the state. Conversely, TNCs are neither bound by international law nor, have binding obligations under international human rights law.

Thus far, in an attempt to regulate the behaviour of TNCs an array of soft law instruments such as UN Draft Code, the OECD Guidelines, the ILO Declaration, the Global Compact and the UN Draft Norms was created at the international level. Though the instruments are commendable, their voluntary and non-binding nature is a severe drawback. The UN Guiding Principles offers some guidance on what States and TNCs can do in the framework of business to impacts and human rights. However, they are not legally binding, their implementation and enforcement largely depends on the respective states and TNCs. Ruggie himself recognised that there is need for more improvements to be made on the UNGP particularly in aiming specific 'governance gaps', that will ensure TNCs are hold accountable for human rights abuses they perpetrated.[241] Given the complexity of TNCs and the range of possible national approaches, the success of the current call for a legally binding treaty on

[239] Chirwa, (2004) *op. cit,*. p. 11; Zerk, (2006) *op. cit,*. p. 84; Rivera, (2015) *op. cit,*. p. 191.
[240] UN Guiding Principles *op. cit,*.
[241] *Ibid,*.

business and human rights issues is an unlikely prospect at present.[242] In an informal discussions leading up to the vote, Ecuador itself, predicted that a treaty on business and human rights could take a decade or more. Having examined the broad and mostly non-binding attempts art articulating standards to regular the activities of corporations and their impact of human rights, the next few chapters will address the role of judicial mechanisms in resolving cases of human rights abuses by TNCs.

[242] Jennifer Zerk, 'A Discussion Paper on What Changes in the Law Need to Happen' (The Corporate Responsibility (CORE) Coalition 2007) 31.

CHAPTER 3
THE ROLE OF INTERNATIONAL AND REGIONAL COURTS AND BODIES IN ADJUDICATING HUMAN RIGHTS ABUSES BY TRANSNATIONAL CORPORATIONS

3.1. Introduction

The ongoing debate on corporate accountability for human rights violations has been at the heart of the discussion about businesses and their relation to international human rights law over the past few decades.[1] This is largely because human rights violations by TNCs have taken place frequently over the last few years, and when such abuses are committed the victims have the right under international law to seek remedies and judicial redress.[2] The existing accountability instruments,[3] which have taken the form of 'soft-law' and best practices, are purely voluntary and their purpose is to encourage rather than to oblige TNCs to promote and protect the recognised principles of human rights law.[4] Their voluntary nature which is legally not binding has been seen as one of their biggest flaws.[5]

Traditionally, international law recognises only states as the primary duty-bearers to prevent and punish third party interference with the enjoyment of human rights and provide remedies

[1] Olufemi Amao, 'The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations' (2008) 5(12*) The International Journal of Human Rights* 761, 761.

[2] Universal Declaration of Human Rights (1948), UN Doc A/810, art 8; UNGA, 'United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law' (2006), UN Doc A/RES/60/147 (Principles and Guidelines on Reparation).

[3] ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1990), UN Doc E/1990/94; OECD, Declaration and Decisions on International Investment and Multinational Enterprises (2011) (OECD Guidelines); ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006) 4th edn, ILO, (ILO-Declaration); United Nations Global Compact, 'The Ten Principles of the UN Global Compact; UNSUBCOM, Draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003), E/CN.4/Sub.2/2003/12/Rev.2., by the UNSUBCOM, Resolution on the Promotion and Protection of Human Rights (2003), 2003/16, E/CN.4/Sub.2/L.11, 52; UNHRC, Report of the UN Special Representative of the Secretary-General on the issue of human rights and Transnational Corporations and Other Business enterprises; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (2011), A/HRC/17/ 31 (UN Guiding Principle).

[4] Wifa Eddy, 'What Are the Human Rights Responsibilities of Transnational Corporations' 1 <https://www.academia.edu/3795584/WHAT_ARE_THE_HUMAN_RIGHTS_RESPONSIBILTIES_OF_TRANSNATIONAL_CORPORATIONS> accessed 26 September 2015.

[5] See generally, David Kinley et al, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25(1) *Company and Securities Law Journal* 30, 30.

to victims.[6] Failure to take the required steps to realise these obligations may amount to a violation of state treaty obligations.[7] There remains a gap, as in other areas of public international law, in the provision for effective sanctions to punish states for non-compliance. In view of this, states have put in place various means and techniques to ensure access to remedies and justice for victims. One of the most valuable ways to seek a remedy is through judicial bodies. The role of the courts in providing remedies for victims of corporate human rights abuses remains important. Courts achieve this by enlisting the assistance of the state's existing human rights jurisdiction in order to protect those human rights violated by TNCs.

Given the essential role of the courts in enforcing human rights standards against TNCs, examining the use of litigation by victims of corporate human rights abuses is important.[8] The main objectives of this chapter are to evaluate (i) whether the courts have a role to play in holding TNCs accountable for human rights violations that they have committed in the course of their operations; and (ii) the manner in which these entities have been dealt with by international, and regional judicial bodies. In terms of international judicial bodies, the main thrust of the chapter will be on the International Court of Justice (ICJ) and the International Criminal Court (ICC). At the regional level, the study is limited to the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), and the Inter-American human rights system. The last part of the chapter will examine this subject with respect to the African human rights system. While the above mention judicial bodies has frequently address the matter and have never held companies responsible directly for human rights violations

[6] John Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries' (2007) UN Doc A/HRC/4/35/Add.1, para 9.

[7] *Ibid*,.

[8] See, for example, *Kiobel v Royal Dutch Petroleum* [2013] 133 S Ct 1659; *Doe 1 v Nestle USA Inc* [9th Cir 2014] 766 F 3d 1013; *Wiwa v Royal Dutch Petroleum Co* [2000] 226 F.3d 88, C.A.2 (N.Y.); *Sarei v Rio Tinto PLC* [2007] 487 F.3d 1193, C.A.9 (Cal.); *Doe I v Unocal Corp.* [2002] 395 F.3d.932, C.A.9 (Cal.).

Although these international and regional judicial bodies have been confronted with some cases where the perpetrator of human rights violations was a non-state actor, they have never held companies directly responsible. However, the focus is on the above mention judicial bodies because they create a legal framework that other courts may be able to improve further in holding TNCs liable for human rights violations they committed in the course of their operations. Also, in series of their decisions, their emerging approach to state responsibility to protect its people from human rights violations by private actors could inspire the developing host countries to be more efficient to prevent and punish human rights abuses by TNCs. Beside some of these decisions condemning corporate human rights violations would mark a significant step on the path toward corporate accountability. The overarching aim of this chapter is to assess whether international and regional courts present an appropriate forum through which victims of human rights violations by TNCs may seek redress, either individually, collectively or through a state or other interlocutors. This analysis will be informed by an evaluation of whether the various judicial authorities cited have been successful in at least addressing if not successfully curbing alleged and legally determined human rights violations perpetrated by TNCs within their respective jurisdictional ambits.

3.2. Bringing Human Rights Abuses by Transnational Corporations under the Jurisdiction of the International Courts and Bodies of Justice (ICJ)

This section will assess the role played by international judicial mechanisms in holding TNCs accountable for human rights violations that they committed in the course of their operations and the manner in which these entities have been dealt with. As indicated earlier, it will focus on the practice of the ICJ and the ICC and the International Criminal Tribunals.

3.2.1. International Court of Justice

The ICJ, also known as the World Court, is situated in The Hague, Netherlands, and is the primary judicial body of the United Nations (UN). It was created in 1945 by the UN Charter and began operating in 1956 as the successor to the Permanent Court of International Justice.[9] The Court comprises 15 judges elected for nine year terms by the UN General Assembly (UNGA) and the Security Council (UNSC).[10] The jurisdiction of the ICJ extends to contentious issues and advisory opinions. In terms of its contentious jurisdiction, the Court hears legal matters submitted to it by states and settles them in accordance with international law.[11] The Court settles international legal matters regarding the interpretation of treaties, disagreements on questions of law, breaches of international obligations, and the nature and extent of damages suffered as a result of breaches of an international obligation.[12] Only Member States may be parties in disputes before the ICJ although a non-Member State may become a party before the Court if it assents to such an issue on conditions to be effected by the UNGA upon the recommendation of the UNSC.[13]

Thus, individuals, corporations, NGOs or other private entities cannot become a party or appear before the Court.[14] The Court's advisory jurisdiction is restricted to offering opinions on legal matters at the request of the UNGA, the UNSC and other agencies of the UN that have been given such a right.[15] Inevitably, the advisory jurisdiction has also been used to seek legal opinions on matters which could be considered of an 'inter-state' nature.[16] In these circumstances, the Court is expected to demonstrate a sound understanding of relevant legal

[9] The International Court of Justice was brought into being by the Charter of the United Nations (Articles 7(1), 36(3), and 92-96), and by the Statute of the Court which was made an integral part of the Charter; both of which were signed in San Francisco on 26 June 1945.
[10] Statute of the International Court of Justice (1945), 39 AJIL Supp. 215, art 2.
[11] ICJ Statute, (1945) *Ibid.*, art 36.
[12] *Ibid.*, art 36(2).
[13] Charter of the United Nations and Statute of the International Court of Justice (1945), 59 Stat 1039, art 93; ICJ Statute, (1945) *Ibid.*, art 35.
[14] International Court of Justice <http://www.icj cij.org/jurisdiction/index.php?p1=5&p2=1> accessed 6 November 2015.
[15] ICJ Statute, (1945) *Ibid.*, art 65; UN Charter, (1945) *Ibid.*, art 96.
[16] *Western Sahara* [1975] Advisory Opinion ICJ Rep 12.

authorities. Current thought within the legal community on the role of the ICJ in holding TNCs accountable for human rights abuses that they have committed in the course of their operations is explored below.[17]

3.2.1. 1. ICJ on Human Rights and TNCs

Although the ICJ is not a court of human rights, its mandate inevitably means that it has been called upon to adjudge and provide meaningful advisory opinions on issues cognate to human rights.[18] As Higgins observed, 'notwithstanding that the ICJ is not a human rights court as such, it is fully engaged in the judicial protection of human rights'.[19] In its 1996 advisory opinion on the *Threat or Use of Nuclear Weapons*, it was vigorously argued by the UNGA that the threat or use of nuclear weapons constituted a violation of the right not to be arbitrarily deprived of life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR).[20] Although the Court's opinion on the issue is not very exhaustive or penetrating, it is remarkable because the ICJ established that Article 6 of the Covenant applied in wartime but found that what is arbitrary must be determined through the applicable *lex specialis* – the laws of armed conflict.[21] Also, in the *Wall* advisory opinion, the ICJ found Israel to have breached its obligation to respect the right to self-determination of the Palestinians, as well as the norms of international humanitarian law, and violated Article 12(1)

[17] Ralph Wilde, 'The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12(4) *Chinese Journal of International Law* 639, 640.
[18] Stephen Schwebel, 'Human Rights in the World Court' (1991) 24 *Vanderbilt Journal of Transnational Law* 945; Stephen Schwebel, 'The Treatment of Human Rights and of Aliens in the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 327; Joshua Castellino, 'Territorial Integrity and the Right to Self-Determination: An Examination of the Conceptual Tools' (2008) 33(2) *Brooklyn Journal of International Law* 503, 538.
[19] Rosalyn Higgins, 'The International Court of Justice and Human Rights' in Karen Wellens (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Martins Nijhoff 1998) 703.
[20] *Legality of the Threat or Use of Nuclear Weapons* [1996] Advisory Opinion, ICJ Rep 239.
[21] *Ibid,.*

of the ICCPR, the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC).[22]

Similarly, in its contentious proceedings the ICJ had the opportunity to directly enforce human rights law through the finding of violations.[23] The Court has done this in the *DRC v Uganda* judgment[24] in which it ruled that Uganda had breached the ICCPR,[25] the CRC[26] and its Optional Protocol on the Involvement of Children in Conflict,[27] and the African Charter on Human and Peoples' Rights[28] when it engaged in armed conflict in the DRC from 1998 to 2003. The Court also held that Uganda has contravened the provisions of international humanitarian law instruments.[29] In 2010, the ICJ in its *Diallo* merits judgment found that the DRC had infringed the provisions in Article 13 of the ICCPR and Article 12(4) of the ACHPR by arresting and expelling Mr. Diallo from Congolese territory.[30] Because these were contentious proceedings, the judgments were binding on the parties.

Notwithstanding the question of *locus standi*, in view of its mandate the ICJ ought to be among the most central regulatory bodies for holding TNCs responsible and providing justice to the victims of human rights abuses by these corporations. The potential for justice for the victims of human rights abuses by TNCs becomes questionable when one becomes aware of

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[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] Advisory Opinion ICJ Rep 136, [120], [122], [132], [134] (Wall); Joshua Castellino, 'Refereeing Boundaries: Why the World Needs the World Court' (2015) 33(3) *Wisconsin International Law Journal* 427, 462.

[23] See, for example, *Nuclear Tests cases* (*Australia v France*; *New Zealand v France*) [1974] ICJ Rep253 and *Request for Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment* (20 December 1974 in the *Nuclear Tests case* (*New Zealand v France*) [1995] ICJ Rep 288 respectively were landmark cases in the jurisprudence of the Court in relation to human rights violations.

[24] *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 168.

[25] International Covenant on Civil and Political Rights (1966), 999 UNTS 171.

[26] Convention on the Rights of the Child (1989), 1577 UNTS 3.

[27] UNGA, Optional Protocol on the Involvement of Children in Conflict (2000), UN Doc A/Res/54/263, Annex I.

[28] African Charter on Human and Peoples' Rights (Banjul Charter) (1981), 21 ILM 58 (1982).

[29] *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v* Uganda) [2005] *Idid.*, p. 219; See also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) [2007] Unreported, ICJ. In the *Genocide* case, the ICJ affirmed the commission of genocide in Srebrenica and that Serbia had breached its obligation to prevent and punish genocide.

[30] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] (Merits) ICJ Reports 2010, 639 (II), 692, para 165(2) of the operative part.

the fact that the ICJ can only hear cases between different states.[31] Individuals are not allowed to bring their cases regarding human rights violations by TNCs to the ICJ directly.

Furthermore, this study argues that until the issue of whether international human rights law directly places legal obligations on corporate actors has been legally resolved, the conflicting discussion over business and human rights will probably not end. Thus, in the quest for an international legal solution to this dilemma, this study proposes that an advisory opinion by the ICJ should answer this important international law question. Some of the reasons which justify the need for an ICJ advisory opinion are as follows. First, there is no general agreement in customary international law or other sources of international law on the issue of whether the current international human rights norms are binding on businesses. Second, it is well-known that businesses in the course of their activities commit human rights abuses, and victims of such abuses are required to get justice and remedies through an accountability instrument. Third, there is a stringent enforcement gap in current corporate accountability mechanisms. This situation is aggravated when the only accessible rules are those of soft law or self-regulation, when a state is unwilling and/or unable to apply its duty to protect its residents from corporate harms, and when the acts perpetrated do not create liability for offences under the ICC Statute.

Lastly, current ICJ precedent on corporate actors in international human rights law may help in resolving this question to a great extent.[32] In seeking an advisory opinion before the ICJ, the UNGA would be the best body to begin this process. The UN Human Rights Council is responsible for advising the UNGA on continuing developments of international law within the sphere of human rights and specifically with respect to the promotion and protection of

[31] Eric Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal (2007) University of Chicago Law & Economics (2007) *Olin Working Paper* 148/2007, 3.

[32] Jean-Marie Kamatali, 'The New Guiding Principles on Business and Human Rights' Contribution in Ending Divisive Debate Over Human Rights Responsibilities of Companies: Is It Time for an ICJ Advisory the Opinion?' (2012) 20 *Cardozo Journal of International & Comparative Law* 437, 454.

human rights.[33]However, this could be more strictly prepared to present such an application if permitted by the UNGA as stipulated under Article 96 of the UN Charter. Although by its nature an ICJ advisory opinion is not binding, it can strongly affect the advancement of legal jurisprudence. As Judge Azevodo observed, the fact that an advisory proceeding does not have the same influence as *res judicata* 'is not sufficient to deprive an advisory opinion of all the moral effects which are inherent in the dignity of the organ delivering the opinion, or even its legal consequences'.[34]Also, Judge Jennings pointed out that although some feel the ICJ is legally imperfect, as a Court it represents different people and legal regimes and is especially suited to handle varying interests and viewpoints.[35] He was of the view that because of the Court's twofold role in both resolving disputes and the development and expansion of international law, it is specifically suited to deal with all the aspects of international law.[36] Hence, the ICJ could certainly help in the interpretation of treaty provisions concerning human rights obligations for private actors including businesses.

Since the ICJ is the principal judicial body of the UN and the most competent interpreter of international law, its opinion serves as a form of directive for states to follow. Jurisprudence from the ICJ concerning private actors and international law and human rights could assist in resolving the question of corporate responsibility for human rights abuses. However, in the *Reparation for Injuries* case,[37] the case *Concerning the interpretation of the Agreement of 25 March 1951 between WHO and Egypt*,[38] the *Western Sahara* case,[39] *Interpretation of Peace*

[33] UNGA, Human Rights Council: Resolution/Adopted by the General Assembly (2006), UN Doc A/RES/60/251. (creating the Human Rights Council).
[34] Cited in Kamatali, (2012) *Ibid.*, p. 462.
[35] Cited in, Malgosai A Fitzmaurice, 'Equipping the Court to Deal with the Developing Areas of International Law: Environmental Law' in Connie Peck and Roy S Lee (eds), *Increasing the Effectiveness of the International Court of Justice, In a Presentation to the Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary* (Kluwer Law International 1997) 400.
[36] *Ibid.*, p. 401.
[37] *Reparations for Injuries Suffered in the Service of the United Nations* [1949] Advisory Opinion ICJ 174 WL 3.
[38] *Case Concerning the Interpretation of the Agreement of 25 March 1951 between WHO and Egypt* [1980] Advisory Opinion ICJ Rep 178.
[39] *Western Sahara* [1975] Advisory Opinion ICJ Rep 12.

Treaties case,[40] the *United Nations Administrative Tribunal*,[41] and the *Mazilu* case,[42] the ICJ was requested essentially to give a legal opinion in order to assist the UN and its agencies discharge their duties and was not called upon to decide any parallel interstate issues which might have occurred.

However, the ICJ also played a significant role in the development of certain principles of law which were to have great effect on business and human rights, in particular, the principle that reparation is to be made for breach of international law and the state is responsible for acts of its government agencies or officers as stated in *Chorzów Factor*.[43] The ICJ also enunciated the principle that a state should not knowingly allow its territory to be used for activities that are against the rights of other states in the *Corfu Channel*[44] case. The principle was also further established, in the *Barcelona Traction* case, that the international legal personality of a company is exclusively governed by the domestic law of the state where the company operates.[45] Although business and human rights were not the subject matter in either of these findings, they not only demonstrate that the ICJ has an attendant track record in addressing issues linked to business, they could also assist the Court in answering the question of corporate responsibility for international human rights violations.

Furthermore, the ICJ needs to consider the current increase in the role, practices and rights of businesses and the frequent inability of states, in particular developing host countries, to protect residents from corporate human rights violations in order to justify the need for direct international human rights obligation on TNCs. Decisions of the ICJ in which private actors are bound by international humanitarian law could also help in resolving the issue of whether

[40] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* [1950] Advisory Opinion ICJ Rep 65.
[41] *Application for Review of Judgement no. 158 of the United Nations Administrative Tribunal* [1973] Advisory Opinion ICJ Rep 166.
[42] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* [1989] Advisory Opinion ICJ Rep 177.
[43] *Case Concerning the Factory at Chorzów (Indemnities) (Germany v Poland)* (Merits) [1928] PCIJ (ser A) No 13.
[44] *Corfu Channel Case* (*United Kingdom of Great Britain and Northern Ireland v People's Republic of Albania*) [1949] ICJ Rep 4, para 22-23.
[45] *Barcelona Traction, Light and Power Co (Second Phase) (Belgium v Spain)* [1970] ICJ Rep 3, para 34-5.

private actors, including businesses, can bear international human rights obligations. For instance, the ICJ in *Nicaragua v United States*[46] found that '[t]he conducts of the contras concerning the Nicaraguan Government are ... governed by the law applicable to conflicts of that character ...'[47]The key issue before the Court was whether the conduct of the non-state actors was attributable to the State in order to hold the United States responsible for violations of international humanitarian law committed by the non-state actors.[48]The ICJ established the notion of 'control' test which must be exercised by the State for the conduct to be attributable to it. The Court held that even if the US participate in such activities contrary to international human rights and humanitarian law, there was no sufficient evidence to justify the attribution of the conduct to the State.[49]

Some scholars of international law believe there is a need for an arrangement where issues within a specific area of international law are to be determined in specialised courts. Fitzmaurice offers the idea of an international legal regime in which such specialised courts would 'exist within a single court or at least linked to a system of international courts within which the ICJ would maintain an appellate position, enabling it to guide the unified development of general rule of international law'.[50] For instance, the Convention creating the *International Centre for Settlement of Investment Disputes* (ICSID), a venue in which corporate actors have standing could perhaps be amended so that an appeal from the ICSID ruling may be taken to the ICJ in applicable cases which resolve an unsettled international legal question.[51] The advantages of allowing the ICJ to operate as an exclusive court of appeal are most apparent within the sphere of international human rights law.[52] It is within

[46] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v US*) [1986] ICJ 14.
[47] *Ibid,*.
[48] *Ibid.,* para 86.
[49] *Ibid.,* para 109 and 115.
[50] Fitzmaurice, (1997) *op. cit,*. p. 397.
[51] Convention on the Settlement of Investment Dispute between State and National of Other States (1966), 575 UNTS 159.
[52] Alice de Jonge, *Transnational Corporation and International Law, Accountability in the Global Business Environment* (Edward Elgar 2011) 202.

this sphere that a more coherent jurisprudence is required although the same advantages in the advancement of other fields of international law jurisprudence are also pertinent. Thus, it is not an extreme view to propose that the ICJ could be a satisfactory international court of appeal in related claims from judgments made by different international tribunals. As Fitzmaurice predicts, there could be a period when private actors, including NGOs, were allowed to access an international system of courts and tribunals headed by the ICJ.[53]

The ICJ should be the supreme authority responsible for holding corporate actors accountable for human right violations that they have committed in their operations in developing countries but it is a sad fact that ICJ lacks jurisdiction over TNCs. There are different reasons for this but the rigid policy and variations in international laws are the primary reasons. Therefore, the extensive use of the request for an advisory opinion together with expanding the possible parties who might be allowed to make for such request is one ways in which Court proceedings could be advanced to handle the growing number of complex cases, including international corporate human rights violations. As Fitzmaurice observed, there are different ways in which this could be achieved without amending the existing Rules and Statute of the Court, in particular, by allowing NGOs and TNCs access to the Court.[54] Among other things, these ways may include the extensive use of the phrase 'whatever body' under Article 65 of the ICJ Statute, in conjunction with Article 66 of the Statute.[55]

In other words, a more pleasant approach to permit NGOs and corporations access to the Court can be emanated under Article 66 of the ICJ Statute. Article 66 provides that, once a request for an advisory opinion is submitted to the Court, any state and international organisation likely to be able to provide the information in question 'shall be informed ... that the Court will be prepared to receive ... written statements, or to hear at a public sitting to be

[53] Fitzmaurice, (1997) *op. cit.*, p. 397.
[54] Malgosai A Fitzmaurice, 'The International Court of Justice and the Environment' (2004) 4 *Non-State Actors and International Law* 173, 195; De Jonge, (2011) *op. cit*,. p. 203.
[55] Fitzmaurice, (1997) *op. cit*,. p. 412.

held for that purpose, oral statements relating to his question'.[56] A small alteration to the provision of this article could allow the ICJ to obtain information from NGOs and corporate actors in an advisory proceeding. The Court can only give an advisory opinion to an international organisation but not a state although the advisory opinion itself is not binding.[57] As to the importance of the advisory procedure, O'Connell observed that 'though the ICJ's advisory proceedings are not legally binding but they established certain obligations for the States ... actually, it happens very rarely that countries disregard decisions by the ICJ ...'[58]

The right to seek an advisory opinion under Article 96(1) of the Charter is a derivative right in the sense that it is granted by the UNGA for the Economic and Social Council (ECOSOC), the Trusteeship Council, the International Atomic Energy Agency (IAEA), World Health Organisation (WHO) and other agencies of the UN. Therefore, business enterprises and civil society organisations should be permitted to access the proceedings of the ICJ on an advisory opinion.[59] This would allow both TNCs and NGOs to give witness statements in such an action and also enable the states to get legal direction on matters which are of international importance. Moreover, the Court at the moment has the authority to call upon NGOs to provide evidence, although a previous attempt by the Court to obtain evidence from NGOs has not been successful. For instance, the Court allowed the International League for the Rights of Man (ILRM) to submit a written statement with valuable information that will possibly assist Court in its advisory proceedings put to it in the request regarding the *South West Africa* although it was never submitted.[60]

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[56] ICJ Statute (1945) *op. cit*., art 66(2).
[57] *Interpretation of Peace Treaties* [1950) ICJ Rep 80 Judge Azevedo dissenting opinion.
[58] Mary Ellen O'Connell, 'ICJ has Clear Case against Severing Kosovo from Serbia' (*De [Construct].Net*, 18 April 2009) (quoting an interview with Mary Ellen O'Connell by a reporter from the Serbian edition of the BBC) <https://oslobodjenje.wordpress.com/2009/04/21/the-biggest-case-in-icj-history/> accessed 20 June 2016.
[59] De Jonge, (2011) *op. cit*., p. 203.
[60] *International Status of South West Africa*, [1950] Advisory Opinion ICJ Rep 128, Pleadings, oral arguments, documents, at 324. For a full account of relations between the ICJ and the League in that case, see Roger S. Clark, The International League for Human Rights and South West Africa 1947-1957: The Human Rights NGO as Catalyst in the International Legal Process, (1981) 3(4) *Human Rights Quarterly* 101, 117.

However, the ILRM was refused leave to provide information in the later 1970 proceedings.[61] Again, in the *Nuclear Weapons* proceedings the Court in exercising its discretion refused an application to provide information compiled by the International Physician for the Prevention of Nuclear War.[62] It is proposed that the Court should find a more readily available means of allowing the assistance of international organisations through *amicus curiae* briefs. As Judge Higgins pointed out, although the possibility of NGOs being granted standing before the ICJ is unlikely, they can play an important role by providing *amicus curiae* briefs.[63] During the *Nuclear Weapons* proceedings, NGOs played a useful role. They were the main force behind the official request from the WHO and the UNGA to ask the Court for an advisory opinion.[64] On the 'floodgates' argument which is that the Court would be overwhelmed if access was broadened to the ICJ,[65] Shelton argues that the existing Court's Statute clearly establishes adequate weaponry with which the Court can filter out those requests which are not properly agreed to.[66] Besides, the Court has the discretion to refuse permission to any person or organisation to submit an *amicus curie* brief, and the rules of the Court clearly restrict the involvement of NGOs, thus rejecting the ability of individuals and national organisations to apply.[67]

An ICJ advisory opinion has the advantage of consolidating different opinions that exist at the international level on the question of whether private actors including businesses are

[61] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 [1970] Advisory Opinion ICJ Rep 16.
[62] *Legality of the Threat or Use of Nuclear Weapons* [1996] Advisory Opinion ICJ Rep 276; Adam McBeth, 'Human rights in Economic Globalisation' in Joseph, Sarah, and Adam McBeth (eds) *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 147.
[63] Roslyn Higgins, 'Remedies and the International Court of Justice: An Introduction' in M Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart 1998) 203.
[64] Judge Higgins made the following observation: 'At one level this seems to be progressive and desirable. But it is not without problems. There is always a possibility that the judge may be influenced by something that these actually making written or oral statements may know about and have the opportunity to challenge. But, as things stand at the moment, practitioners who advice NGOs should follow the work of the Court closely to see if there is a possibility of making an input, at least on issues which come before the Court in advisory form; Higgins, in M Evans (ed), (1998) *op. cit*., p. 2.
[65] De Jonge, (2011) *op. cit*., p. 203.
[66] Dinah Shelton, 'The Participation of Non-Governmental Organisations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611, 624.
[67] *Ibid,*.

bound by international human rights law as well as also to get a definitive legal answer to the question which has occupied many scholars, and for which we see do not see consistent *opinio jurist*. Furthermore, it can assist in determining whether the current legally binding treaty initiative on business and human rights is required.[68] So far, an international normative instrument such as the 2003 Draft Norms[69] and the Guiding Principles[70] have not been very successful in providing a robust solution on how to deal with corporate human rights abuses. The main reason for this failure is that none of these instruments has succeeded in answering, in a more inclusive or authoritative way, the question of whether corporations are or can be bound by international human rights law. They addressed issues of business and human rights more as a political and economic issue than as a legal problem.[71]

An ICJ advisory opinion on this issue can therefore act as an essential instrument to advance the agreement required on how international human rights law may successfully preclude serious corporate exploitations. Furthermore, an advisory proceeding would assist in determining whether attempts to address corporate human rights abuses should be resolved through the existing human rights mechanisms, through embracing other ones, or only through agreement techniques and joint actions with the businesses themselves. Also, it may potentially assist in finding the best way to hold TNCs liable through legally binding human rights instruments. On the whole, an ICJ's advisory opinion may be able offer judicial pronouncement on both the question of human rights abuses by TNCs and the potential reparations for the injury suffered by the victims.

3.2.2. Prosecution of TNCs before the International Criminal Court and Tribunals

[68] UNHRC, Elaboration of an international legally binding instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights' (2014), UN Doc A/HRC/26/L.22/Rev.1.
[69] UNSUBCOM, Draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003), E/CN.4/Sub. 2/2003 /12/Rev., by the UNSUBCOM, Resolution on the Promotion and Protection of Human Rights 2003/16, (2003) UN Doc E/CN.4/Sub.2/L.11, 52.
[70] UN Guiding Principles.
[71] Kamatali, (2012) *op. cit*., p. 460.

International criminal law (ICL) is part of international law that has, to date, developed around seeking individual accountability for genocide, war crimes, crimes against humanity, and most recently the crime of aggression. Under it, accountability is explicitly placed upon non-state actors, with a vigorous enforcement instrument aimed at prosecuting individuals. The International Criminal Tribunals (ICTs), which are temporary tribunals, and the ICC, which is a permanent court, are the judicial organs vested with the mandate to prosecute four specific international crimes. Although not all the Tribunals referred to have jurisdiction over the four international crimes.

3.2.2.1. Ad Hoc International Criminal Tribunals

Numerous ICTs have been established by the UNSC, for example, the International Criminal Tribunal for Rwanda (ICTR) in 1994[72] and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993.[73] Other ad hoc tribunals were formed after World War II to try international criminals, mostly German and Japanese ones. These tribunals include the International Military Tribunal (IMT) Nuremberg,[74] created by agreement between the UK, the USA, USSR and France in 1945; and the International Military Tribunal formed in 1946 for the Far East (IMTFE Charter), also known as the Tokyo Tribunal.[75] In recent times, hybrid criminal tribunals were established by the UN with the states concerned (whose establishment, structure and function is ensured by both the UN and the state concerned): the

[72] Statute of the International Criminal Tribunal for Rwanda, (1994), UN Doc S/RES/955 (ICTR Statute). See also, William A Schabas, 'International Criminal Tribunals: A Review of 2007' (2008) 6(3) *Northwestern Journal of International Human Rights* 382, 383.
[73] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, (1993), UNSC, Res. 1660, UN Doc S/25704 at 36-8 annexes. (ICTY Statute).
[74] Charter of the International Military Tribunal Nuremberg, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (usually referred to as the Nuremberg Charter or London Charter) (1945), 82 UNTS 279.
[75] Tokyo Charter for the International Military Tribunal for the Far East (1946), [General Orders No. 1], Tokyo, as amended by No. 20, TIAS No. 1589 4 Bevans 20 (1946) (Tokyo Charter).

Special Court for Sierra Leone (SCSL) in 2002,[76] the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2004,[77] and the Special Tribunal for Lebanon (STL) in 2007.[78]

A grave violation of international human rights norms, or complicity in such abuses was an essential principle of ICL as recognised by the IMT at Nuremberg and other ICTs.[79] The statutes of these tribunals do not provide for criminal proceedings against states or corporate actors.[80] Their jurisdiction is restricted to natural persons (state officials or private persons), initiators and accomplices who partake in the formation or a common plan or conspiracy for the execution and represent a criminal organisation.[81] The principle of complicity was also recognised by the statutes of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda. They established criminal liability within the Tribunal's jurisdiction for persons who had 'organised, initiated, ordered, committed or otherwise aided and abetted in the formation or execution of a crime'.[82]

However, various tribunals that followed the end of World War II did prosecute corporate officials for violations of ICL or complicity in the commission of such crimes. The legal bases for these tribunals include the Nuremberg Charter[83] and the 1946 Control Council Law No. 10.[84] These legal devices were important for numerous reasons that are considered here.

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[76] Statute of the Special Court for Sierra Leone and the Residual Special Court for Sierra Leone (2000), UN Doc S/RES/1315, (SCSL Statute).

[77] Law on the Establishment of the Extraordinary Chambers, in the Court of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kamppuchea as amended (2004) UN Doc S/RES/1315.

[78] Statute of the Special Tribunal for Lebanon (STL Statute) (2007), UN Doc S/ Res 1757.

[79] At the trial of an individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

[80] See, for example, ICTR Statute, (1994) *Ibid.*, art 5and 6; ICTY Statute, (1993) *Ibid.*, art 6 and 7; See also United Nations Convention on the Suppression and Punishment of the Crime of Apartheid of (1973), UNGA, RES/3068(XXVIII), UN Doc A/9030.

[81] See, for example, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (1951), 82 UNTS 279, art 6, (IMT).

[82] ICTR Statute, (1994) *Ibid.*, art 7(1); ICTY Statute, (1993) *Ibid.*, art 6 (1).

[83] Charter of the International Military Tribunal Nuremberg, Annex to the Agreement for the Prosecution and Punishment of major war criminals of the European Axis (usually referred to as Nuremberg Charter or London Charter) (1945), 82 UNTS 279.

[84] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 Official Gazette of the Control Council for Germany (1946), CCL 10 50-55. CCL 10 was signed by the World War II Allies in 1945 to enable additional future trials of major defendants in any of the

For instance, the IMT at Nuremberg relied on Article 9 of the Nuremberg Charter to criminalise organisations such as the Gestapo, the Leadership Corps of the Nazi Party, the SD (*Sicherheitsdienst*) and the SS (*Schutzstaffel*) in order to punish corporate officials.[85]

> At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.[86]

Further, the Nuremberg Tribunal recognised that corporate entities could be culpable of crime.[87] Hence, the Nuremberg Tribunal laid the groundwork for the concept of international corporate criminal liability.[88] Though companies as entities were not tried, their involvement was closely observed and their employees were held liable pursuant to international criminal law.[89]

In the wake of the Nuremberg Tribunal, corporate officials in their individual capacity were convicted before military tribunals of the Allied Forces for complicity in international crimes. The legal instrument for these tribunals was the 1946 Control Council Law No. 10,[90] an agreement that allowed both multilateral trials similar to the IMT and other trials in any of the four occupation regions by one or more of the major Allies. Although it did not explicitly provide for the prosecution of corporate actors or even officials, it did establish jurisdiction over international offences closely modelled on the offences being prosecuted at the first

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four occupational zones by one or more of the major Allies; William Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 83(842) *International Review of the Red Cross* 439, 442.

[85] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) 131; Nadia Bernaz, 'Corporate Criminal Liability under International Law the New TV SAL and Akhbar Beirut SAL Cases at the Special Tribunal for Lebanon' (2015) 13(2) *Journal of International Criminal Justice* 313, 320.

[86] Nuremberg Charter, (1945) *Ibid.*, art 9.

[87] International Military Tribunal (Nuremberg), Judgement and Sentences (1946), reprinted in 41 *American Journal of International Law* (1947) 172, 251.

[88] Eric Engle, 'Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations' (2006) 20 *St John's Journal of Legal Commentary* 287, 292; Ole Kristian Fauchald and Jo Stigen, 'Corporate Responsibility before International Institutions' (2009) 40 *Washington International Law Review* 1027, 1035.

[89] International Commission of Jurist (ICJ), *Corporate Complicity in International Crimes*, vol 1 (2008) ICJ 6.

[90] Control Council Law No. 10, (1946) *op. cit*,.

Nuremberg trial, and that appeared to allow prosecution for similar defendants such as Krupp and Farben, as discussed below.[91]

In addition, the instruments also offered the means by which to deal with corporate officials who were complicit in criminal activities. A prime example is the case of *the United States of America v Carl Krauch et al*,[92] also known as the *I.G. Farben* case, in which the United States Military Tribunal (USMT) sitting in Nuremberg prosecuted corporate executives for war crimes; offences against peace; crimes against humanity; and exploitation and participation in the organisation or conspiracy to commit crimes.[93] In this case, the culprits had all been directors of I.G. Farben, a German multinational company manufacturing chemical and pharmaceutical related products. The company knowingly produced Zyklon-B poison gas for German concentration camps to murder millions of people. It facilitated the notorious medical experiments that were carried out without the consent of prisoners at camps, and operated a huge production plant next to the concentration camps that harmed over 25,000 prisoners, most of whom died from exhaustion, ailments and hunger.[94]

In the *I.G. Farben* case, the Tribunal based many of its decisions on the role of Farben Corporation as an entity but the Tribunal could not deliver a judgment against Farben as a company because it lacked jurisdiction over juristic persons.[95] Instead, Farben was described as a vehicle through which individual actors were able to jointly participate in illegal activities. The judgments basically centred on the nature of the company and its role in committing certain offences. As the Tribunal stated:

> While the Farben organisation, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the

[91] Jonathan A Bush, 'Essay – The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094, 1114.
[92] *United States of America v Carl Krauch, et al. (I.G. Farben)* VIII Trials of War Criminals before the Nuremberg Military Tribunals No. 10 (1952).
[93] *Ibid.*, p.1082.
[94] *Ibid.*, p. 1114.
[95] *Ibid.*, p.1372.

> Farben organisation as an instrument through which they committed the crimes enumerated in the indictment.[96]

Moreover, in the prosecution concerning the concentration camps, the owner of the company Bruno Tesch which provided the toxic gas was prosecuted, alongside other officials who had prepared the consignments of the Zyklon B gas, based on the same reasoning.[97] The same pattern is visible in the case of *The United States of America v Alfred Krupp et al,*[98] also known as the *Krupp* trial, in Nuremberg. In this trial, the Tribunal prosecuted eleven directors of Krupp Group (weapons manufacturer) for using prisoners of war and concentration camp prisoners as forced labourers in various Krupp industrial units in Germany and, in so doing, actively participating in the German war effort. It also charged them with plunder and spoliation resulting in war crimes, crimes against humanity, crimes against peace and conspiracy to commit crimes against peace.[99] Like the *Farben* case, criminal liability was not placed upon Krupp as an entity because 'guilt must be personal' but the Tribunal opined that corporate officials who acted to further the interests of their corporation may be held criminally responsible.[100] Similarly, in *Alfred Musema v Prosecutor*[101] the ICTR Appeals Court in 2001 affirmed the life sentence given in 2000 by the court of first instance against the executive of the Tea Plant Gisovu (Kibuye, western Rwanda). Alfred Musema used his position as a director to assist in the commission of grave violations of international human rights norms. Musema, the largest employer in the area, lent vehicles and is presumed to have been regularly present at the massacre sites. Besides vehicles, drivers and employees of his

[96] *Ibid.*, p.1108.
[97] While this raises questions concerning directors' individual liability for corporate actions, and questions around the nature of the "personhood" of companies, these are beyond the remit of this thesis. For more on this see, *United Kingdom v Bruno Tesch and Two Others* (The Zyklon B Case) Case No. 9 British Military Court, Hamburg 1-8 (1947) 93.
[98] *United States of America v Alfred Krupp et al.* 9 Trials of War Criminals before the Nuremberg Military Tribunals (1948).
[99] *Ibid.*, p. 1337, 1435.
[100] *Ibid.*, p. 1447.
[101] *Musema* Case No. ICTR-96-13-A, Judgment and Sentence (2001).

company were alleged to have been used to convey the killers to the massacre sites in Rwanda.[102]

By contrast, in the *New TV S.A.L.*[103] and *Akhbar Beirut S.A.L*[104] cases, the Appeals Panel of the Special Tribunal for Lebanon (STL) declared that the Tribunal had jurisdiction over corporate entities in contempt proceedings. The cases involve contempt charges against two journalists and two media companies for alleged broadcasting of information concerning purported confidential witnesses in a series of programmes.[105]Also, they were charged with violating a court order by refusing to remove that information from the website of the Television Station and YouTube channel despite a pre-trial order by the STL to do so.[106] In both cases, the accused through their conduct 'knowingly and wilfully interfered with the administration of justice'.[107] Although the decision is narrowed to offences regarding the administration of justice, and not about a main crime over which the Tribunal has jurisdiction. [108] Arguably, the decision of the Tribunal was a stepping stone in the development of corporate liability under international criminal law and could have a major effect in the business and human rights sphere.[109]

Some scholars have argued that the *Krauch Trial*, the *Krupp Trial* and *Bruno Tesch Trial* have underpinned the possibility that in some situations it is the conduct of the company that

[102] *Ibid.*, para 3, 4 and 5.
[103] Order Designating Contempt Judge, New TV S.A.L. and Khayat (STL-14-05/l/CJ), President, 31 January 2014.
[104] Order Designating Contempt Judge, Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin (STL-14-06/I/PRES), President, 31 January 2014.
[105] New TV S.A.L. and Khayat, (2014) *Ibid*., ; Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin, (2014) *Ibid.*,; David Akerson and Nandish Wuetilleke, 'Contempt of Court a Digest of the Case Law of Contempt of Court at International Criminal Tribunals and the International Criminal Court' (2015) 44(2) *Denver Journal of International Law and Policy* 87, 123.
[106] New TV S.A.L. and Khayat, (2014) *Ibid*., Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin, (2014) *Ibid.*; Jean Paul Pierini, 'The Inflated Invocation of Inherent Jurisdiction and Powers by International and Internationalized Criminal Courts and Tribunals: Between Gap Filling and the Erosion of Core Values' (2015) *Quaderni Europei, Working Paper* 75/2015, 9.
[107] New TV S.A.L. and Khayat, (2014) *Ibid*., Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin, (2014) *Ibid.*
[108] Bernaz, (2015) *op. cit*., p. 321.
[109] Nadia Bernaz, '*The New TV S.A.L. Case at the Special Tribunal for Lebanon* Corporate Criminal Liability under International Law (*On Rights as Usual*, 31 October 2014) <http://rightsasusual.com/?p=883> accessed 20 June 2016.

appears criminal rather than that of individual employees.[110] For instance, in *Krupp*, this occurred through various company officials engaged in systematic plunder and spoliation through its acquisition and removal of property in other foreign countries. The conduct of the company is therefore at the forefront as opposed to decisions or actions of any employee.[111] Nevertheless, these cases have been very useful in pointing to the possibility of ascribing criminal liability to TNCs. Although the respective tribunals made a decision on the conduct of individuals, it is the action of the companies that clearly established the basis for the whole tribunal.[112] It appears as if the accused persons were being prosecuted as representatives of the companies themselves. The individual employees of each case were jointly prosecuted, with liability arising from the criminal activities of the company rather than the conduct of individuals.[113] Of particular importance is that the decisions of the tribunals are widespread, with evidence that strongly suggests that like the individuals, corporate entities were bound by international criminal law as far back as 1945.[114] Arguably, there is no theoretical rationale for why a legal person cannot be liable under international criminal law and international human rights, and the notion has never been explicitly rejected. In fact, it was never explicitly embodied either until the appeal decision of *New TV S.A.L.*[115]

Moreover, the global community has shown some interest in holding corporate actors as subjects of certain kinds of international law. For instance, the *International Convention on*

[110] Kendra Magraw, 'Universally Liable - Corporate-Complicity Liability under the Principle of Universal Jurisdiction' (2009)18 (2) *Minnesota Journal of International Law* 458, 460-1.
[111] Ramasastry, 'Corporate Complicity from Nuremberg to Rangoon – An Examination of Forced Labor Cases their Impact on the Liability of Multinational Corporations' (2002) 20(1)4 *Berkeley Journal of International Law* 91, 108; Danielle Olson, 'Corporate Complicity in Human Rights Violations under International Criminal Law' (2015)1(1) *International Human Rights Law Journal* 1, 8.
[112] Ramasastry, (2002) *op. cit*,. p.108; Engle, (2006) *op. cit*., p. 292; Fauchald OK and Stigen J, (2009) *op. cit*., p. 1035; Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8 *Journal of International Criminal Justice* 895, 903.
[113] Alexandra Garcia, 'Corporate Liability for International Crimes: A Matter of Legal Policy since Nuremberg' (2015)24 *Tulane Journal of International & Comparative Law* 98, 114-19; Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *Chinese Journal of International Law* 43, 50-5.
[114] W Cory Wanless, 'Corporate Liability for International Crimes under Canada's Crimes against Humanity and War Crimes Act' (2009) 7 *Journal of International Criminal Justice* 201, 217.
[115] Bernaz, (2015) *op. cit*., p. 320.

the Suppression and Punishment on the Crime of Apartheid, currently endorsed by about 107 requires states to declare organisations engaging in apartheid as criminals rather than make it offence for them to commit apartheid.[116] Equally, the *United Nations Convention against Corruption* requires Member States to adopt measures against companies for violations of law established in the Convention.[117] Accordingly, the involvement of corporate officials in international crimes should be a condition for the criminal liability of corporate entities. It appears that the well-known dictum of the IMT Nuremberg requires a certain amount of review.[118] Crimes against international law can be perpetrated by companies as long as that they act in conjunction with individuals. Despite these optimistic views, the companies themselves have so far evaded liability.

3.2.2.2. The International Criminal Court

The ICC, which is governed by the Rome Statute, was established on 17 July 1998 by the Treaty of Rome at the United Nations Diplomatic Conference of Plenipotentiaries, and its role is defined by the Statute of the ICC.[119] The Court is headquartered in The Hague[120] and is the first permanent international criminal court that came into existence.[121] The ICC is a treaty-based body with 123 member countries.

[116] International Convention on the Crime of Apartheid (1973), 1015 UNTS 243, art 1(2).
[117] United Nations Convention Against Corruption, (2003), UN Doc, A/58/422, art 26; Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000) 172-8.
[118] Wilt, (2013) *op. cit.*, p. 77.
[119] Report of the Preparatory Committee on the Establishment of an International Criminal Court, (1998) vol II, 49, UN Doc A/CONF.183/9, corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. On the establishment of the court see also, Rome Statute of the International Criminal Court (1998), UN Doc 2187 UNTS 90**,** art 1.
[120] Rome Statute, *Ibid.*, art 3.
[121] FIDH, 'Victims' Rights before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs' (2007).

Unlike the ICJ, the ICC has exclusive jurisdiction only over individuals accused of the most serious crimes of international concern, namely genocide, crimes against humanity, war crimes and the crime of aggression.[122] Juristic persons, such as companies, are thus presently precluded from the competence of the ICC. This is supported by the fact that the criminal liability of corporate actors is not universally acknowledged.[123] However, it remains possible to prosecute individuals working within companies for violations of international criminal law. Any individual who commits an offence within the jurisdiction of the ICC shall be personally responsible and liable for punishment provided under the Statute.[124]

An individual shall be accountable and liable for a crime within the jurisdiction of the Court if the person 'is the author, co-author, principal, instigator or an accomplice in the commission of such a crime,[125] or such an individual orders, solicits or encourages the perpetration of such an offence,[126] and/or complicity or otherwise assists in its perpetration or its attempted commission, including organising the means for its commission'.[127] Article 25(3)(d) also stipulates that a person who conspires in any way in the perpetration or attempted commission of an offence by a group of persons with mutual intention will be convicted. This participation must be intentionally made with the purpose of advancing the criminal act of the group where such action encompasses the perpetration of a crime within the authority of the Court or is made in the acquaintance of the aim of the group to commit the offence.

The ICC has jurisdiction to prosecute these offences where (1) the accused is a citizen of State Parties to the ICC in which case State Parties may under Article 14 request the Court to initiate an investigation into a particular situation; (2) the UNSC acting under Chapter VII of

[122] Rome Statute, *Ibid.*, art 5 and 25(1).
[123] Diana Kearney, Corporate Liability in Regional Human Rights Courts (2013) *Selected Works* 18.
[124] Rome Statute, *Ibid.*, art 25(2) (a).
[125] *Ibid.*, art 25(3) (a).
[126] *Ibid.*, art 25(3) (b).
[127] *Ibid.*, art 25(3) (c).

the UN Charter can refer an alleged crime to the Court; and (3) the Court *proprio motu* may open investigations regarding an alleged crime based on information obtained from credible sources.[128] For instance, in 2009, the Prosecutor requested the permission of the Pre-Trial Chamber of the ICC to open an investigation into the alleged human rights transgressions perpetrated in Kenya during the 2007-2008 post-election tension which killed over 1,100 and displaced 600,000. In March 2010, the judges of the Pre-Trial Chamber II permitted the Prosecutor of the ICC to investigate the Kenyan situation.[129] This was the first time that the Prosecutor of the ICC on its own volition had initiated an investigation into a crime without first having received a referral from a State Party or the UNSC.[130]

The offences over which the ICC has jurisdiction are not subject to any statute of limitations.[131] This means that there is no timeframe to institute an action after the commission of the crime (upon condition that the crime occurred after 1st July 2002 and/or the date of ratification of the ICC Statute by the state). To decide whether to commence an investigation, the Prosecutor may seek more information from reliable sources such as states, UN bodies and NGOs or other credible sources considered relevant that will assist in determining whether there is a basis to open an investigation.[132] In this regard, the FIDH presented the ICC with important information regarding serious international human rights abuses in the Central African Republic, Colombia and the Democratic Republic of Congo.[133] A situation may be referred to the ICC by non-State Parties through a statement consenting to the jurisdiction of the Court with respect to the crime in question.[134] This happened with the

[128] *Ibid.*, art 13.
[129] Chandra Lekha Sriram1 and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact' (2012) 12 *International Criminal Law Review* 219, 220; Sabine Höhn, 'New Start or False Start? The ICC and Electoral Violence in Kenya (2014) 45(3) *International Institute of Social Studies* 565, 577. Also, Situation means the context of developments in which it is suspected that a crime within the jurisdiction of the Court has been committed.
[130] Höhn, (2014) *op. cit*., p. 566.
[131] Rome Statute, *Ibid.*, art 29.
[132] *Ibid.*, art 15(2).
[133] FIDH, (2007) *Ibid.*, p. 257-8.
[134] Rome Statute, *Ibid.*, art 12(3).

Ivory Coast in 2003 when the government made a declaration consenting to the jurisdiction of the Court for offences perpetrated since 19 September 2002.[135]

Irrespective of whether the ICC theoretically has jurisdiction over a case, in reality the principle of complementarity established in the Rome Statute lessens the ability of the ICC to exercise that jurisdiction.[136] The complementarity principle, as stated in Paragraph 10 of the Preamble[137] and in Articles 1[138] and 17,[139] is generally regarded as a 'cornerstone'[140] of the Rome Statute and as a principle 'carefully negotiated' to protect the sovereignty of states and to ensure their rights would not be encroached upon by the Court.[141] The ICC is not meant to act as an alternative to domestic courts. It is asserted, therefore, that the Court 'shall be complementary to national criminal jurisdictions'.[142] This means that the responsibility to try these serious crimes lies largely with the domestic courts.[143] In other words, the ICC does not

[135] Coalition for the International Criminal Court.

[136] Remigius Oraeki Chibueze, 'The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute' (2006) 12(1) *Annual Survey of International &* Comparative 185, 187; David Scheffer, 'International Criminal Court' in William A Shabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2010) 74; Anna Bishop, 'Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge' (2013) 22(2) *Minnesota Journal of International Law* 388, 392.

[137] Rome Statute, *Ibid.,* par 10 of the preamble of the Rome Statute stated that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'; Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare (2008) 19 *Criminal Law Forum* 115, 126.

[138] Rome Statute, *Ibid.,* art 1 unambiguously asserted that the Court will 'be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdictions'.

[139] Rome Statute, *Ibid.,* art 17 stated that the ICC has no jurisdiction over a case that is being investigated or prosecuted by a state which has jurisdiction over it; Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity' (2003) 7 *Max Planck Yearbook of United Nation Law* 591, 594.

[140] Williams A Schabas, 'Jurisdiction, Admissibility and Applicable Law' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd ed, Hart 2008) 606.

[141] Williams A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 336.

[142] Rome Statute, *Ibid.,* art 1, Para 10 of the preamble and art 17(1).

[143] See *Prosecutor v Thomas Lubanga Dyilo* (2006) ICC-01/04-01/06, Ruling on the Practices of Witness Familiarisation and Witness Proofing, PTC I, 8 November 2006, and para. 34. It must be pointed out that, although this statement comes from the ICC, it is not legally binding and should be regarded as *obiter dictum* rather than *ratio decidendi*. Lijun Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4(1) *Chinese Journal of International Law* 121, 121-2: Mark A Drumbl, 'Policy Through Complementarity' in Carsten Stahn and Mohammed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice,* Vol I (CUP 2011) 200.

admit cases that have already been appropriately dealt with by a domestic court that has jurisdiction over the matter.[144]

However, the Court intervenes as a last resort only in situations where the national judicial regimes are 'genuinely unwilling or unable' to investigate or prosecute over Article 5 crimes.[145] Article 17 also applies to state leaders who through their position or authority instigate the commission of crimes or knowingly fail to prevent or punish the perpetrators of a crime within the jurisdiction of the Court.[146] The Court also lacks jurisdiction if the accused has already been tried for the offence.[147] The ICC can also prosecute persons where no national court has initiated proceedings or where a national court has affirmed its intention to do so but in reality lacks the willingness or is unable to conduct such prosecutions.[148]

The ICC Statute specifies guidelines for determining whether the state is 'genuinely unwilling or unable' to investigate or prosecute a matter.[149] With regard to unwillingness, the Statute provides that having 'regard to the principles of due process recognised by international law' the ICC is to consider the matter where the national proceeding is trying to shield the accused person from criminal liability for an offence within the Court's jurisdiction.[150] A case will also become admissible before the ICC where the state is using a mock trial in order to protect the individual concerned, either by delaying the proceedings or by not conducting an independent or impartial proceeding.[151] Some international criminal law scholars have also contended that unwillingness should be established where a state will not provide the accused person with national due process.[152] Some are of the view that the ICC

[144] William A Schabas, *An Introduction to The International Criminal Court* (4th edn, CUP 2004) 187.
[145] Rome Statute *Ibid.*, art 17.
[146] *Ibid.*, art 28.
[147] *Ibid.*, art 17(c).
[148] *Ibid.*, art 17(2) (a).
[149] *Ibid.*, art 17; Bishop, (2013) *op. cit*., p. 397.
[150] Rome Statute, *Ibid*., art 17; Bishop, (2013) *op. cit*., p. 397.
[151] Rome Statute, *Ibid*., art 17(2) (b)(c); Scheffer, in Shabas and Bernaz (eds), (2010) *op. cit*., p. 75.
[152] Rome Statute, *Ibid*., art 17(2).

should take into consideration a state's 'legal regime of due process standards, rights of accused, [and] procedures' when determining whether a case is admissible.[153]

There is a type of unwillingness not stated in Article 17(2) of the Statute but which is consistent with the aim and objective of the ICC Statute because it entirely 'respects the drafters' intention to put an end to impunity'.[154] This is where a state may not have the intention to prosecute the perpetrators of international crimes before its national courts but is willing to collaborate with the Court to bring an individual to justice.[155] An example of this was where Uganda referred itself to the ICC in the *Katanga* case.[156] The Trial Chamber II (TC II) stated that, contrary to Article 17(2), states may want to see an individual accused of international crimes being prosecuted but for numerous reasons may not want to bring them to justice through their national system.[157]

Inability in a particular case is established when the national judicial regime has completely collapsed or become fragmented during an internal conflict, and so the state is unable to find the accused person or sufficient evidence and witnesses or otherwise is unable to investigate and/or prosecute the accused.[158] The inability criterion was considered when the Pre-trial Chamber issued an arrest warrant against Thomas Lubanga.[159] President Joseph Kabila of the Democratic Republic of Congo (DRC), in referring the situation in his country to the ICC,

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[153] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process (2006) 17(3) *Criminal Law Forum* 255, 259; Statement by Luis Moreno-Ocampo (16 June 2003) Ceremony for the Solemn Undertaking of the Chief Prosecutor, Quoted in ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (ICC, 2003) 28.

[154] Schabas, (2004) *op. cit*., p. 194.

[155] *Ibid*,.

[156] *Prosecutor v Joseph Kony et al.* ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, PTC II, para 37; See also Schabas, in Politi and Gioia (eds), (2008) *op. cit*., p. 40; Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility' (2012)10 *Journal of International Criminal Justice* 325, 333.

[157] *Prosecutor v Germain Katanga* [2009] ICC-01/04-01/07-1213 para 77, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Art 19 of the Statute).

[158] Rome Statute, *Ibid*., art 17(3).

[159] *The Prosecutor v Thomas Lubanga Dyilo*[2006] ICC-01/04-01/06-32; Schabas, (2004) *op. cit*., p. 194; William A Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731, 741.

did not explicitly cite Article 17(3) to show an inability in the DRC judicial system, but the indirect reference to the Statute appears clear enough.[160]

The complementarity principle has weakened the jurisdiction of the ICC and created a way for a state to employ the complementarity provisions to protect its people from the reach of the Court.[161] The referral by the UNSC concerning the situation in Darfur, Sudan reveals this concern as it guarantees that the consequence of such a referral is tested.[162] At present, the Government of Sudan has made everyone believe that it has no intention of collaborating with the ICC and will not give up any of its citizens to the Court concerning this referral.[163] Following the referral, the Sudanese Government formed a special court to prosecute individuals accused of committing crimes in Sudan.[164] Accordingly, the Government of Sudan questions the jurisdiction of the ICC and has proceeded to prosecute some security personnel over the Darfur unrest. This differs from the position of the UNSC on Sudan that the special court is 'relatively inaccessible' and suffers from a lack of resources and expertise and does little to prosecute Sudanese officials responsible for committing the atrocities in Darfur.[165] The Sudanese local justice initiative has been widely perceived to be a mock trial to shield Sudanese citizens from the jurisdiction of the Court by taking advantage of Article 17.

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[160] *The Prosecutor v Thomas Lubanga Dyilo* [2006] *Ibid*,. ICC-01/04-01/06-32- Annex A1.
[161] Chibueze, (2006) *op. cit*., p. 193.
[162] *Ibid*,.
[163] Sudan Tribune, 'ICC Delegation to Visit Sudan's Darfur' (27 February 2006). Reporting that the Sudanese Minister of Justice Mohamed AI-Mardi told Reuters in an interview on 13 December 2005 that Moreno Ocampo's investigators would not have any access to Darfur where ethnic cleansing has resulted in killings, rape and the uprooting of 2 million refugees. The paper quoted the Justice Minister as saying that 'the ICC officials have no jurisdiction inside the Sudan or with regards to Sudanese citizens' and that 'they cannot investigate anything on Darfur'.
[164] The Sudanese Government has not made any pretence as to its intentions in establishing the special court. Indeed, as an official of the Sudanese Ministry of Justice stated, 'ICC Article 17 stipulates that it can refuse to look into any case if investigations and trials can be carried out in the countries concerned except if they are unwilling to carry out the prosecutions'.
[165] United Nations Security Council Sixty-first year, 5589th meeting (2006), UN Doc PV.5589, 3-4. For more discussion on the Darfur situation see, Schabas, (2004) *op. cit*., p. 195.

The only remarkable case on admissibility that failed based upon the principle of complementarity is *Germain Katanga*.[166] Following the DRC's referral of the atrocities perpetrated in the Congo to the ICC, the ICC issued an arrest warrant against Katanga himself on particular charges and he was transferred to The Hague Court by the Government of Congo. Katanga raised the principle of complementarity in challenging the admissibility of his situation, i.e. that he could be prosecuted in the Congolese national judicial system but not before The Hague Court.[167] The Court, however, found the case admissible by linking the inaction of the DRC with the inability or unwillingness preconditions for admissibility.[168] Schabas is of the view that the admissibility criterion adopted has the advantage of accommodating cases that reach the court by self-referral while still respecting the principle of complementarity, where it might be argued that by its cooperation the state is actually consenting to the jurisdiction of the Court.[169] For instance, the representative of the DRC at the trial of Katanga posited that the Congolese justice system was unable to carry out an effective investigation into the Bogoro genocide and articulated its support for the ICC to proceed with its case.[170]

It should finally be noted that the complementarity regime of the ICC to domestic criminal jurisdiction makes it different from other *ad hoc* international tribunals.[171] The principle describes the legal and practical tie between domestic courts and the ICC.[172] The complementarity principle is not only important to the ICC but also a fundamental concept of

[166] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, [2009] ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (art 19 of the Statute).
[167] *Ibid,*.
[168] *Ibid.*, para 77.
[169] Schabas, (2004) *op. cit*., p. 192. Schabas and Bernaz, (2010) *op. cit*., p. 221.
[170] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* [2009] op. *cit*., para 78. This marked the first time in which a State Party to the Rome Statute participated in an ICC proceeding.
[171] Nuremberg Charter, (1945) *op. cit*., art 9(2); ICTR Statute, (1994) art 8. International Tribunals have primacy over national courts.
[172] Mohamed M El Zeidy, 'From Primacy to Complementary and Backwards: (Re)-Visiting Rule 11 BIs of the Ad Hoc Tribunals Shorter Articles, Comments, and Notes' (2008)57 *International and Comparative Law Quarterly* 403, 404; Pål Wrange, 'The Crime of Aggression and Complementarity', in Roberto Bellelli (edn) *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Ashgate, 2010) 592.

international criminal law.[173] A state is required to establish its jurisdiction over those liable for international crimes within its borders.[174]

3.2.2.2.1. Possibility of Extending Jurisdiction of the International Criminal Court Over Companies as Legal Persons

The draft Statute, which emerged during the Rome Diplomatic Conference on the creation of the ICC which was held in 1998, included a provision conferring on the Court jurisdiction over persons. More particularly, Draft Article 23(5) and (6) stated that:

> The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.[175] The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.[176]

The Draft Statute in Article 76 also specifies possible penalties applicable to legal persons, including fines, prohibition of the exercise of activity and dissolution, and Article 99 provides for enforcement of fines and forfeiture measures.[177] Following much debate, Article 23(5) and (6) of the Draft Statute was rejected by delegates of States Parties at the Rome Conference as a result of which the French representative presented a working paper with a revised proposal for the inclusion of criminal liability of juridical persons in the Statute

[173] Jennifer Trahan 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression - Considering the Problem of Overzealous National Court Prosecutions' (2013) 45*Cornell International Law Journal* 569, 578.
[174] Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law* (M N Publishers 2008) 156.
[175] Rome Statute, *Ibid.*, art 23(5).
[176] *Ibid.*, art 23(6).
[177] Preparatory Committee, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume III Reports and other documents' (1998), UN Doc A/CONF.183/9.

alongside that of individuals.[178] At the Rome Conference, the French delegation revised the controversial Article 23(5) and (6) of the ICC Draft Statute and recommended the following instead:

> Without prejudice to any individual criminal responsibility of natural persons under this Statute the Court should have 'jurisdiction over legal persons … when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives when the crime has been perpetrated in the name of the corporation, with his explicit consent, and as part of its activities when the individual has been convicted of the crime.[179]

The similarity between the Draft Statute during the Rome Diplomatic Conference and the French draft is that they both recognise derivative liability. However, the French draft is more exhaustive in its approach than the Diplomatic Conference draft. A distinction between the draft statutes is that the French proposal offers a precise and strict definition of a juridical person.[180]

The French proposal was backed by various delegations who called attention to the engagement of corporate entities in ongoing conflicts globally. For example, they observed the role of oil exploration firms in forcible population transfers and the role played by radio stations that aided the murder of Tutsis during the Rwandan genocide.[181] Some noted the ongoing Holocaust-related cases in some domestic courts, particularly in the USA against Swiss banks and German corporations. They argued that the exclusion of jurisdiction over

[178] Per Saland describes the unsuccessful effort at the Rome Conference to subject 'legal entities' to ICC jurisdiction. He explains that a very difficult issue throughout the Conference was whether to include criminal responsibility of legal entities. 'This matter deeply divided the delegations. For representatives of countries whose legal system does not provide for the criminal responsibility of legal entities, it was hard to accept its inclusion, which would have had far-reaching legal consequences for the question of complementarity. Others strongly favored the inclusion on grounds of efficiency … Among the last opponents were Nordic countries, Switzerland, the Russian Federation and Japan. Some other countries opposed inclusion on procedural … grounds. Time was running out … Eventually, it was recognized that the issue could not be settled by consensus in Rome.' Cited in Roy SK Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (Martinus Nijhoff 1999) 199.

[179] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court' (1998), UN Doc A/Conf./183/WGGP /L.5/Rev.2.

[180] The French proposal defines a juridical person as a 'a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization'.

[181] Clapham, in Kamminga and Zia-Zarifi (eds), (2000) *op. cit.*, p. 148.

companies would be a setback in view of Nuremberg and other similar proceedings at the domestic level.[182]

The French proposal was withdrawn because there was not enough support for such a novel suggestion.[183] The lack of consensus was not because State Parties believed it was forbidden to include juridical persons within the jurisdiction of the ICC but rather when several delegations considered the issue differently, they were unable to realise common legal standards for holding juridical persons liable.[184]

It is obvious that State Parties whose judicial system does not allow criminal liability of legal persons will disagree with the prosecution of business entities before the ICC. As Kai Ambos, an observer at the Conference, stated, the French proposal was rejected because the delegates strongly believed that corporate criminal liability was not commonly recognised in most domestic systems.[185]

Some also pointed to the practical implications, such as the fact that the meaning of business entities differed between states and the principles of corporate criminal liability did not apply in their national legal systems which would raise significant difficulties in terms of complementarity.[186]At the same time, some delegations largely opposed the proposal, arguing that the main objective of the ICC was to prosecute individuals accused of committing serious international crimes, while others were ready to assent but only to the extent of establishing civil liability for juridical persons. Also, many were worried about procedural

[182] Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Utrecht University 2010) 15.

[183] Douglass Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6(2) *Northwestern Journal of International Human Rights* 304, 316; Kathryn Haigh, 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14(1) *Australian Journal of Human Rights* 199, 203.

[184] Anita Ramasastry, 'Mapping the Web of Liability: The Expanding Geography of Corporate Accountability in Domestic Jurisdictions' (*Business and Human Rights Resource Centre*, 2008) <http://business-humanrights.org/en/mapping-the-web-of-liability-the-expanding-geography-of-corporate-accountability-in-domestic-jurisdictions> accessed 13 May 2016.

[185] Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edn, CH Beck 2008) 746.

[186] This comment appears in Cassel, (2008) *op. cit.*, p. 315-16.

issues such as who would represent businesses before the Court and how would assets be taken without having an effect on shareholder rights.[187] Few delegates were of the opinion that criminal liability could be imposed on self-determination movements or against state-owned companies.[188] A further group considered the proposal to be underdeveloped or unworkable in the light of the ongoing debates around the Nuremberg trials and the lack of appropriate advancement in international law and practice.[189]

Knowing the current regulatory inadequacies, some businesses in search of commercial activities have come to operate in countries facing serious unrest which often brings about human rights violations. Some TNCs are known to have been directly engaged in serious human rights abuses such as murder, forced labour, torture, rape and the displacement of inhabitants in developing host states.[190] Others assist the host government or rebel groups with the equipment required for the perpetration of international crimes, such as arms, army equipment, raw products and money.[191] Exploration for natural resources in some developing host countries is an example of TNCs' participation in grave human rights violations and supports the growing need for regulation and liability.[192]

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[187] Stoitchkova, (2010) *op. cit*., p. 15; Saland, m in Roy S Lee (ed), (1999) *op. cit*., p. 199; Kyriakakis, (2008) *op. cit*., p. 122-42; Joanna Kyriakakis, 'Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses Under Australian Criminal and Tort Law' (2005) 21(1) *Monash University Law Review* 95, 106.

[188] The following delegations spoke in favour of the proposal: Rwanda, France, Italy, Portugal, Solomon Islands, Egypt, Tanzania and Libya. The following spoke against: Belgium, Colombia, Venezuela, Sweden, Switzerland, Austria, Japan, Finland and Norway. Clapham, in Kamminga and Zia-Zarifi (edns), (2000) *op. cit*., p. 157.

[189] Stoitchkova, (2010) *op. cit*., p. 15; Leila Ladat Wexler and Cherif Bassiouni (eds), 'Model Draft Statute for the International Criminal Court Based on The Preparatory Committee's Text to The Diplomatic Conference, Rome, 15 June-17 July 1998' (Toulouse: Nouvelles Penales 1998) 42; Generally, see UN, 'Summary Records of the Meetings of the Committee as a Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (1st mtg, at 52) UN Doc A/CONF.183/C.1/L.3 (16 June 1998).

[190] Stoitchkova, (2010) *op. cit*., p. 1; For a reference to cases of ongoing concern, see the project of the International Peace Academy & Fafo AIS, 'Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law' (2004).

[191] Stoitchkova, (2010) *op. cit*., p. 2; *See also* the Business and Human Rights Resource Centre Website <http://www.business-humanrights.org/Home> accessed 20 June 2016 (presenting allegations and Responses by Companies Concerning Human Rights Abuses Connected with Their Business Operations) (20 April 2007).

[192] Stoitchkova, (2010) *op. cit*., p. 2.

Imprudent control of regions with mineral resources has been the reason for the continuing crises in the DRC.[193] In 2000, the UNSC asked a panel of experts to report on the abuses due to mineral resources there and this exposed that the government of the DRC had signed mining agreements worth millions of American dollars with several TNCs in order to secure the supply of arms.[194] However, Article 13(b) of the Rome Statute[195] gives the UNSC operating under Chapter VII of the Charter of the UN the power to refer a case to the ICC, including those where offences were perpetrated on the territory of Member States. [196]Like all the cases that come before the Court, the admissibility procedure of the ICC also applies to those resulting from the UNSC referral.[197]

In its verdict against *Germain Katanga and Mathieu Ngudjolo Chui*, the ICC stated that the struggle over control of Ituri's resources was the driving force for the ongoing crises in the area.[198] The ICC prosecutor also noted the complicity of diamond mining companies in atrocities committed in the DRC by stating that 'if [those in the companies] received diamonds and knew that the people delivering them were getting them because of genocide

[193] William A Schabas, *War Economies, Economic Actors, and International Criminal Law. Profiting from Peace: Managing the Resource Dimensions of Civil War* (Lynne Rienner 2005) 1; Lawrence Moss, The UN Security Council and the International Criminal Court Towards a More Principled Relationship (International Policy Analysis 2012)2.

[194] Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo <http://www.un.org/en/sc/repertoire/2000-2003/00-03_5.pdf#page=16 UN Doc. S/2002/1146, 16 October 2002> accessed 14 July 2015.

[195] Rome Statute *Ibid.*, art 13(b) stated that: 'The [ICC] may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provision of the Statute if: … (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the United Nations Charter'.

[196] The UNSC power of referral to the ICC comes from Chapter VII of the Charter of the United Nations (UN Charter), in which the Security Council is authorised to order Member States to comply with any measures it deems fit for the purpose of protecting or restoring international peace and security. It was signed on 26 June 1945 and came into force on 24 October 1945; Hemi Mistry and Deborah Ruiz Verduzco. 'The UN Security Council and the International Criminal Court' (Chatham House, International Law Meeting Summary, with Parliamentarians for Global Action, 2012)3.

[197] Rome Statute *Ibid.*, art 17.

[198] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* [2008] ICC-01/04-01/07-717, para 3, (Decision on the Confirmation of Charges) referring to UNSC Special Report on the Events in Ituri, January 2002-December 2003, UN Doc S/2004/573 (16 July 2004); In a press release from 2003, the ICC prosecutor noted the following with regard to the situation in the DRC: 'Although the specific findings of these reports have not been confirmed, the Prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted. The Office of the Prosecutor is establishing whether investigations and prosecutions on the financial side of the alleged atrocities are being carried out in the relevant countries'.

then they could well be part of the crime'.[199] Notably, like all other cases, the UNSC cannot, in a referral of a matter to the Court under Article 13(b), extend the jurisdiction to corporate entities. The concern is that states may genuinely be unwilling to prosecute businesses accused of committing international crimes knowing the possibility that (given the gravity and severity of some of these offences) the state through its officials may itself have aided and abetted the commission of the alleged crime. This concern was exactly one raised in supporting the complementarity principle of the ICC Statute. Oil exploration firms in Nigeria, particularly Chevron and Shell, have been accused of transporting soldiers with company helicopters to offshore drilling platforms where unarmed protestors were subsequently killed by the Nigerian military.[200] In Sudan, the Chinese National Petroleum Corporation has been accused of assisting the Sudanese Army with resources and oil revenues that were used to aid the killings of civilians and mass displacement whilst operating without proper regulation.[201] The same proximity of oil firms linked to atrocities perpetrated by the military is evident in Myanmar, where the military *junta* was accused of complicity with the Indonesian army in massacres committed during the Suharto regime.[202]

The ICC's target of individuals and the absence of precedent make it more difficult to acquire international criminal jurisdiction over corporate entities. This is not to argue against pursuing international criminal law as an instrument to hold businesses responsible for abuses of human rights that they have committed. In addition, corporate criminal responsibility might serve as a valuable means of eradicating abuses in states that fail to regulate the activities of TNCs that result in human rights abuses. It has been noted that criminal law may

[199] BBC News, *Firms Face "Blood Diamonds" Probe* (23 September 2003) (Quoting Prosecutor Moreno-Ocampo) <http://news.bbc.co.uk/2/hi/business/3133108.stm> accessed 29 May 2016.
[200] Robert Dufresne, 'The Opacity of Oil: Oil Corporations, Internal Violence and International Law' (2004) 36 *New York University Journal of International Law and Politics* 331, 337; Craig Forcese, 'Deterring Militarised Commerce: The Prospect of Liability for Privatised Human Rights Abuses' (2000) 31 Ottawa Law Review 171, 173-7.
[201] Kamari Clark, 'Treat Greed in Africa as a War Crime' *The New York Times* (New York, 29 January 2013) <http://www.nytimes.com/2013/01/30/opinion/treat-greed-in-africa-as-a-war-crime.html?_r=1> accessed 15 July 2015.
[202] Dufresne, (2004) *op. cit*., p. 337.

have a greater deterrent effect than civil liabilities as examined in tort law. Criminal sanctions on TNCs carry a stigma that imposes greater deterrence because the conduct has been widely regarded as a violation of international human rights norms and destroys the reputation and finances of a company.[203]

The limitations of the ICC mandate prevent it from holding corporations criminally responsible for their human rights abuses. Notwithstanding the position and anticipation of some concerned NGOs, extending the ICC jurisdiction to juridical persons, in particular corporations, was not put on the agenda for the Review Conference of the Rome Statute held by State Parties in Kampala in 2010.[204] Also, numerous Protocol proposals were made in order to establish an international tribunal with power over corporate entities, none of which succeeded. Various NGOs continue to campaign for the establishment of such a tribunal. In all these cases of offences perpetrated by businesses, the victims must then show the existence of a link of complicity between the person prosecuted by the ICC and the company from which they are seeking damages for the injury sustained.

Since the Nuremberg and Tokyo trials, international criminal prosecutions dealing with the liability of corporate officials for their participation in serious human rights violations have become scarce.[205] For the first time, an international tribunal, the STL Appeals Panel decision in *New TV S.A.L.* and *Akhbar Beirut S.A.L* recognised that corporations may be criminally liable.[206] In making its decision concerning corporate criminal liability, the STL relied on national rather than international law.

Whilst it is certainly positive that individual executives may be held liable under the Rome Statute for committing international crimes through their organisations, imputing liability solely to officials within a company does not adequately reflect the level of the offence. The

[203] Kearney, (2013) *op. cit.*, p.19.
[204] Coalition for the International Criminal Court.
[205] Stoitchkova, (2010) *op. cit*., p. 66.
[206] Bernaz, (2015) *op. cit*., p. 321.

inclusion of legal persons within the competence of the ICC would offer a different deterrent benefit from finding individual corporate officials liable, causing greater caution in profit-motivated decision-making processes with a potential criminal impact.[207] The economic incentives for complying with international human rights standards would be more significant if the company as an entity is penalised when failing to do so.[208] Corporate criminal responsibility within the ICC jurisdiction would not only encourage shareholders to be concerned about the company's behaviour, but would also serve as a practical instrument for guaranteeing damages in cases where individual corporate executives cannot afford to pay the damages enjoined by the court.[209] Thus, the jurisdiction of the ICC needs be amended to include corporate entities and not to be limited to individual crimes. The French proposal to this effect is ripe for reconsideration.[210]Real international criminal justice involves not only prosecuting individuals but also the TNCs that are part of the ecosystem of global violence.

3.3. Liability of Transnational Corporations in the Regional Human Rights Courts

This section will evaluate the role played by regional judicial mechanisms in creating the legal framework that other courts may be able to develop further in holding TNCs liable for human rights violations they committed in the course of their operations and the manner in which these entities have been dealt with. The section will cover the CJEU, followed by the ECtHR, the Inter-American human rights system and the African human rights system.

[207] Kyriakakis, (2008) *op. cit*., p. 148; Mordechai Kremnitzer, A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law (2010) 8(3) *Journal of International Criminal Justice* 909, 916; Ramasastry, (2002) *op. cit*., p. 95; Nadia Bernaz, 'Recognising Criminal Liability of Companies under International Law would Deter Complicity' (*Rights as Usual*, 24 May 2016) 156.

[208] Francis T Cullen and Paula J Dubeck, 'The Myth of Corporate Immunity to Deterrence: Ideology and the Creation of the Invincible Criminal' (1985) 49 Federal Probation 3, 6-8. Generally see, Christopher D Stone, 'Where the Law Ends: The Social Control of Corporate Behavior' (1975) 62 *Virginia Law Review* 259.

[209] Clapham, 'in Kamminga and Zia-Zarifi (eds), (2000) *op. cit*., p. 147.

[210] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court' (1998) UN Doc A/Conf./183/WGGP /L.5/Rev.2.

3.3.1. Liability of Transnational Corporations in the Court of Justice of the European Union

The CJEU is the European Union's highest judicial organ as well as that of the European Atomic Energy Community (Euratom). The Court is sub-divided into three further tribunals: the Court of Justice, the General Court and the Civil Service Tribunal.[211] This study will only focus on the CJEU and its role in adjudicating human rights abuses by TNCs. The CJEU which has its seat in Luxembourg was established in 1952 by the *Treaty of Paris*[212] as part of the Coal and Steel Community, and its competence has progressively developed under the *Treaty of Rome* (1957),[213] *Treaty of Maastricht* (1992),[214] *Treaty of Amsterdam* (1997),[215] *Treaty of Nice* (2001)[216] and the *Treaty of Lisbon* (2007)[217]. It is composed of 28 judges and 11 advocates who are appointed for a renewable six-year term by mutual agreement of the EU Member States.[218] The Court can consider cases in panels of three or five judges, a panel of 11 judges or as a full court in specific cases stipulated by the Statute of the Court.[219]

[211] European Union, Court of Justice of the European Union (CJEU).
[212] Treaty Establishing the European Coal and Steel Community (1951), 261 UNTS 140 (Treaty of Paris); Michal Bobek, 'The Court of Justice of the European Union' in A Arnull & D Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 153.
[213] Treaty Establishing the European Economic Community (1957), 298 UNTS 11 (EEC Treaty); Sionaidh Douglas-Scott, 'Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *Common Market Law Review* 629, 629-30.
[214] Maastricht Treaty of on European Union (1992), OJ C191. This Treaty is the result of external and internal events. At an external level, the collapse of communism in Eastern Europe and the outlook of German reunification led to a commitment to reinforce the Community's international position. At an internal level, the Member States wished to supplement the progress achieved by the Single European Act with other reforms.
[215] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (1997), 97/C 340/01.
[216] Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts (2001), OJ/C80/1.
[217] Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts (2001), OJ/C80/1, Generally on Treaties that established the CJEU see, Alan Dashwood et al, *Wyatt and Dashwood's European Union Law* (6th edn, Bloomsbury Publishing 2011) 3-21; Rene Barents, 'The Court of Justice in the Draft Constitution' (2004) 11(2) *Maastricht Journal of European and Comparative Law* 121, 142.
[218] Tom Kennedy, 'Thirteen Russians! The Composition of the European Court of Justice' in Angus IL Campbell and others (eds), *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie-Stuart* (Trenton 1996) 69. lyiola Solanke, 'Diversity and Independence in The European Court of Justice' (2008) 15 *Columbia Journal of European Law* 90, 102.
[219] Protocol on the Statute of The Court of Justice, art 16, The High Contracting Parties, Treaty Establishing the European Community (1997), OJ C 340/3 (EC Treaty); Henri De Waela, 'Not Quite the Bad that Procrustes Built: Dissecting the System of Selecting Judges at the Court of Justice of the European Union' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 24.

The CJEU is tasked with the responsibility of maintaining the legitimacy of EU law; ensuring equal interpretation and application in all EU countries; and resolving legal issues between Member States and EU institutions.[220] In some situations, the Court may also be utilised by individuals, companies or organisations to file an action against an EU institution if they feel their rights have been violated.[221] To enable it to perform its mandate, the Court has extensive jurisdiction to entertain numerous kinds of cases. The Court has competence to rule on applications for annulment of a measure taken by a Member State or an institution;[222] to review the legitimacy of a failure to act on the part of a Member State or an institution;[223] take actions against Member States for failure to fulfil obligations under EU law;[224] and deal with references for a preliminary ruling[225] and appeals against decisions of the General Court on points of law.[226] Private actors, including companies whose rights have been affected 'directly' and 'individually' by a Member State or an EU institution, can file an action before the Court. Indirectly, this can be done through national courts which may elect to refer the claim to the CJEU. Victims can directly lodge a complaint before the General Court if they are directly affected by a judgment of an EU institution.[227]

The CJEU through its decisions has recognised a duty of Member States and the institutions concerned to extensively apply EU law within the scope of their competence and to dis-apply

[220] European Union, Court of Justice of the European Union (CJEU); Margot Horspool and Matthew Humphreys, *European Union Law* (7th edn, OUP 2012)67; Jason Coppel and Aidan O'Neill, 'The European Court of Jutice: Taking Rights Seriously' (1992)12(2) *Legal Studies* 227, 234 .
[221] European Union, Court of Justice of the European Union (CJEU); Roberto Mastroianni, 'Access of Individuals to the European Court of Justice of the European Union under the New Text of Article 263, para 4, TFEU' (2014) *Rivista Italiana Di Diritto Pubblico Comunitario* 923, 924.
[222] EC Treaty, (1997) *Ibid.,* art 230. Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45(3) *Common Market Law Review* 617, 673.
[223] EC Treaty, (1997) *Ibid.,* art 232; Takis Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union' in Takis Tridimas and Paolisa Nebbia (eds), *EU Law for the Twenty-First Century*, vol 1 (Hart 2004) 113.
[224] EC Treaty, (1997) *Ibid.,* art 226. Anthony Arnull, 'From Bit Part to Starring Role? The Court of Justice and Europe's Constitutional Treaty' (2005) 24(1) *Yearbook of European Law* 1, 7.
[225] EC Treaty, (1997) *Ibid.,* art 236.
[226] EC Treaty, (1997) *Ibid.,* art 225.
[227] EC Treaty, (1997) *Ibid.,* art 230(4).

any national law if it conflicts with EU law.[228] This implies that the court's decisions are not only legally binding but also have primacy over national laws where the two are in conflict. Since the EU is an organ built on the rule of law, the judiciary is an essential body tasked with the mandate of ensuring that the Contracting States and the institutions involved, such as the European Commission, act in harmony with the signed treaties and the current 2007 Lisbon Treaty, in accordance with the EU constitution.[229] For instance, in *Flaminio Costa* the CJEU held that in issues where EU law is in conflict with national law, the former is superior.[230] Nevertheless, the CJEU also works together with the national courts, which are the ordinary courts applying EU law. Any national court or tribunal which is asked to resolve issues regarding EU rule might, and at times should, present a question to the CJEU for a preliminary ruling. The Court should then provide its interpretation or review the legitimacy of an EU regulation.[231]

The CJEU also plays an important part in consolidating the protection of the rights bestowed on citizens through direct application of EU laws, and this may impact on the application of the EU laws by State Parties.[232] In the case of *Van Gend en Loos v Nederlandse Administratie de Belastingen*, the court ruled that EU provision had a direct effect not only on the Contracting States but also on the citizens of the EU, and this ultimately granted individual's

[228] *Flaminio Costa v ENEL* [1964] 6/64 ECJ; *Regina v Secretary of State for Transport Ex p Factortame* [1990] (No. 2) HL.

[229] European Union, Court of Justice of the European Union (CJEU), following the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union now has legal personality and has acquired the competences previously conferred on the European Community. Community law has therefore become European Union law, which also includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon.

[230] *Flaminio Costa v ENEL* [1964] *Ibid,*.

[231] Takis Tridimas and Gabriel Gari, 'Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance 2001-2005' (2010) 2 *European Law Review* 131.

[232] EC Treaty, (1997) *Ibid.,* art 230(4); *Plaumann & Co v Commission* [1963] ECR 107. Stefan Enchelmaier, 'No-One Slips Through the Net? Latest Developments and Non-Developments in the European Court of Justice's Jurisprudence on Art 230(4)' (2005) 24(1) *EC Yearbook of European Law* 173, 174; Naboth van den Broek, 'A Long Hot Summer for Individual Concern? The European Court's Recent Case Law on Direct Actions by Private Parties and a Plea for a Foreign Affairs Exception' (2003) 30(1) *Legal Issues of Economic Integration* 61, 62.

access to the CJEU.[233] The CJEU has been increasingly utilised by individuals due to its 'David-versus-Goliath flavor'.[234] This is reflected in the Court ruling that a dental practice that piped music into its surgery should not have to pay royalties for the tunes because the music was not being transmitted to the public for profit and the audience was restricted.[235]

In respect of corporate actors, the CJEU has frequently ruled on actions both brought against and by corporations. For instance, *Jégo-Quéré v Commission*[236] and *Unión de Pequeños Agricultores v Council*[237] are cases brought before the CJEU by corporate actors challenging the validity of EU regulations.[238] The landmark case that received global attention was a 2007 decision that held American IT giant *Microsoft Corporation* liable for breaching European antitrust laws.[239] The European Commission accused Microsoft of exploiting its dominant market position by using a technique to block out the competition. It ordered Microsoft to pay the sum of $1.3 billion. Microsoft appealed against the decision to the CJEU but the court upheld the decision of the European Commission that the IT firm had to pay the fine imposed by the Commission (later reduced to $1.05 billion).[240] In this respect, the CJEU has appeared to be what Lord Mance, a leading British judge, termed 'a central achievement of the EU, a court with unparalleled transnational power'.[241]

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[233] *Van Gend en Loos v Nederlandse Administratie de Belastingen* [1963] 26/62 ECJ*; Les Verts v European Parliament* (1986) ECR 1339, para 31; *Toepfer v Commission* [1964] C-106 &107/63; *Stichting Woonpunt* [2014] C-132/12, para 68.

[234] Ronald Flamini, 'Judicial Reach: The Ever-Expanding European Court of Justice' *World Affairs* (Washington DC, November /December 2012)

[235] *Società Consortile Fonografici (SCF) v Marco Del Corso* [2012] C-135/10.

[236] *Jégo-Quéré v Commission* [2002] ECR II-2365; Ana Stanic, 'Removal of the Head of a Multilateral Organization - Independence of International Organizations and Their Secretariats - Political Interference by Member States in the Operation of International Organizations' (2004) 98 *American Journal of International Law* 810, 815; Albertina A Llorens, 'Remedies Against the EU Institutions after Lisbon: An Era of Opportunity'(2012) 71(3) *Cambridge Law Journal* 507, 514.

[237] *Unión de Pequeños Agricultores v Council* (2002) ECR I-6677; Steve Peers and Marios Costa, 'Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and Others v. Commission* & Judgment of 25 October 2011; Case T-262/10 *Microban v Commission*' (2012) 8(1) *European Constitutional Law Review* 82, 99.

[238] *Codorniu v Council* [1994] ECR I-1853; *Telefonica v Commission* [2013] C-274/12P.

[239] *Microsoft Corp v Commission of the European Communities* [2007] T-201/04; see also, *YKK and Others v Commission* [2014] C-408/12 P.

[240] *Microsoft Corp v Commission of the European Communities* [2007] T-201/04.

[241] Cited in Flamini, (2012) *op. cit*,.

The development of its case-law shows the Court's impact on establishing a legal framework for both individuals and corporate actors through protecting the rights which EU law grants them in different areas of their everyday lives. The next section will assess whether the rulings of the CJEU have helped to hold TNCs responsible for the human rights violations that they have committed in the course of their activities. In evaluating this, the section will consider the decisions of the CJEU and procedural obstacles that may have prevented this and victims receiving justice and sufficient remedies.

3.3.1.1. Court of Justice of the European Union on Human Rights and TNCs

From the above discussion, it is evident that the CJEU presents both standing for and jurisdiction over 'any juristic or artificial person'. This expression assigns some human rights responsibilities to corporate actors. One of the main ways in which the CJEU has been successful in holding TNCs directly accountable for human rights violations is through the invocation of the responsibility of the State itself to protect human rights in its jurisdiction.[242] If one focuses on the evaluation of the steps taken by the CJEU for its jurisprudence on issues of human rights violations, one will have to focus on the legal framework which involves holding the TNCs accountable for their human rights violations and about the substantive impact which includes the development of policies in order to meet the modern requirements of human rights. The CJEU and the European Commission have been successful in a proper setup about the cases if someone's rights are violated by TNCs. As noted by Ratner, 'in a range of very important claims, the CJEU strictly enforced on businesses not only legal

[242] Clemens Rieder, 'Protecting Human Rights Within the European Union: Who Is Better Qualified to Do the Job-the European Court of Justice or the European Court of Human Rights' (2005) 20 *Tulane European & Civil Law Forum* 74, 77-8. Philippa Watson, 'European Court of Justice Creative Responses in Uncharted Territory' in Malcolm Langford (ed), *Social Rights Jurisprudence Emerging Trends in the International and Comparative Law* (CUP 2008) 453.

responsibilities but also human rights obligations concerning non-discrimination'.[243] This can be seen in the *Walrave and Koch* and *Defrenne* proceedings which were based upon the statement of the Treaty of the Rome which does not differentiate between public and private companies in barring gender and nationality grounded discrimination.[244] Recently, the CJEU signalled a significant jurisprudential development concerning the fundamental rights and obligations of companies in the EU by holding *Google* liable for the violation of the right to privacy.[245] In its ruling, the Court stated the existence in the EU of a right to have personal data deleted from search engines on request, in particular, a right to have that information forgotten.[246] As a response to the judgment, *Google* introduced a governance instrument through which individuals could request that outdated information about them be deleted from the lists of results.[247]

The decision by the General Court of the EU in *Frente Polisario*[248] shows a significant development regarding the obligations of the EU institutions to protect human rights abroad,

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[243] Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility* (2001-02) 111 *The Yale Law Journal* 443, 485; Roel Van Leuken, 'Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries, Is the Approach of the European Court of Justice in *Akzo Nobel* Also Relevant in a Private-Law Context' (2016) 3(4) *European Review of Private Law* 513.

[244] Ratner, (2001-02) *op. cit*., p. 485; *Walrave v Association Union Cycliste Internationale* [1974)] ECR 1419; Case 43/75, 1405 *Defrenne v Societe Anonyme Belge de Navigation Adrienne Sabena* [1976] ECR 455, 457-63; Watson, in Langford (edn), (2008) *op. cit*., p. 469-70.

[245] *Google Spain SL and Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez* [2014] C-131/12, unreported; The case arose out of a dispute between Google Inc and Google Spain on the one hand, and Mr Costeja Gonzalez and the Spanish Data Protection Agency on the other. The dispute began when Mr Costeja Gonzalez lodged a complaint with the Spanish Data Protection Agency against a daily newspaper, La Vanguardia, as well as against Google Inc and its Spanish subsidiary, Google Spain, for failure to protect his privacy. The basis for Mr Costeja Gonzalez's complaint was that, whenever a Google search of his name was carried out, the top results listed linked the Internet user to two property auction notices for the recovery of social security debts that Mr Costeja Gonzalez had owed 16 years earlier, which still appeared on La Vanguardia's website. The applicant sought to obtain an order to the effect that the newspaper should alter, delete, or protect this information, and that Google should either delete or conceal the links to those pages.

[246] For more details of the case see, Dominic McGoldrick, 'Developments in the Right to be Forgotten' *(*2013) 13(4) *Human Rights Law Review* 761, 766; Daniel Krošlák, 'Practical Implementation of the Right to be Forgotten in the Context of Google Spain Decision' (2015) 1 *Communication Today* 58, 60-1; Herke Kranenborg, 'Google and the Right to Be Forgotten' (2015) 1(1) *European Data Protection Law Review* 70-79.

[247] Eleni Frantziou, 'Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*' (2014) 14 *Human Rights Law Review* 761, 761; Ignacio Cofone, '*Google v. Spain*: A Right to Be Forgotten? Spain: A Right to Be Forgotten' (2015) 15 *Chicago-Kent Journal of International & Comparative Law* 1, 5.

[248] *Frente Polisario*'s *v Council* [2015] T-512/12; Geraldo Vidigal, 'Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in *Frente Polisario v Council* and the Protection of Fundamental Rights Abroad' (*Blog of the European Journal of International Law*, 11 December 2015).

raising issues for companies involved in such activities. The ruling could be interpreted as requiring EU institutions to enter into agreements with third states to ensure that this agreement themselves do not violate human rights and that the EU does not 'benefit' from them.[249]

Furthermore, the CJEU has interpreted the *Brussels I Regulation* on jurisdiction as requiring courts in each European nation to assert jurisdiction over corporations that are domiciled or centrally administered in the EU.[250] Thus, the CJEU has shown its readiness to ensure that corporate actors respect human rights standards. As a result, the CJEU has demonstrated that a regional court can gain jurisdiction over TNCs without the intervention of individual states. To some extent, businesses are directly responsible to the CJEU by virtue of the provisions of the Treaty of Rome.[251]

3.3.2. The European Court of Human Rights

The ECtHR is a regional human rights court situated in Strasbourg, France which was created in 1959 by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, also known as the *European Convention on Human Rights*. It became permanent in 1998 with the entry into force of protocol No 11.[252] The Court has jurisdiction to resolve issues referred to it as provided in artcle 33, 34, 46 and 47 regarding the interpretation, application and violation of the Convention and its Protocols.[253] It is the responsibility of the

[249] Nadia Bernaz and Elvira Dominguez Redondo, 'Guest Post: General Court of the European Union annuls the EU-Morocco Free Trade Agreement on Human Rights Grounds but Forgets Self-Determination' (Opinio Jurist)<http://opiniojuris.org/2015/12/16/guest-post/> accessed 14 November 2016.
[250] Regulation 44/2001 of 22 December 2000 on jurisdictions and the regulation and enforcement of judgement in civil and commercial matters (2001,) OJ L12, applicable in all EU Member States including Denmark (2005) OJ L299 (from July 2007).
[251] Ratner, (2001-02) *op. cit*., p. 485.
[252] Currently, about 47 states have ratified the Convention. Some of these states have also ratified one or more of the Additional Protocols to the Convention, which protect additional rights; See also Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, As Amended by Protocols Nos. 11 and 14 (1950), 213 UNTS 221, art 19; see also, Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd edn, OUP 2011) 10.
[253] European Convention on Human Rights *Ibid.*, art 32.

Court to ensure that Member States respect and guarantee the rights spelled out in the Convention. The Court may hear a complaint filed by any person (natural or artificial), a group of individuals, an NGO or a Contracting State which alleges that they are a victim of a violation by any State Party of the rights guaranteed in the Convention and its Protocols.[254] Where it resolves that a Member State has violated any of these rights in the Convention, the Court makes a binding decision finding a breach. The State Parties concerned are under an obligation to comply with the Court judgment.[255]

The ECtHR is restricted to receiving cases against Member States who have allegedly violated the Convention. The wrongful activity must have been perpetrated by one or more state officials involved (for instance, the police or an executive authority). [256] These rights set out in the Convention are mainly civil and political rights although since 1979 the ECtHR has developed interesting case law that has extended the scope of the Convention with regard to social rights and established a link between the rights protected by the Convention and those protected by the European Social Charter. [257] Whilst the ECtHR enjoys jurisdiction in providing monetary damages, costs awards and legal fees,[258] it does not award injunctive relief and punitive damages.[259] Additionally, the litigants may not seek the jurisdiction of the

[254] European Convention on Human Rights, *Ibid.*, arts 33 and 34; Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (OUP 2012) 32.

[255] European Convention on Human Rights, *Ibid.*, art 46.

[256] International Federation of Human Rights (FIDH), 'Corporate Accountability for Human Rights Abuses; A Guide for Victims and NGOs on Recourse Mechanisms' (July 2010) 97.

[257] In particular, the following rights are protected: the right to life (art 2); the prohibition of torture (art 3); the prohibition of slavery and forced labour (art 4); the right to liberty and security (art 5); the right to a fair trial (art 6); the right to respect for private and family life (art 8); freedom of thought, conscience and religion (art 9); freedom of expression (art 10); freedom of assembly and association (art 11); the right to an effective remedy (art 13); the prohibition of discrimination in the enjoyment of the rights set forth in the Convention (art 14); the right to hold free elections at reasonable intervals by secret ballot (art 3 of the Protocol No.1 to the Convention). The Protocols to the Convention cover: the protection of property (art 1 of Protocol No. 1); the right to education (art 2 of Protocol No. 1); the right to free elections (art 3 of Protocol No. 1); the expulsion by a state of its own nationals or its refusing them entry (art 3 of Protocol No. 4); the death penalty (art 1 of the Protocol No. 6); the collective expulsion of aliens (art 4 of the Protocol No. 4);the prohibition of discrimination (Protocol No. 12); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (CUP 2006) 349-418; Leach, (2011) *op. cit*., p. 178-185.

[258] *Agrotexim and others v Greece* [1995] 330-A Eur Ct HR.

[259] Francisco F. Martin, 'The International Human Rights & Ethical Aspects of the Forum Non Conveniens Doctrine' (2004) 35(1) *The University of Miami Inter-American Law Review* 101, 105.

ECtHR until they have exhausted all forms of domestic remedies based on the rules of international law and within a period of six months from the date in which the final judgment was given.[260] Normally, this will mean a complaint to the applicable domestic court, followed by an appeal, where necessary, and even a further appeal to a superior or constitutional court.[261] The coming into force of Protocol No 11 gave individuals and NGOs the right to file their claims against Member States before the Court for human rights violations by private third parties, also recognised in European law as *Drittwirkung*.[262] *Drittwirkung* is originally a German legal principle and within the context of the European Convention it implies the application of the Convention to issues between individuals or private actors, not only between individuals and states.[263] This suggests that the state has a duty to ensure that private parties behave in a certain way towards other private parties.

3.3.2.1. Liability of TNCs for Human Rights Abuses in the European Court of Human Rights

The ECtHR operates on the idea of subsidiarity, which means that it is *ipso facto* a court of last resort.[264] Under this arrangement, domestic laws regulate the activities of TNCs and only an infringement of a national law which has effect on the Convention requires the attention of the Court.[265] When asked about the possibility of extending the jurisdiction of the Court to cover TNCs, one judge of the ECtHR responded that to do so would require 'rewriting the

[260] Art 35 of the European Convention for the Protection of Human Rights and Fundamental Freedom; Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 1058.
[261] ECtHR, 'European Court of Human Rights: Questions and Answers'.
[262] Stefanie Khoury, 'Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to Accountability'(2010) 4(1) *Onati Journal of Emergent Socio-Legal Studies* 68, 76; Evert Albert Alkema, 'The Third Party Applicability or Drittwirkung of the European Convention of Human Rights' in Franz Matscher, Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag 1988) 33-45.
[263] 'Corporate Accountability for Human Rights Abuses; A Guide for Victims and NGOs on Recourse Mechanisms' (*International Federation of Human Rights [FIDH]*, 2010) 98.
[264] Nikos Vogiatzis, 'The Admissibility Criterion under Article 35(3) (b) ECHR: a "Significant Disadvantage" to Human Rights Protection' (2016) 65(1) *International and Comparative Law Quarterly* 185, 195.
[265] Clapham, (2006) *op. cit*., p. 349.

whole Convention'.[266] Another judge said that 'States would [not] like to transform this Convention … [this] Convention is not here to solve all the disasters of the world … [the Court] already … [has] 100,000 pending cases [and] one has to be realistic about the system of human rights envisaged and the protection and mechanism it introduces was foreseen for something else'.[267] For the foreseeable future, it seems that corporate actors will remain free from ECtHR criticism.

It is clear from the decisions of the ECtHR that the Court has managed to hold corporate actors liable through holding the host state liable for human rights transgressions. This was demonstrated in two principal cases: *Guerra v Italy*[268] and *Lopez Ostra v Spain*[269]. These concerned environmental pollution caused by a TNC which affected the enjoyment of family and private life as per article 8 of the ECHR.[270] The ECtHR found that the host state was liable for this transgression as it had failed to adopt adequate regulations to deal with these activities. Accordingly, it conducted inspections in order to prevent corporate misconduct.[271] Thus, it is clear that the ECtHR is only able to address corporate human rights violations through holding the state governments liable because its jurisdiction is limited to complaints against the states.[272]

In the case of *Costello-Roberts v UK*, which related to corporal punishment by schoolteachers in a private school in the UK, the ECtHR made it clear that the state could not argue that it was not responsible for the acts of private actors and corporations, and held that 'the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the [ECHR]

[266] Khoury, (2010) *op. cit.*, p. 82.
[267] *Ibid,*.
[268] *Guerra and others v Italy* [1998] 26 EHRR 357.
[269] *Lopez Ostra v Spain* [1995] 20 EHRR 277.
[270] *Guerra and others v Italy* [1998] *Ibid,* para. 55-58; *Lopez Ostra v Spain* [1995] *Ibid.,* para. 51.
[271] *Guerra and others v Italy* [1998] *Ibid,* para. 60; *Lopez Ostra v Spain* [1995] *Ibid.,* para. 58.
[272] *Lopez Ostrav v Spain* [1995] *Ibid,*.

if it proves to be incompatible with [any of its provisions]'.[273] Similarly, in *Z et al v UK*, which concerned allegations of the state having failed to protect its citizens from degrading and inhuman treatment,[274] the ECtHR ruled that the state had the primary obligation to secure the fundamental rights prescribed in the ECHR for all of the individuals within its jurisdiction. Indeed, the ECtHR famously stated that the Convention 'requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals'.[275]

On the subject of human rights violations committed by the TNCs of Council of Europe States Parties abroad, it is important to consider whether the Convention can be applied extraterritorially. As provided by Article 1 of the European Convention, the Court must first consider whether the cause of action falls within the jurisdiction of the state involved.[276] In fact, there is no precise extraterritorial application of the European Convention. It is mostly subject to the interpretation of the phrase 'within their jurisdiction' by the Court and application of the Convention respectively.[277] For instance, the ECtHR in *Bankovic* held that application of the Convention extraterritorially by a State Party is 'exceptional' and that the 'Convention is a multilateral treaty operating … in a mainly regional level and specifically in the legal space of the Member States'.[278] For matters that legitimately fall outside the

[273] *Costello-Roberts* [1993] 247 Eur Ct HR (ser A) 50, para. 28; See also *Calvelli and Cigilo v Italy* [2002] App No 32967/96, ECtHR.
[274] *Z et al. v UK* [2001] App. No. 29392/95, 34 Eur HR Rep 3.
[275] *Ibid., para.* 73.
[276] European Convention on Human Rights, *Ibid.,* art 1 the provides that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'; Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9(4) *Human Rights Law Review* 521, 530.
[277] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) *Human Rights Law Review* 411, 417; Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) *European Journal of International Law* 121, 122.
[278] *Bankovic and others v Belgium and 16 other Contracting States* [2001] 7 EHHR 775 App No 52207/99; *Behrami & Behrami v France* [2007] 45 EHRR SE10 App Nos71412/01; *Saramati v France, Germany & Norway* [2007] 45 EHRR SE10 App Nos 71412/01; Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Hart 2004) 120.

jurisdiction of Member States, the Court determines that the scope of State Parties' responsibility under the Convention could be employed because of actions of their authorities, such as judges, which create negative effects outside their own territory.[279] The Convention may also be applied extraterritorially where a State Party has 'effective overall control over an area' through its agents operating outside its territory.[280]

However, the disadvantage of the ECtHR is that the Court has less power to deal with socio-economic human rights and protection from the illegal activities of TNCs as these rights are generally absent from the ECHR.[281] Thus, even though it seeks to rectify human rights violations of private actors such as TNCs by holding the state liable for the violations, the scope of the ECtHR is not as wide and therefore only renders a small percentage of the level of protection of human rights. Hence, in issuing recommendations to the ECtHR, the primary recommendation ought to be that the Court needs to be able to find ways to expand the instances in which it could hold states liable for the human rights transgressions of TNCs. This is best done by amending the ECHR, perhaps through an additional protocol that provides both litigants and TNCs with the ability to make sufficient amendments to their case applications/activities. This would ensure that the ECtHR better protects the rights enshrined under the ECHR. The next section will consider the manner in which the Inter-American Human Rights system functions in order to properly study whether the system has been useful in combating human rights violations by TNCs.

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[279] *Cyprus v Turkey* [1992] App No 25781/94, paras 77, 78; *Freda v Italy* [1980] 21 DR 250; *Sanchez-Ramirez v France* [1996] 86-A DR 155; Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach' (2016) *DIHR Matters of Concern Human Rights Research Papers* No 2016/04, 15.

[280] *Drozd and Janousek v France and Spain* [1992] 14 EHRR 745, §91; *Loizidou v Turkey* [1995] App No 15318/89, para 62, Judgment (Preliminary Objections); *Medvedyev and others v France* [2010] App No 3394/03; *Al-Saadoon and Mufdhi v UK* [2009] App No 61498/08; *Ilascu and others v Moldova and Russia* [2004] 40 EHRR 1030.

[281] Luke Clement and Alan Simmons, 'European Court of Human Rights Sympathetic Unease' in Malcolm Langford (ed), *Social Justice Jurisprudence Emerging Trends in International and Comparative Law* (CUP 2008) 409-10; Nhina Le, 'Are Human Rights Universal or Culturally Relative' (2016) 28(2) *A Journal of Social Justice* 203; Tom Zwart, 'Safeguarding the Universal Acceptance of Human Rights through the Receptor Approach' (2014) 36(4) *Human Rights Quarterly* 898, 899; James A Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54(2) *International and Comparative Law Quarterly* 459.

3.3.3. The Inter-American Human Rights System

The Inter-American Human Rights system is primarily composed of the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR), its sister institution.[282] The Commission and the Court draw their mandate from two essential documents applicable to all members of the Organization of American States (OAS).[283] These include the *American Declaration of the Rights and Duties of Man* (1948)[284] and the *OAS Charter* (1948).[285] Their function expanded with the establishment of the *American Convention on Human Rights* (ACHR) in 1969 alongside its following protocols on human rights.[286] The ACHR with its substantive assurances and institutional framework is conceivably the most influential and comprehensive mechanism established by a regional body. It significantly broadens the reach and content of the 1948 American Declaration by including more exhaustive and precise civil and political rights as well as economic, social and cultural rights.[287]

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[282] Dinah Shelton, 'The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System' (2015)5(1) *Notre Dame Journal of International and Comparative Law* 1, 2. Cecilia Medina Quiroga, *The Battle of Human Rights: Gross Systematic Violations and the Inter-American System* (Martinus Nijhoff 1988); Jo M Pasqualucci, *The Practice and Procedure and Procedure of the Inter-American Court of Human Rights* (CUP 2003) 3; Sonja Grover, *Prosecuting International Crimes and Human Rights Abuses Committed Against Children: Leading International Court Cases* (Springer 2010) 3; Robert K Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31(4) *Human Rights Quarterly* 856.

[283] Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

[284] The American Declaration of the Rights and Duties of Man, also known as the Bogota Declaration, was adopted on *2 May* 1948 OAS Res XXX, by the Ninth International Conference of American States at Bogotá, Colombia; Eugenio D Matibag, 'Inter-American Commission on Human Rights' (2012) 2 *Encyclopaedia of United States-Latin American Relations* 479, 479.

[285] The Charter of the Organization of American States (1948), 119 UNTS 3.

[286] American Convention on Human Rights, also known as the Pact of San José (1969), 1144 UNTS 123; Goldman, (2009) *op. cit*., p. 866.

[287] Rhona KM Smith, *Textbook on International Human Rights* (6th edn, OUP 2014) 120. The following rights are contained in the American Convention on Human Rights: Civil and Political Rights (arts 3 to 25); Right to judicial personality (art 3); Right to life (art 4); Right to humane treatment (art 5); Freedom from slavery (art 6); Right to personal liberty (art 7); Right to a fair trial (art 8); Freedom from ex post facto laws (art 9); Right to compensation (art 10); Right to privacy (art 11); Freedom from conscience and religion (art 12); Freedom from thought and expression (art 13); Right of reply (art 14); Right of assembly (art 15); Freedom of association (art

The IACHR, based in Washington, D.C., USA was established in 1959 and commenced its operations in 1960.[288] The OAS adopted the ACHR in 1969, which called expressly for the institution of the IACtHR.[289] The IACtHR situated in San José, Costa Rica, commenced operations in 1979, only after the ratification of the eleventh State had brought the American Convention into force. Within this framework, the Commission and the Court play complementary yet exclusively distinct roles.[290] The Court and the Commission are both composed of seven members each. The judges of the IACtHR serve terms which are six-years long, and are allowed to be re-elected only once.[291]

The Commission operates as the first step in the admissibility process for cases which are contentious in nature, seeking to promote friendly settlements between the respective parties.[292] It also investigates the condition of human rights in the American states, thereby issuing pertinent reports. Functionally speaking, the Commission and the Court play largely distinct roles with regard to preserving human rights in the American subcontinent. The Court serves as a medium of final resort for complaints regarding violations of human rights which have not been given sufficient remedy via invocation of domestic legal provisions.[293] The

16); Rights of the family (art 17); Right to a name (art 18); Rights of the child (art 19); Right to nationality (art 20); Right to property (art 21); Freedom of movement and residence (art 22); Right to participate in a government (art 23); Right to equal protection (art 26); Right to judicial protection (art 25); and Economic, Social and political rights and progressive development (art 26).

[288] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2008) 200; Richard J Wilson and Pat Paterson, 'The Most Important Cases of the Inter-American Commission on Human Rights' (2014) 5 *Security and Defense Studies Review* 139, 139; Olivier De Schutter, *International Human Rights Law: Cases Materials and Commentary* (2nd edn, CUP 2014) 1006.

[289] Department of International Law, 'American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)' (Organization of American States); Michael J Camilleri and Viviana Krsticevic, 'Making International Law Stick: Reflections on Compliance with Judgments in the Inter-American Human Rights System' (2013) *Derechos Humanos, Relaciones Internacionales y Globalizacion* 235, 235.

[290] Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection' (2010) 9 *Washington University Global Studies Law Review* 639, 641.

[291] A Laurence Burgorgue-Larsen et al, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011).

[292] The Commission has members who serve terms which are four years long, and they could also be re-elected once. Both these members and judges are elected to serve owing to their personal capacities, regardless of their respective citizenships. Inter-American Convention on Human Rights art 35 and 35; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 1999) 122.

[293] International Justice Resource Center, 'Preventing and Remedying Human Rights Violations through the International Framework: Advocacy before the Inter-American System – Manual for Attorneys and Advocates' (2012) 7-8.

Commission on the other hand facilitates the functions of the Court by serving as the first step of the investigation for these cases and conducts separate human rights activities such as monitoring and promoting human rights in lieu of potential abuses in the future.[294]

The Commission, as one of its primary functions, regularly monitors the situation of human rights in all of the countries which fall within its jurisdiction and publishes reports on special subjects and situations of concern in the respective states.[295] The Commission also establishes rapporteurs in order to research further into the themes and topics of human rights which are of concern in the Americas.[296] These rapporteurs help by proposing amendments of additional Protocols to the American Convention in order to better reflect and protect the state of human rights.[297] As part of its ambit of responsibilities, the Commission also receives complaints of specific human rights abuses in one or more of the Member States.[298] The Commission processes the complaints and admits the complaint in order to negotiate between the parties and seek a friendly settlement between the injured parties and the TNC or offending state. It has the task of making a finding of faults and issuing recommendations to the offending body on how to better conform to the expected levels of human rights.[299] The Commission on its own or at the request of any party can ask the state to take precautionary

[294] Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case' (1998) 38(324) *International Review of the Red Cross* 505, 510-11; Diego Rodríguez-Pinzón and Claudia Martin, 'The Inter-American Human Rights System: Selected Examples of its Supervisory Work' in Sarah Joseph and Adam McBeth (eds), *Research Handbook in International Economic Law* (Edward Elgar 2010) 357; Fernando Volio, 'Inter-American Commission on Human Rights' (1980) 30 *The American University Law Review* 65, 68-9; Cindy S Woods, 'Engaging the U.N. Guiding Principles on Business and Human Rights: the Inter-American Commission on Human Rights & the Extractive Sector' (2015) 12(2) *Brazilian Journal of International Law* 571, 575.

[295] Inter-American Commission on Human Rights, 'Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings Organisation of American States (2 October 2007).

[296] International Justice Resource Center, 'Inter-American Human Rights System' <http://www.ijrcenter.org/regional/inter-american-system/> accessed 8 October 2015.

[297] International Justice Resource Center, 'Inter-American Human Rights System'.

[298] Inter-American Commission on Human Rights, 'Petition and Case System – Informational Brochure' (Organization of American States, 2010); Henry J Steiner et al, *International Human Rights, The Successor to International Human Rights in Context: Law, Politics, Morals: Text and Materials* (OUP 2008) 1038.

[299] Inter-American Commission on Human Rights, 'Petition and Case System – Informational Brochure' (Organization of American States, 2010); See also Brian D Tittemore, 'Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle against Terrorism (2006) 6(2) *Human Rights Law Review* 378, 383-7.

measures to protect human rights, or to address the subject matter of a pending proceeding or petition before the Commission.[300]

The Court may issue decisions only against those State Parties that have accepted its jurisdiction; it is only in certain situations when the state or the offending body refuses to act as per these recommendations that the case proceeds to the contentious jurisdiction of the Court, which then seeks to issue legally binding decisions on the state.[301] In order to do this, the Court first determines whether it has jurisdiction in adjudging the case and when it does it proceeds to analyse whether the offending body has violated the human rights as enshrined in the American Convention and the American Declaration of the Rights and Duties of Man.[302] Where such a violation has taken place, the Court may issue injunctive relief and compensatory damages to the injured parties.[303] The Court may also, in a separate function, issue advisory opinions to any OAS organs or states regarding the interpretation of the obligation of human rights, as it sees fit.[304]

[300] Rules of Procedure of the Inter-American Commission on Human Rights, art 25(1); Par Engstrom et al, 'Strengthening the Impact of the Inter-American Human Rights System through Scholarly Research' (Inter-American Human Rights Network Reflective Report 2016) 11; Oscar Parra-Vera, 'The Protection of the Right to Health through Individual Petitions before the Inter-American System of Human Rights' in Ebenezer Durojaye (ed), *Litigating the Right to Health in Africa: Challenges and Prospects* (Routledge 2016) 243; Brittany West et al, 'Regional Human Rights Systems' (2013) 20(2) *Human Rights Brief* 65, 68.

[301] American Convention on Human Rights, *Ibid*., art 63(1); *The Matter of Viviana Gallardo and others* [1984] Advisory Opinion No. G 101/81, Inter-Am Ct HR (Ser A); Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19(1) *The European Journal of International Law* 101, 102; Cecilia Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections of a Joint Venture' (1990) 12(4) *Human Rights Quarterly* 439, 446.

[302] Pasqualucci, (2003) *op. cit*., p. 172.

[303] In its 2004 decision, *Plan de Sanchez v Guatemala* [2004] Inter-Am Ct HR (ser C) No 116, 49(2), the Inter-American Court of Human Rights was met with a dispute of historic proportions: requesting adequate reparation for a Mayan indigenous community devastated by the mass killing of over 250 persons; *Velasquez-Rodriguez v Honduras* [1989] Inter-Am Ct HR (ser C) No 7; *Godinez-Cruz v Honduras* [1989] Inter-Am Ct HR (ser C) No 8; Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493, 507; Thomas M Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *Columbia Journal of Transnational Law* 351, 353.

[304] American Convention on Human Rights, *Ibid*., art 64(1); *Restrictions to the Death Penalty (Arts 4.2 and 4.4 American Convention on Human Rights*) [1983] OC-3/83, Advisory Opinion Inter-Am Ct HR (Ser A) No 3 (1983); Velasquez Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493, 499.

3.3.3.1. Inter-American Commission on Human Rights and Tranational Corporatios

This section seeks to evaluate whether the decisions of the IACHR have had an effect in holding TNCs accountable for human rights transgressions in the American subcontinent. In analysing this, the section will refer to both actual decisions of the IACHR and technical issues which might seek to defeat holding the TNC actors accountable in time for the aggrieved parties to receive adequate and sufficient remedies. One of the main ways in which the IACHR has managed to hold TNCs responsible for human rights violations is through the invocation of the responsibility of the state itself to protect the human rights in its jurisdiction.[305] This is because TNCs are protected by the fact the IACHR lacks jurisdiction over these entities, and therefore enjoy de facto legal immunity from all challenges which arise from an international domain.[306] Hence, the IACHR seeks to enforce human rights protection by requiring the state itself to apply domestic laws in order to hold the TNCs accountable.

One of the strengths of this application by the IACHR is that the obligation upon the states is based in international human rights treaties themselves, whereby such treaties establish the extent of the obligations of the state. Thus, from this normative idea, it becomes clear that in the eyes of the IACHR human rights obligations are not exclusive to territories alone but rather to jurisdictions, which in practice implies that a state has human rights obligations both to individuals under its jurisdiction and individuals within its territory.[307] For example, in

[305] Analia Marsella Sende, 'The Responsibility of State Actions Transnational Corporations Affecting Social and Economic Rights: A Comparative Analysis of the Duty to Protect' (2009) 15 *Columbia Journal of European Law Online* 33, 35; Cecilia Anicama, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System' (Report on the American Convention on Human Rights to Inform the Mandate of UN Special Representative on Business & Human Rights John Ruggie, April 2008) 9.

[306] Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press 2009) 291.

[307] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *Modern Law Review* 598, 603.

Report 38/99 of *Saldaño v Argentina,*[308] the IACHR sought to determine the proper interpretation of Article 1(1) of the American Convention which states that 'State Parties have undertaken to respect and ensure the substantive guarantees enshrined in the Convention in favour of persons subject to their jurisdiction'.[309] The IACHR determined in this regard that the term jurisdiction does not merely denote the national territory of the state but rather also obligates the state in instances where the acts and omissions of its agents have produced effects of human rights transgressions, even if they are undertaken outside of the ambit of the state's geographical territory.

Thus, from this reading, it is easy to deduce that when the term 'jurisdiction' is interpreted in its wider meaning and is not subjected to the confines of territory then this increases the scope for the IACHR to hold TNCs accountable for human rights violations in the American subcontinent.[310] Indeed, one might argue that this does not allow the IACHR to directly deal with the TNC but rather indirectly abuse the position of the state membership in order to achieve this purpose. However, when one comprehends the nature of the IACHR, where it requires aggrieved parties themselves to try domestic remedies first, one does not reach the natural conclusion that the IACHR is not potent in dealing with TNCs in a 'direct fashion'. The IACHR has also made it possible through its rulings and reports for the State to not need to have effective control over the entity/individual in order to be held liable for human rights violations. This was made evident in the prominent case of *Alejandre v The Republic of*

[308] *Saldaño v Argentina* Rep [1998] No 38/99, IACHR Annual Report 1998 at 17.

[309] Sumithra Dhanarajan, 'Transnational State Responsibility for Human Rights Violations Resulting from Global Land Grabs' in Connie Carter and Andrew Harding (eds), *Land Grabs in Asia: What Role for the Law* (Routledge 2015) 167; Daniel Augenstein, 'To Whom It May Concern: International Human Rights Law and Global Public Goods' (2016) 23(1) *Indiana Journal of Global Legal Studies* 225, 244; Christina M Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia Antwerp 2004) 144.

[310] *As per Coard et al v United States* [1999] Report no 109/99, p.37, Inter-American Commission on Human Rights; Robert K Goldman, 'Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict' in *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 110.

Cuba[311] where it was stated that when agents of a state, both civilian and military, exercise even marginal authority over entities/individuals, then it has obligations to respect human rights. Thus, it no longer becomes possible for a TNC to evade the scrutiny of the IACHR by stating that the IACHR does not have jurisdiction over the activities of the TNC.[312] This is a powerful move by the IACHR as it can now considers even human rights abuses which have not yet turned apocalyptic by invoking the state to properly regulate the activities of the TNC in its jurisdiction. As an example of this attitude of the IACHR one can refer to the case of *Yanomami v Brazil*.[313] This related to the dangers and harms caused by the mining activities of a TNC to the indigenous people of the region owing to the lack of installations by the TNC in protecting the welfare of the people. Using the aforementioned principles and indirect approaches, the Commission found that there was a direct violation of the Right to the Preservation of Health and Well-Being, as per the American Declaration of the Rights and Duties of Man.

Similarly, the IACHR issued various precautionary measures ordering the state to take certain actions to protect human rights including the rights to life, health, land, personal integrity, indigenous peoples and child rights.[314] In the case *Maya Indigenous Community of Toledo District in Belize*[315] the IACHR found the Belize authorities responsible for abusing the rights of the affected people to property by allowing the exploitation of resources in their ancestral lands. The Commission specifically called upon the state to suspend all oil exploration and any other activities related to the concession given to the extractive company on lands used

[311] *Alejandre v the Republic of Cuba* [1997] 996 F Supp 1239. For more details of the *Alejandre* case, see Darin Joseph, 'International Law - United States Quickly Shuts Door to Cuba in Most Recent Jurisdictional FSIA Case - *Jerez v. Republic of Cuba*, 775 F.3d 419 D.C. Cir. 2014' (2015) 38(2) *Suffolk Transnational Law Review* 509, 515-16; Andrew Lyubarsky, 'Clearing the Road to Havana: Settling Legally Questionable Terrorism Judgments to Ensure Normalization of Relations between the United States and Cuba' (2016) 91(2) *New York University Law Review* 458, 467-8.

[312] For an example, see *Agricultural Community of Diaguita de los Huascoaltinos Chile* [2011] Case 12.741.

[313] *Yanomami v Brazil* [1985] Report No. 12/85, Case 7.615, Inter-Am CHR.

[314] Diego Rodríguez-Pinzón, 'Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance' (2013) 20(2) *Human Rights Brief* 3.

[315] *Maya Indigenous Community of the Toledo District v Belize* [2004] Report No. 40/04 Case 12.053, Inter-Am CHR, OEA/Ser.L/V/II.122 Doc. 5, rev. 1, para 117.

and occupied by the community until the Commission had investigated the issues raised in the claim.[316] The Commission similarly granted precautionary measures in support of *Marco Arena Mirtha Vasquez and others* requesting the Peruvian government to take appropriate measures to ensure the protection of the rights to life and integrity of the claimants.[317] The Commission also asked the authorities to ensure the effective implementation of the measures of protection by the competent authorities and report on the steps taken to investigate judicially the facts that lead to the precautionary measures.[318] Further, the Commission in the cases *Saramaka* [319] and *Kichwa indigenous community* [320] called upon the respective governments to take adequate precautionary measures to stop ongoing exploitation of the resources contained on the ancestral lands of the indigenous people.[321] The Commission has examined similar situations concerning indigenous people in other countries throughout Central and South America.[322]

The Commission also conducted examinations of the human rights situation in Ecuador for several years 'in response to claims that oil exploitation activities in the region were

[316] James Anaya and Robert A Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System' (2001) 14 *Harvard Human Rights Journal* 33, 39; Megan S Chapman, 'Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems' (2010) 18(1) *Human Rights Brief* 6, 11; Jo M Pasqualucci, The Evolution of International Indigenous Rights in the Inter-American Human Rights System (2006) 6(2) *Human Rights Law Review* 281, 288; Nadia Bernaz and Jeremie Gilbert, 'Resources Grabbing and Human Rights: Building a Triangular Relationship between States, Indigenous Peoples and Corporations' in *Natural Resources Grabbing: An International Law Perspective* (Brill 2015) 10.

[317] IACHR, *Marco Arana, Mirtha Vasquez et al. v Peru*, [2007] Inter-Am. C.H.R., OEA/Ser.L/V/II.130, doc. 22 rev. 1, Ch. III, (Precautionary Measures) para 44. In the case, Yanacocha mine was a gold mine located in the Peruvian region of Cajamarca run by NewMont, the largest US-based mining company. Allegations against the company for environmental pollution, and fears amongst the communities led to various protests, intimidation, violence and fatal confrontations between pro and anti-mining groups.

[318] 'Oxfam Calls on Mining Company to Respect Human Rights' (*Qxfam*, 1 July 2009) <oxfamamerica.org/press/oxfam-calls-on-mining-company-to-respect-human-rights/> accessed 17 November 2016; Judith Schonsteiner, 'Irreparable Damage, Project, Finance and Access to Remedies by Third Parties' in Sheldon Leader and David Ong, *Global Project Finance, Human Rights and Sustainable Development* (CUP 2011) 308; Anicama, (2008) *op. cit*., p. 17.

[319] *Saramaka Indigenous People v Suriname* [2003] OEA/Ser.L/V/11.117, Doc.1.rev.1, Ch.111. C.1 (precautionary measures) para 75.

[320] *Kichwa Peoples of the Sarayaku Community and its Members v Ecuador* [2003] OEA/Ser.L/V/11.118, doc.5.rev.2, Ch.111. C.1 (precautionary measures) para 34.

[321] Tara J Melish, 'Defending Social Rights Through Case-Based Petition' in Malcolm Langford (ed), *Social Rights Jurisprudence Emerging Trend in International and Comparative Law* (CUP 2008) 370-1.

[322] See, for example, *Ngöbe Indigenous Communities et al. v Panama* [2009] 56/08; *Mendoza Prison Inmates v Argentina* [2006] Petition 1231/04, Report No. 70/05, Inter-Am Comm HR, OEA/Ser.L/V/11.24, doc. 5, para 23.

contaminating the water, air, and soil, thereby causing the people of the region to become sick and to have a greatly increased risk of serious illness' and in order address the negative impacts of TNCs conducting operations which led to these results.[323] Finding gross violations by the TNC in conducting its mining operations, the IACHR made several recommendations not directly to the TNC, but rather to the State and agent acting through the State-Owned company in order to ensure that the state policies better reflected its human rights obligations as per the American Convention and Declaration.

Finally, it is worth mentioning a very recent development in the decision-making faculties of the IACHR, with primary relevance to the illegal activities of TNCs and the way they affect the rights of indigenous people. The IACHR seemed to suggest that it would be open to not only analysing the liability of the host state owing to violations of the TNC but rather also the liability of the home state of the TNC for permitting such actions on the part of the corporation.[324] This was as a result of serious allegations being raised against Canada from where several mining TNCs were conducting operations across nine Latin American countries, leading to severe environmental degradations and infringing on several of the rights of the people in these countries.[325] The mining activities concerned reportedly dividing communities, forcibly displacing the indigenous people from their residential zones, impoverishing them, fraudulently acquiring their properties and making false claims about potential socio-economic benefits and welfare.[326] For instance, the 'tar sands' extraction in the Athabasca River area of Alberta, Canada, to get crude oil have not only displaced the

[323] Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Ecuador' (1997) <http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm> accessed 5 October 2015.
[324] Benjamin Hoffman, 'Inter-American Commission on Human Rights to Consider "Home Country Liability" for the Extraterritorial Actions of Transnational Corporations' (7 November 2013) Earth Rights International 1.
[325] Christina M Cerna, 'Out of Bounds? The approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law' (2006) *Center for Human Rights and Global Justice Working Paper* 6/2006, 16; Christina M Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 172-173.
[326] David Hill, 'Canadian Mining doing Serious Environmental Harm, the IACHR is told' *The Guardian* (UK, 14 May 2014).

indigenous community of the province, destroying their constitutionally protected ancestral lands but have also violated their right to cultural life. The tar sands mining and production into crude oil has destroyed both wild animals and aquatic lives intimately linked to the cultural life of the indigenous people of the region as a source of income and food. Also, the massive amount of water being used by the tar sands industry has the potential to reduce the fish stock of the region's rivers and stream below sustainable levels devastating another traditional means of livelihood for the indigenous residents. The situation Alberta area has been considered by indigenous people like a slow industrial genocide being committed against them.

TNCs are exploiting the weak legal systems of the Latin American countries, thereby permitting the Canada-funded TNCs to shift their operations before they were prosecuted for human rights violations.[327]Indeed, the official report in this regard made recommendations to Canada to stop funding these TNCs and to avoid making its domestic legal framework flexible enough for these TNCs to exploit and operate from its safe havens.[328] In response to these claims, the IACHR claimed that it would look into considering home state liability for human rights transgressions by TNCs in the territories of the OAS.[329] Thus, when one considers all of these elements together, it is clear that, regardless of the level of success of the IACHR, the Commission is doing its best to hold TNCs accountable, directly or otherwise, for transgressions of human rights in Latin America. Given that it is also considering the way forward in the future by considering holding home states liable too, there are no recommendations in this regard to the IACHR.Thus, it is clear from the above decisions that

[327] Working Group on Mining and Human Rights in Latin America, 'The Impact of Canadian Mining in Latin America and Canada's Responsibility' (Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, 2011) 2.
[328] *Ibid,.*
[329] Inter-American Commission on Human Rights, 'Report on the 153rd Session of the IACHR' <https://www.oas.org/es/cidh/prensa/docs/Report-153.pdf> accessed 5 October 2015.

the Inter-American system adopts a parallel approach to that of the ECtHR with regard to the manner in which it deals with private corporations.

3.3.3.2. Inter-American Court of Human Rights and Transnational Corporations

The Inter-American Court of Human Rights is a prominent example of a regional tribunal which seeks to enshrine the human rights of local people in the American subcontinent. The Court essentially operates to resolve contentious disputes, and uses its authority to issue advisory opinions on specific technical issues of law.[330]The IACtHR has produced extensive case law in this regard, comprising a large spectrum of case subjects and contexts. TNCs play a considerable, albeit indirect, role in the jurisprudence of the IACtHR.[331] While the IACtHR has been able to address issues of corporate human rights violations, the fact remains that the Court has only achieved this by holding the state in which the TNC operates liable for the transgression. The Court grants various opportunities for victims to utilise the court in the assertion of their rights, and in increasing recognising on the effect of corporate activities on human rights within the inter-American system.

When considering the merits of the IACtHR, the case of *Awas Tingni v Nicaragua*[332] is an important one as it concerned the situation where Nicaragua had permitted logging concessions without obtaining the consent of the Awas Tingni people, and the latter claimed that the former had engaged in unconstitutional conduct by refusing them land rights. The point of contention here was Article 21 of the American Convention. The instance of

[330] American Convention on Human Rights, *Ibid.,* art 62(1) and 64; Pasqualucci, (2003) *op. cit*., p. 11; Jo M Pasqualucci, 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law' (2002) 38 *Stanford Journal of International Law* 24, 248-9; Huneeust, (2011) *op. cit*., p. 499; Carole J Petersen, 'Bridging the Gap: The Role of Regional and National Human Rights Institutions in the Asia Pacific (2011) 13 Asian-Pacific Law & Policy Journal 174, 187; De Schutter, (2014) *op. cit*., p. 1012.

[331] James L Cavallaro & Stephanie Erin Brewer, 'Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 *The American Journal of International Law* 768, 768.

[332] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Merits, reparations and costs, Inter-American Court of Human Rights Series C No. 79; Petersen, (2011) *op. cit*., p. 188.

contention was that the state had granted to a private Korean logging company, the *Sol del Caribe S.A.* (SOLCARSA), the exclusive rights to the land for a period of 30 years so that the company could construct roads and exploit timber in the region.[333] The state then claimed that the IACtHR did not have jurisdiction over the case as the claimants had not yet exhausted the local remedies. The IACtHR, however, ruled emphatically that the state had indeed breached the Article 21 rights of the group as it had 'endangered the economic interests, survival, and cultural integrity of the Community and its members'.[334] This shows that though the IACtHR could not directly hold the TNC liable for the human rights violations, it achieved this through holding the state liable for granting the concession, and thereby granting the aggrieved parties appropriate remedies.

Another case of merit here is *Saramaka People v Suriname*.[335] The Saramaka people are part of the Maroons tribe, and claimed that the mining concessions which were granted by the Suriname government to private mining corporations on lands which belonged to the Saramaka people violated their right to property as the tribe had not been fully and effectively granted participation in this. The Suriname government defended its actions by stating that as per its Constitution all of the land belonged to the government.[336] The Court analysed the

[333] See University of Minnesota Human Rights Library, 'The Mayagna (Sumo) *Awas Tingni Community v Nicaragua'* <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html> accessed 6 October 2015; Leonardo J Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of *Awas Tingni v. Nicaragua*' (2007) 24(3) *Arizona Journal of International & Comparative Law* 609, 612; Christiana Binder, 'The Case of Atlantic Coast of Nicaragua: The Awas Tingni Case, or Realising that a Good Legal System of Protection of Land Rights is no Guarantee of Effective Implementation' in Joshua Castellino and Niamh Walsh (eds), *International Law and Indigenous People*, vol 20 (Martinus Nijhoff 2005) 249-52; Jennifer A Amiott, 'Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System: *Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua* Notes and Comments' (2002) 32 *Environmental Law* 873, 899-900.

[334] *Agricultural Community of Diaguita de los Huascoaltinos Chile* [2011] Case 12.741 para 140.

[335] *Case of the Saramaka People v Suriname*, [2007] Series C No. 172, Preliminary objections, merits, reparations and costs, Inter-American Court of Human Rights.

[336] Anwar I Hollingsworth, The Indigenous Peoples Conservation Rights in Suriname a United Nations (UN) Declaration: Review of the Declaration Implementation' (Institute of International Relations University of the West Indies St. Augustine Trinidad and Tobago 10 of September 2014) 10-11; Marcos A Orellana, '*Saramaka People v. Suriname*' (2008) 102 *American Journal of International Law* 841, 842-3; Lisle Brunner, 'The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights' (2008) 7(3) *Chinese Journal of International Law* 699, 701; Sophie Lemaitre, 'Indigenous Peoples' Land Rights and REDD: A Case Study' (2011) 20(2) *Review of European Community & International Environmental Law* 150, 154.

case to determine whether, similar to the previous case, a violation of Article 21 had occurred. The Court stated in no uncertain terms that the right to property, as per the Constitution of Suriname, could be restricted in instances where the restriction has been 'a) previously established by law, b) necessary, c) proportional and d) with the aim of achieving a legitimate aim … and where the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and its members'.[337] Thus, the Court ruled that the state of Suriname had violated the right to property as they had not fulfilled these criteria and therefore the Saramaka people ought to receive a reasonable benefit from the profits made by the Suriname government in developing urban projects on their traditional ancestral lands.

Thus, while the IACtHR has not been successful in holding corporations directly responsible for human rights violations, these violations have not gone unheard, and the IACtHR has managed to scrutinise the activities of one or two in spite of this, thereby achieving justice for the victims. Indeed, the IACtHR has achieved this through recognition of the notion that a state could be held liable for the transgression of human rights by private actors such as TNCs when the state has 'failed to exercise due diligence to prevent and respond to the violations'.[338] Thus, even though the act of violation is not directly imputable to the state, the state obtains international responsibility owing to the fact that it had failed to exercise due diligence in preventing the violation.[339] The state therefore remains liable for the TNC's actions if the state has failed to undertake investigative actions of the violations and impose appropriate punishment upon the TNC in order to ensure adequate compensation.[340] It is the

[337] Benjamin Hoffman, 'Inter-American Commission on Human Rights to Consider "Home Country Liability" for the Extraterritorial Actions of Transnational Corporations' (*Earth Rights International*, 7 November 2013) <https://www.earthrights.org/blog/inter-american-commission-human-rights-consider-home-country-liability-extraterritorial-actions> accessed 6 October 2015.
[338] Danwood M Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melbourne Journal of International Law* 1, 14.
[339] Kamminga and Zia-Zarifi, (eds) (2000) *op. cit*., p. 78.
[340] *Case of Velásquez Rodríguez v Honduras* [1988] Series C No. 4, para 174, Merits, Inter-American Court of Human Rights.

role of the Court to try to remedy human rights violations by seeking to award adequate compensation to the aggrieved parties as it is the duty of the Court and the State to ensure that the damaged parties have received appropriate compensation.[341]

Hence, in terms of recommendations, unless the IACtHR makes explicit changes via the American Convention to directly hold TNCs liable, the present approach remains the most suitable in dealing with TNCs. However, on the technical front, a case only reaches the Court after the Commission has dealt with it, and this takes approximately four years. Then, when the Court deals with the case, this takes another four long years. During this time, given the many resources available to TNCs, there could be a substantial loss of evidence and the conditions of human rights violations could worsen. Hence, the primary recommendation would be to ensure that the Court processes are executed at a quicker rate, and that the Court needs to open a separate channel where litigants could directly apply to the jurisdiction of the Court. As there are two sections to this recommendation, it remains the case that the former recommendation is technical in nature and could be quite easily achieved by convening the Court more regularly and employing more judicial members. With regard to the latter recommendation, the problem primarily lies with the fact that this would need a fundamental restructuring of the Court's interaction with the Commission, and therefore would need Pan-American support and amendment of the American Convention. Thus, both procedurally and politically, this might prove to be troublesome.[342]

3.3.4. The African Regional Human Rights System

The African human rights system is the most recent of the three judicial or quasi-judicial regional human rights arrangements and was established under the influence of the African Union (AU). In the same way as the Inter-American and the European systems were initially

[341] *Case of the Yakye Axa Indigenous Community v Paraguay* [2005] Series C No. 127, paras 179-180, Merits, reparations and costs, Inter-American Court of Human Rights.
[342] Dinah Shelton, *Regional Protection of Human Rights*, vol 1 (OUP 2010) 1024.

conceived, it comprises two bodies: a Commission and the Courts. The African human rights system is preserved in the *African Charter on Human and Peoples' Rights* (African Charter or Charter).[343] It is the principal legal instrument for the promotion and protection of human rights on the African continent.[344]

The African Charter came into force on 21 October 1986 after its adoption on 27 June 1981 in Nairobi, Kenya by the Assembly of Heads of States and Government of the Organization of African Unity (OAU). It was ratified by all State Members of the AU which replaced the OAU in 2001. The African Charter further established the African Commission on Human and Peoples' Rights (ACHPR)[345] which is a quasi-judicial body in charge of monitoring the implementation of the African Charter by Member States.[346] The Commission started operating on 2 November 1987 having come into force on 21 October 1986. In 1998, a Protocol to the African Charter on the creation of the African Court on Human and Peoples Rights (ACrtHPR) was adopted in Ouagadougou, Burkina Faso by the Assembly of Heads of State and Governments of the AU.[347] The Protocol entered into force in January 2004 and was ratified by 26 Member States. Lastly, the Protocol that created the Court of Justice (CJ) of the AU was adopted on 11 July 2003 in Maputo, Mozambique and came into force in 2009.[348]

The African Charter recognised the rights guaranteed under the Charter as a principle and objective in its Constitutive Act. The Charter opened a new era for human rights protection in

[343] The African Charter on Human and Peoples' Rights (1981), 21 ILM. 58, (Banjul Charter).
[344] Eghosa Ekhator, 'Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria' (2014) 22(1) *African Journal of International and Comparative Law* 63, 66; JC Mubangizi, 'Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: the Pains and the Gains' (2006) 6(1) *African Human Rights Law Journal* 146, 147.
[345] The African Commission on Human and Peoples' Rights (the Commission).
[346] Art 30 of the African Charter provides for the establishment of the Commission.
[347] Art 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), Doc. OAU/LEG/MIN/AFCHPR/PROT/III. The proposal for its establishment was made at the International Commission of Jurist African Conference on Rule of Law, Lagos, Nigeria in 1961.
[348] Draft Protocol of the Court of Justice of the African Union (2003), Assembly/AU/Dec.25 (II), Doc. EX / CL/59 (III) 1, art 2 of the Protocol.

Africa; it was influenced by the legal text of the two international covenants on human rights, the Universal Declaration of Human Rights and the regional human rights conventions as well as the legal traditions of Africa.[349] At the time of its adoption, the African Charter was particularly innovative due to its broad conception of internationally recognised human rights norms which makes it unique and different from other conventions. The Charter realises rights that are not only civil and political rights[350] but also economic, social and cultural,[351] as well as those protected by the Protocol on the Rights of Women in Africa.[352] In addition to individual rights, it also recognises people's rights which are regarded as 'third-generation' or collective rights such as the right to development, the right to a satisfactory environment, the right to peace, and the right of people to dispose of their wealth and natural resources.[353] Possibly, the inclusion of socio-economic rights in the African Charter along with civil and political rights is the most important for the purpose of this study. This view indicates the indivisibility of human rights and the significance of developmental issues within the African region. Virtually all these rights enshrined in the African Charter can be violated by private actors, including companies. For example, the growing number of TNCs operating in various

[349] Lalit Kumar Arora, *Major Human Rights Instrument* (Gyan Books 2006) 72; Danwood Mzikenge Chirwa, 'African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights' In Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 323; Pierre De Vos, 'A New Beginning - The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples' Rights' (2004) 8(1) Law, *Democracy and Development* 1, 4.

[350] Arts 2-14 of the African Charter on Human and Peoples' Rights deal with Civil and Political Rights: Right to non-discrimination (art 2); Right to equality before the law (art 3); Rights to life and physical and moral integrity (art 4); Right to the respect of the dignity inherent in a human being, the prohibition of all forms of slavery, slave trade, physical or moral torture and cruel, inhuman and degrading punishment or treatment (art 5);Right to liberty and to security of the person and the prohibition of arbitrary arrests or detention (art 6); Right to a fair trial (art 7); Freedom of conscience and religion (art 8); Right to receive information and freedom of expression (art 9); Freedom of association (art 10); Freedom of assembly (art 11); Freedom of movement, including the right to leave and enter one's country and the right to seek and obtain asylum when persecuted (art 12); Right to participate in the government of one's country and the right of equal access to public service (art 13); and Right to own property (art 14).

[351] Arts 15-17 of the African Charter deals with Economic, Social and Cultural Rights: Right to work under equitable and satisfactory conditions and receive equal pay for equal work (art 15); Right to physical and mental health (art 16); Right to education and the freedom to take part in cultural activities (art 17); and Right of family, women, aged or disabled to specific measures of protection (art 18).

[352] AU Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa (adopted 10-12 July 2003).

[353] Arts 19-26 of the African Charter; Morne Van der Linde and Louw Lirette, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication' (2003) 3 African Human Rights Law Journal 167, 174-5.

parts of Africa, particularly oil extractive industries, poses potential threats to the right to a clean environment which must be enjoyed according to Art 24 of the African Charter. Equally, the rights in the Charter may also be violated through the complicity of companies in violations committed by others.[354] The potential of the African system to deal with corporate human rights violations is a reflection of the provisions of the African Charter itself.

The African Charter largely adheres to the international law approach of 'state responsibility' to protect human rights.[355] In other words, it imposes duties on the State Parties to respect, protect, promote and justify the rights in the Charter.[356] The duty to protect embraces a consideration of the state's responsibilities to guarantee that private actors, including companies, do not violate or become complicit in the violation of the rights in the Charter.[357] Unlike other international and regional human rights instruments, the Charter does not allow any state to derogate from the provision of the Charter even during a public emergency situation. For instance, the African Commission found that states are not allowed to derogate from the provisions of the Charter since no derogation clauses are included within the *Treaty of Article 19 v. Eritrea*.[358] The African Charter also contains several clauses that limit the scope of these rights; these are generally termed 'claw-back clauses'.[359] These rights are

[354] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* [2001] Communication No. 155/96 (*SERAC v Nigeria*).
[355] Amao, (2008) *op. cit.*, p. 762.
[356] In terms of art 1 of the African Charter, Member States are required to recognise the rights, duties and freedoms encompassed in the Charter and to adopt legislative and other measures to give effect to them.
[357] South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), 'The State Duty to Protect, Corporate Obligations and Extra-Territorial Application in the African Regional Human Rights System' (17 February 2010) 15. In trying to preserve African culture and values, the Charter imposes duties on the individual toward his family, society, the state, and other legitimately recognised communities and toward the international community. Whilst each individual is being called upon to exercise these rights, the rights can only be limited by the rights of others, collective security, morality and common interest.
[358] *Treaty of Article 19 v The State of Eritrea* [2007] Communication No. 275/2003; The *Media Rights Agenda and Others v Nigeria* [2000] Communication No. 224/98 2000, 'the Commission affirmed that the lack of any derogation clauses in the African Charter means that the limitation on the rights and freedom …cannot be justified by emergency or special circumstances'. Malcolm Evans and Rachel Murry, 'Civil and Political Rights in the African Charter on Human and Peoples' Rights Article 1-7' in Malcolm Evans and Rachel Murry (eds), *The African Charter on Human and Peoples Rights: The System in Practice, 1986-2006* (CUP 2008) 176.
[359] Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2003-4) 108(3) *Penn State Law Review* 679, 688; Christof Heyns, 'Civil and Political Rights in the African Charter' in Malcolm Evans and Rachel Murry (eds), *The African Charter on Human and Peoples Rights: The System in Practice,*

restricted by phrases such as 'except for reasons and conditions previously laid down by law',[360] 'subject to law and order'[361] or 'within the law'.[362] It has been argued that the limitations will subject these rights to domestic law which in those instances have to be measured in accordance with a domestic standard, thus undermining their scope and content.[363]

Like other international and regional human rights mechanisms, the primary duty-bearers to ensure the implementation of the rights protected in the Charter are states. Although the African Charter expressly imposes duties on individuals, its horizontal application remains controversial due to the lack of a clear statement in the Charter as to whether it may be directly applied against private actors.[364] Still more controversial is the effect that the duties stated in the Charter may have on individuals and whether a case brought against a private actor would be admissible.[365]

3.3.4.1. The African Commission on Human and Peoples' Rights and Transnational Corporations

The Commission is entrusted with the mandate of ensuring the promotion and protection of human and peoples' rights within the African continent.[366] The Commission also has jurisdiction to interpret the broad set of rights spelt out in the African Charter at the request of

1986-2006 (CUP 2002)142; PHPHMC van Kempen, 'Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR.' (2010) 14(3) *European Journal of Comparative Law* 1, 5.

[360] Art 6 of the African Charter provides that: 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

[361] Art 8 of the African Charter provides that: 'Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.'

[362] Art 9(2) of the African Charter states that: 'Every individual shall have the right to express and disseminate his opinions within the law.'

[363] Heyns, (2003-4) *op. cit*., p. 688.

[364] SAIFAC, 'The State Duty to Protect, Corporate Obligations and Extra-Territorial Application in the African Regional Human Rights System' (17 February 2010) 31.

[365] *Ibid.*,

[366] African Charter, *Ibid.*, art 45.

a State Party, an institution of the AU or an African civil organisation recognized by the AU.[367] To achieve these goals, the Commission is mandated to collect documents; carry out studies and research on African problems in the field of human and peoples' rights; organize seminars and conferences; disseminate information; and give its views or make recommendations to Member States.[368] Its duties include receiving national reports on the human rights situation which State Parties are required to submit every year; adopt resolutions on specific issues related to human rights situations in countries; make declarations and state visits; adjudicate complaints (communications) submitted to the Commission; send urgent appeals to Member States; and publish press releases.[369] Also, the Commission has the mandate of preparing cases for submission to the African Court on Human and Peoples' Rights.

Although the Commission is allowed to directly accept and consider communications from State Parties, it can also receive complaints from private actors under the provision of 'Other Communications'.[370] This gives individuals and NGOs the possibility to bring complaints before the Commission. This implies that the Commission certainly provides very broad standing in that a claimant need not even know or have any link with the victim. However, a complaint can only be lodged against a State Party for violation of rights provided by the Charter, not against private actors including corporations.[371] This quasi-judicial procedure empowers the Commission to make resolutions which criticise the violation of rights stated in the Charter by a State Party and to make recommendations it considers appropriate in a

[367] *Ibid.*,; Japhet Biegon and Magnus Killander, 'Human Rights Developments in the African Union during 2008' (2009) 9(1) *African Human Rights Law Journal* 212, 224.
[368] African Charter, *Ibid.*, art 45(1).
[369] The Commission's Interim Rules of Procedure, art 23.
[370] African Charter, *Ibid.*, arts 55-9. The term 'communication' means the document filed by a State Party, an NGO or an individual alleging violation of the African Charter by a State Party.
[371] African Charter, *Ibid.*, art 47.

specific case.[372] The Commission on its own initiative cannot enforce its decisions but can sometimes grant an interim measure to avoid irredeemable damage.[373]

The lack of enforcement power of the Commission rendered its decision remote, if not virtually insignificant to the victims.[374] For example, following the Commission's findings in *International PEN and others v Nigeria* that Nigeria had breached its human rights obligations,[375] the Nigerian state under the leadership of late Gen. Sani Abacha did not just disregard the recommendations of the Commission but even challenged the judicial capacity of the Commission to consider communications.[376] Despite the interim measures provided requesting that the execution of Ken Saro-Wiwa and others be suspended pending the consideration of the case by the Commission, Nigeria disregarded the Commission and executed the death sentence.[377]

The Commission embraces the traditional principle of international law so complaints can only be brought against a Member State of the Charter, not against private actors, including businesses.[378] This means that private actors, including businesses, can only be involved when a state is held responsible for human rights abuses. This is in accordance with the principle of state responsibility under international law. For example, in *Zimbabwe Human*

[372] International Federation of Human Rights (FIDH), 'Practical Guide: The African Court on Human and Peoples' Rights. Towards the African Court of Justice and Human Rights' (April 2010) 25.
[373] UO Umozorike, 'The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness' (2007) 13(1) *Annual Survey of International and Comparative Law* 179, 186; Rules 111 of the Rules of Procedures of the African Commission on Human and Peoples' Rights adopted on 6 October 1995 allows the Commission to grant interim provisional orders.
[374] Makau W Mutua, 'The Construction of the African Human Rights System: Prospects and Pitfalls' in Samantha Power and Graham Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact* (St Martin's Press 2000) 143; George Mukundi Wachira, African Court on Human and Peoples' Rights: Ten Years on and Still no Justice (Minority Rights Group International 2008) 11.
[375] *International Pen, Constitutional Rights Project, Inter-Rights on Behalf of Ken Saro Wiwa Jr and Civil Organisation v Nigeria* [1998] No.137/94, 139/94, 154/96 and 161/97, African Commission on Human and Peoples' Rights, Comm.
[376] Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Intersentia Publishing, 2014) 459.
[377] *Ibid,.*
[378] African Charter, *Ibid.*, art 47; Olufemi Amao, *Corporate Social Responsibility, human Rights and the Law Multinational Corporations in Developing Countries* (Routledge, 2011)59.

Rights NGO Forum v Zimbabwe,[379] the Commission was given the opportunity to consider the extent of state responsibility for human rights violations committed by private actors under the African Charter. In this case, supporters of the Zimbabwe African National Union Patriotic Front [ZANU (PF)] and other local militias intimidated and harassed people who opposed the new government's proposal. In the violent environment of that period, human rights abuses, including murder, rape, torture and destruction of property, were reported. The complainant also stated that various ZANU (PF) officials condoned the violence for political interests, including President Mugabe. Zimbabwean law enforcement allegedly turned a blind eye to the human rights abuses and generally failed to interfere or investigate incidents. Afterwards, the Commission went on to investigate the scope of the state's responsibility for private actors under the African Charter. The Commission held that State Parties have a responsibility under Article 1 of the African Charter to prevent acts or omissions that violate the rights provided in the African Charter.[380] The Commission was of the view that '[a]ny impairment of those rights which can be attributed under the rules of international law to the acts or omissions of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the African Charter'.[381] The Commission went further by stating that 'an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation'.[382]

[379] [2006] Communication No. 245/2002, AHRLR 128 ACHPR Annexure 3 to the African Commission on Human and Peoples' Rights 21st Activity Report. In this case, the complainant alleged that political tension flared up in Zimbabwe after the Zimbabwean Constitutional Referendum in February 2000 in which the majority of citizens voted against the government proposal to draft a new Constitution. For more details on this case see, Amao, (2011), *op. cit.*, p. 182-185.
[380] *Zimbabwe Human Rights NGO Forum v Zimbabwe* [2006] *Ibid.*, para 215.
[381] *Ibid*,. para 142.
[382] *Ibid*,. para 143.

The Commission's most extensive decision concerning state responsibility for human rights violations by TNCs was in *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC and CESR) v. Nigeria*.[383] The issue which formed the basis of the complaint proceeded from activities that involved the operations of Shell Petroleum Development Corporation (SPDC), a subsidiary of Shell International, which was in a consortium with the Nigerian National Petroleum Corporation (NNPC wholly owned by the government of Nigeria). The complaint alleged that SPDC mining activities in the Niger Delta region in Nigeria had caused environmental degradation and health problems among the people of Ogoniland.[384] The complaint further alleged that the Nigerian government through its security forces used violence and intimidation against members of a movement opposing these human rights violations at the request of the oil companies. The government also participated in the abuses by executing some Ogoni leaders and through the use of its military killed many innocent people and destroyed villages and homes belonging to the Niger Delta people.[385] Although the *SERAC* case was brought against the Nigeria State, the prime target was SPDC. The majority of the claims put forward in the complaint originated from the activities of the oil mining corporation. [386] On the other hand, the claims against the government of Nigeria concerned condoning and facilitating human rights violations by the oil corporations' by placing the legal and military powers of Country at their disposal.[387] According to the complaint, the allegations constituted violated several rights in the Charter

[383] (2001) Communication 155/96, the African Commission on Human and Peoples' Rights.
[384] *SERAC v Nigeria,* (2001) *Ibid.,* para 1 and 2; Among the vast literature on the case see, Justice C Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria'* (2005) 2 *African Journal of Legal Studies* 129, 130-131; Nsongurua J Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105, 129-130.
[385] *SERAC v Nigeria*, (2001) *Ibid.,* paras 6-7.
[386] Justice C Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria'* (2005) 2 *African Journal of Legal Studies* 129, 131.
[387] *SERAC v Nigeria*, (2001) *Ibid.,* paras 3.

including Articles 2, 4, 14, 16, 18(1), 21 and 24.[388]Based on the allegations, the Nigerian government was held responsible through the NNPC for failing to protect the Niger Delta people from human rights violations by the consortium.

In giving its opinion, the Commission highlighted the first line of state responsibility for the protection of human rights by holding that states have a duty to protect their citizens through proper legal and effective enforcement mechanisms and also to protect them from violations that may be committed by private actors.[389] The Commission based its decision on the responsibility of the Nigerian government to protect its peoples from abuses and violations and said nothing about the TNC. The way in which the Nigerian government connected to the TNC was also criticised by the Commission as it found that the government had failed to exercise the due diligence required in such situations.[390] The Commission was of the view that the government of Nigeria was required to take all appropriate actions to protect its citizens from human rights violations and should be held liable for failing to do so or if the actions taken were inadequate.[391] The Commission relied on decisions in *Union des Jeunes Avocats/Chad*,[392] *Velasquez Rodriguez v Honduras,*[393] and *X and Y v Netherlands*[394] to hold that the Nigerian government's behaviour fell short of the minimum obligations expected of a state as required by the African Charter.[395]

The Commission found the Nigerian state responsible for violations of rights protected under the African Charter in relation to the SPDC. It placed all the violations that had been perpetrated by the oil company on the Nigerian government. In conclusion, the Commission

[388] *SERAC v Nigeria*, (2001) *Ibid.,* paras 10.
[389] Amao, (2011), *op. cit*., p. 191.
[390] *SERAC v Nigeria*, (2001) *Ibid.,* para 54.
[391] *Ibid.*, para 58.
[392] *Union des Jeunes Avocats/Chad*, Communication 74/92.
[393] Inter-American Court of Human Rights, Decision *Velasquez Rodriguez v. Honduras* [1988], Series C, No.4 FACT.
[394] *X and Y v Netherlands* [1985] 91 ECHR (Ser. A) at 32 FACT.
[395] *SERAC v Nigeria,* (2001) *Ibid.,* para 57; Kwadwo Appiagyei-Atua, 'Self Determination v State Sovereignty: A Critique of the African Commission Decision in the Ogoni Case', in Joshua Castellino and Niamh Walsh (edn) *International Law and Indigenous People*, vol 20 (Martinus Nijhoff 2005) 309.

urged the government of Nigeria to ensure the enjoyment of human rights for the people of Ogoniland by taking all necessary steps to put in place effective remedies for victims of the human rights violations in the form of a complete clean-up of the environment and rivers, and 'the safe operation of any further oil development … guaranteed through effective and independent oversight bodies for the oil companies'.[396] The Commission also appealed to Nigeria to update the Commission on the effects of its efforts to address the abuses in question through the work of the Federal Ministry of Environment, the Niger Delta Development Commission and the Judicial Commission of Inquiry which were charged with the investigation of the said human rights abuses.[397]

In *Centre for Minority Rights Development (Kenya) and Others v Kenya* a communication was lodged at the African Commission on behalf of the Endorois community by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG).[398] The complainants claimed that in breach of the African Charter the Kenyan government forcibly and illegitimately ejected the residents of Endorois community from their ancestral lands without being adequately compensated. They were moved to semi-arid areas and blocked from accessing the medicinal salt licks, pasture land, and cultural and religious places around the lake.[399] The complainants stated that the Kenyan government used the land to establish a game reserve for tourism, sold portions to third parties and concessions for ruby mining were given to private companies. The Endorois people were neither allowed to effectively take part in the discussion concerning their land nor did they benefit from

[396] Emphasis added.
[397] *SERAC v Nigeria*, (2001) *Ibid., holding of the Commission*; Christoper Mbazira, 'Enforcing the Economic Social and Cultural Rights in African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 *African Human Rights Law Journal* 333, 351; Bernaz and Gilbert, (2015) *op. cit*., p. 10.
[398] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* [2010] Comm no 276/2003 ACHPR.
[399] Elizabeth Ashamu, '*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*: A Landmark Decision from the African Commission' (2011) 55(2) *Journal of African Law* 300, 301-2.

proceeds generated from the game reserve.[400] The Commission investigated the Kenyan government's removal of the Endorois residents from their ancestral lands to create a game reserve with minimal compensation.[401] It found infringement of the Endorois rights to culture, natural resources, to practise their religion as well as the right to development of their community as guaranteed in the African Charter.[402] The Commission recommended that Kenya should give back the Endorois their land, pay fair compensation for injuries suffered and pay royalties to the Endorois people for economic activities on their ancestral lands. The decision of the African Commission concerning the Endorois community is a valuable contribution to jurisprudence on the rights of indigenous people. This was the first findings of the Commission to ascertain who native citizens in Africa are and what rights there are, and it established an important precedent that may have a significant spill-over effect on indigenous Niger Delta minorities in Nigeria and other similar minorities and indigenous communities in Africa. In addition, it was the first judgment in which the Commission addressed violations of the right to development under Article 22 of the African Charter as it is the only international treaty that contains that right.[403]

Although the decisions of the African Commission regarding internationally recognised human rights norms as well as state duty to regulate the activities of TNCs within their territory are promising, it is impossible to hold TNCs directly accountable for human rights violations they perpetrated. Communications can only be lodged before the Commission if it

[400] Jorge E Viñuales, *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 154-5.
[401] In terms of consultation and compensation, the Commission noted that the conditions of the consultation failed to fulfil its own standard of consultation as the community members were informed of the impending project as a *fait accompli,* and not given an opportunity to shape either their policies or their role in the Game Reserve. It held that 'no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior Environmental and social Impact Assessment was not carried out. The absence of these of these three elements is tantamount to a violation of Article 14, the right to property, under the Charter. The failure to guarantee effective participation and to a reasonable share in the profit of the Game Reserve … also extends to violation of the right to development.
[402] Under the African Charter of Human and Peoples' Rights (the African Charter), these allegations included violations of the Endorois right to practise religion (art 8), right to culture (art 7(2) and (3)), right to property (art 14), right to dispose freely of their natural resources (art 21) and the right to development (art 22).
[403] Biegon and Killander, (2009) *op. cit*., p. 225-6.

can be proven that the state has failed to protect its people from human rights violations by a third party or the state itself committed the violations.[404] If it is assumed that most of the claims arise from the direct activities of TNCs, it seems there is a gap in the application of state duty as the obligation of the main perpetrator is ignored.[405] For instance, the judgment in the *SERAC* focused wholly on the Nigerian government, disregarding the consequences of the liability of SPDC.[406] The omission is also glaring when the issue concerning the regulation of the activities of TNCs is considered within the broader framework of the difficulties posed by globalisation, especially where the legal regimes of the host state are incapable of tackling the difficulty.[407]

The African Commission could have played a leading role if it had said more on the responsibility of companies in cases such as *SERAC* since the conditions for imposing liability on Shell were all contended in the claim.[408] This is particularly true because the African Charter is recognised for its enunciation of duties and responsibilities of other actors apart from states.[409] Oloka-Onyango is of the view that where a corporate actor is complicit with the host state in abuses of human rights, direct liability should be established. For instance, in the *SERAC* case the evidence before the Commission indicated that the oil

[404] International Federation of Human Rights (FIDH), Practical Guide: The African Court on Human and Peoples' Rights. Towards the African Court of Justice and Human Rights (April 2010) 127.
[405] Amao, (2008) *op. cit*., p. 772.
[406] J Oloka-Onyango, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa' (2002-3) 18(4) *American University Law Review* 851, 903.
[407] Onyango, (2002-3) *Ibid.,* p. 903; Emeka Duruigbo, 'Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry' (2001) 7(1) *Annual Survey of International & Comparative Law* 101, 139. On this idea, Duruigbo pointed out that: 'The situation is even worse in the case of developing countries which, in their quest and scramble for economic investments of multinational companies, are too enfeebled to regulate or control the multinationals. Indeed, the companies are more likely to show a preference for those countries with lax regulations over multinational business activity. The absence in developing countries of the technical expertise and legal development necessary to monitor or regulate complex activities such as environmental pollution also militates against any efforts by these countries to control the activities of multinational corporations'.
[408] Amao, (2008) *op. cit*., p. 773.
[409] Onyango (2002-3) *op. cit*., p. 910.

exploration companies knew that their businesses were complicit in state promoted abuses and that the company itself perpetrated numerous abuses.[410]

The African regional system is based on treaty arrangements which are not largely limited by the principles of international law. It is down to the AU establishments to ascertain the trend the regional system requires. As a result of the frequent human rights violations instigated by TNCs operating across Africa, it is recommended that a more forthright means like that proposed by Oloka-Onyango should be adopted. The resolution of the African Commission is in the form of recommendations for the affected state to abide by. Notwithstanding its capacity as an institution to protect and promote human rights, the Commission has failed to pronounce clear and specific remedies to effect compliance. If the Commission could go ahead to enunciate on the responsibility of the private actor, this would go some way to offering clarity and would help Member States to realise what to do to remedy the circumstances.

In November 2009, the Commission established a Working Group on Extractive Industries, Environment, and Human Rights Violations in Africa with a two-year research mandate that included 'inform[ing] the African Commission on the possible liability of non-state actors for human and peoples' rights violations under its protective mandate'.[411] In June 2015, the Commission ratified a Draft General Comment on Article 4 of the African Charter (Right to Life)[412] which declared that 'non-State entities such as private individuals and corporations, including private military and security companies, that are responsible for arbitrary

[410] *Ibid.*, p. 904-905.

[411] 46 Ordinary Session of the African Commission on Human and Peoples' Rights, Working Group on Extractive Industries, Environment and Human Rights Violations, Resolution ACHPR/Res.148(XLVI)09, para 12, The Working Group was established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 148 at the 46th Ordinary Session held in Banjul, The Gambia in from 11 to 25 November 2009; see also, Megan S Chapman, 'Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems' (2010) 18(1) *American University Washington College of Law* 6, 11.

[412] General Comment No 3 on Article 4 of the African Charter on Human and Peoples' Rights (the right to life), Adopted During the 57 Ordinary Session of the African Commission on Human and Peoples' Rights, Held from 4 to 18 November 2015 in Banjul, The Gambia.

deprivation of life should also be held accountable'.[413]Bernaz rightly observed that if the Commission was to embrace paragraph 10 of the Draft General Comment in the final report, it would be the first and foremost treaty body mentions direct corporate responsibility for an entirely private venture without reference the responsibility of a state.[414] This would be significant progress and would also reinforce the responsibility of TNCs and other business enterprises to act with due diligence and respect all internationally recognised human rights norms in conformity with the UN Guiding Principles on business and human rights. The Commission adopted the classical doctrine under international law which means that a case can only be brought against a State Party to the Charter and not against private persons or individuals. This means that a private person or individual can only be implicated when a state is held liable for the violation of human rights. This is in line with the principle of state responsibility as enunciated under international law.

3.3.4.2. The African Court on Human and Peoples' Rights (ACrtHPR) and Transnational Corporations

The Protocol creating the ACrtHPR was entered into force after ratification by the required 15 State Parties.[415] The Protocol on the African Court provides the Court with advisory and contentious jurisdiction regarding the rights included in the African Charter.[416] The objective of the African Court is to 'complement the protective mandate' of the African

[413] Paragraph 10, Draft General Comment No 3 on Article 4 of the African Charter on Human and Peoples' Rights (the right to life),
[414] Nadia Bernaz, 'Corporate Accountability in the Draft General Comment on the Right to Life by African Commission on Human and Peoples' Rights' (*Rights as Usual*, 24 August 2015) http://rightsasusual.com/?p=989> accessed 16 June 2017.
[415] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998), OAU Doc. OAU/LEG /EXP /AFCHPR /PROT/III, art 1.
[416] Protocol to the African Charter on African Court on Human and Peoples' Rights, art 3 and 4; see also, Robert Wundeh Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223, 226; Abdelsalam A Mohamed, 'Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights' (1999) 43 *Journal of African Law Review* 201, 202.

Commission.[417] According to Viljoen, the complementary purpose of the African Court is a departure from the quasi-legal instrument to a judicial system, hence leading to a move from recommendatory to a binding and enforceable decision as well as to certain adequate remedies.[418] The Court may receive requests for an advisory opinion from States Parties, the AU and its organs or any other institution recognized by the regional body on any legal issue concerning the Charter or related human rights mechanisms as long as the issue of the opinion is not related to an issue being considered by the Commission.[419]

The Court has jurisdiction to entertain cases brought to it that concern not only the interpretation and operations of the Charter but also the Protocol and any other substantial human rights mechanisms ratified by Member States that have lodged the brought complaint.[420] Also, a Member State that has an interest in a matter in which it was originally not a party may apply to the Court for leave to join.[421] Borrowing from its Inter-American and European counterparts, if the court establishes there has been exploitation of human rights, it has the mandate to take all necessary measures to remedy the injury suffered including payment of adequate compensation and damages.[422] The ruling of the Court is binding and states are bound to execute. The Council of Ministers shall also inform of the decision and shall monitor its implementation on behalf of the AU Assembly.

However, the Court is vested with discretionary jurisdiction, i.e. it has the power to allow or refuse access for other private actors such as individuals and NGOs.[423] Moreover, access to the African Court is extremely limited – only to relevant NGOs with observer status before

[417] Protocol to the African Charter on African Court on Human and Peoples' Rights, art 8; Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004)30(1*) Brooklyn Journal of International Law* 1, 2.
[418] Viljoen, (2004) *Ibid.*, p. 13-15; also, Protocol to the African Charter on African Court on Human and Peoples' Rights, under art 28(1) provides that The judgment of the Court decided by majority shall be final and not subject to appeal.
[419] Protocol to the African Charter on African Court on Human and Peoples' Rights, art 4.
[420] *Ibid.*, art 3(1) and 7.
[421] *Ibid.*, art 5(2).
[422] *Ibid.*, art 27.
[423] *Ibid.*, art 5(3).

the African Commission.[424] The Court can only receive matters from an NGO with observer status where a State Party concerned has made an explicit declaration assenting to the jurisdiction Court to try the matter.[425] The Protocol of the African Court has taken effect with the ratification requirement. To date, among the State Parties that ratified the Protocol only Burkina Faso has allowed a declaration from non-state actors.[426]

The legal instruments of the Court are quite inspiring and should greatly support victims of corporate human rights abuses to access the Court and seek adequate remedies and justice.[427] Nevertheless, the problem that remains is whether States Parties will change their common culture of non-compliance with judgments in any case, and instead seek to execute the ruling of the Court.[428] Therefore, this study recommends that the Protocol to the African Charter that created the African Court of Human Rights be amended so that the judgment of the Court can be implemented in the highest national court of the affected state. This could be learned from the provision of Article 68(2) of the Inter-American Convention on Human Rights which stated that in order to guarantee the execution of a judgment of the Inter-American Human Rights Court, part of the decision 'may be executed in the country concerned by the domestic procedure governing the execution of decision against the state'. The Inter-American approach has also been embraced by the Court of Justice of the Economic Community West African States (ECOWAS), whose ruling can be enforced in the apex domestic court of the State Party concerned. If this approach could be adopted, victims of human rights violations by TNCs from the African region could seek adequate remedies and

[424] *Ibid,.*
[425] *Ibid.*, art 34(6).
[426] Umozurike, (2007) *op. cit*., p. 190.
[427] Oluduro, (2014) *op. cit*., p. 458.
[428] Muna Ndulo, 'African Commission and Court under the African Human Rights System' in John Akokpari and Daniel Shea Zimbler (eds), *African's Human Rights Architecture* (Fanele 2008) 198; See also, for example, the behaviour of Nigeria in the execution of the African Commission's recommendations in *SERAC v Nigeria* [2001]; *International Pen, Constitutional Rights Project, Inter-Rights on Behalf of Ken Saro Wiwa Jr and Civil Organisation v Nigeria* [1998] Comm. Nos 137/94, 139/94, 154/96 and 161/97 ACHPR.

justice in the African Court of Human Rights.[429] An attempt should be made to change the behaviour of non-compliance in cases of human rights abuse that is prevalent in the African region by guaranteeing that member states accede, respect and conform to the stipulations of the protocol. In any case, they agreed to abide by the decisions of the Court and so have a duty to implement them consistent with the principle of *pacta sunt servanda* (agreements must be kept), and based on Article 1 of the African Charter.

Although the restriction under Article 5(3) of the Protocol of the African Court may encourage states to ratify the Protocol, it is however inadequate and devastating to the standing and status of the African Court.[430] Access to the Court is open to two classes of people. The first category includes State Parties, the Commission, AU institutions and intergovernmental organisations.[431] Moreover, the main beneficiaries and users of the African Court ought to be individuals, and human rights courts primarily exist to protect individuals from abuses and violations committed by the state and its agencies. Another element where access to the court is excessively limited is the requirement that access be given only to 'relevant NGOs with observer status before the Commission'.[432] These conditions have been regarded as a unique and possibly critical obstacle to accessing justice and have restrained many victims from seeking remedies from the Court.[433]

There is no standard for determining what constitutes a relevant NGO. Eno has posited that the determination can be left to the African Commission to consider those NGOs that have

[429] George Mukundi Wachira, 'African Court on Human and Peoples Right: Ten Years on and Still no Justice' (Minority Rights Group International Report 2008) 23.
[430] Ndulo, in Akokpari and Zimbler (eds) (2008) *op. cit*., p. 171.
[431] Art 5(1) of the Protocol stated that the Court may receive cases from: a) the Commission; b) the State Party which has lodged the complaint to the Commission; c) the State Party against which the complaint has been lodged at the Commission; d) the State Party whose citizen is a victim of a human rights violation; and e) African Intergovernmental Organizations.
[432] Dan Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper' (2007) 4(2) *Essex Human Rights Review* 1, 6.
[433] Sybril Sakkle Thompson, 'The African Human Rights System Comparison Context and Opportunities for Future Growth' in Michael Wodzicki (ed), *The Fight for Human Rights in Africa Perspective on the African Commission on Human and Peoples' Rights, Rights & Democracy* (International Centre for Human Rights and Democratic Development, Canada 2008) 40. Rebecca Wright, 'Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights' (2006) 24 *Berkeley Journal of International Law* 463, 475.

been submitting their periodic reports to it.[434] Therefore, it is imperative that NGOs without observer status before the Commission apply to get the status for an impending application to the Court as this could present a potential difficulty to access the Court. Getting observer status may take one to two years. To date, the ACrtHPR has not been accessed by victims of corporate human rights abuses. Thus, it has been proposed that the Rules of Procedure for the Court include a clear mention of the fact that domestic remedies must be both effective and adequate or exhaustion would not be required.[435] If the Court assumes a narrow approach in the impending matter, further access to the Court will be hindered.

3.3.4.3. The Court of Justice of the African Union

The Court of Justice of the AU African was originally designed to be the prime judicial organ of the AU, as stated under Article 5(1) of the AU Constitutive Act. Although the Protocol that created the Court of Justice (CJ) of the AU has been ratified by the required 15 AU Member States, this court was never operationalised by the AU.[436] However, during the 2004 AU Summit of the Assembly of Heads of State and Government of the AU, it was decided that the ACrtHPR and the African Court of Justice should be merged into one Court with two chambers – one for general legal matters and the other for deciding human rights issues.[437] It was envisioned that the Court would be integrated with the ACrtHPR and would undertake the judicial function of the African Commission. The integration of the two Courts and the inclusion of the adjudicatory duties of the Commission are important because the decision of the Court will be rigorously enforced.[438] For the marged African Court to function fully, the

[434] Eno, (2002) *op. cit*., p. 231.
[435] Wright, (2006) *Ibid.*, p. 479.
[436] Draft Protocol of the Court of Justice of the African Union (2003), Assembly/AU/Dec.25 (II), Doc. EX / CL/59 (III) 1, art 2 of the Protocol.
[437] Protocol on the Statute of the African Court of Justice and Human Rights (2008), EX CL/253(IX), Annex II Rev., art 1.
[438]Mbori Otieno, 'The Merged African Court of Justice and Human Rights (ACJ&HR) as a Better Criminal Justice System than the ICC: Are We Finding African Solution to African Problems or Creating African

Protocol creating the Court must be ratified by 15 State Parties. To date, it has been ratified by 5 State Parties.[439]At the moment, this has not been done so the African Court of justice still exists without the merger.

The African Court of Justice Court was established to complement the protective mandate of the Commission on human rights in the African region.[440] It is also entitled to receive cases filed by the Commission, Member States to the Protocol, organs of the AU[441] and third parties based on conditions to be determined by the Assembly and with the consent of the Member State concerned.[442] Decisions of the African Court of Justice are more vigorously enforced compared to those of the ACrtHPR and the Commission. Member States are compelled to submit to the judgments of the Court. Nevertheless, in the event of refusing to comply, upon the application by any of the parties the Court may transfer the case to the AU Assembly which may choose measures such as sanctions to give effect to the decision.[443] It is important to note that the African Commission is still very pertinent in the African human rights system despite the establishment of the Court of Justice of the AU. The Court has an option under the admissibility clause to refer cases to the Commission.The intended criminal chamber of the African Court of Justice and Human and Peoples Rights, also known as the African Criminal Court or ACC, witness some advancements. Among them is the Court's proposed jurisdiction over corporate entities, which, if ratified, will create the first-ever regional court to have jurisdiction over businesses directly.[444] On the word of Article 46C of the ACC's Statute, annexed to the Protocol on Amendments to the Protocol on the Statute of

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Problems without Solutions' (2014) *Available at SSRN*: https://ssrn.com/abstract=2445344 > accessed 9 January 2017.

[439]'Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights' (Coalition for an Effective African Court on Human and Peoples' Rights) <http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12> accessed 9 November 2016.

[440] African Charter, *Ibid.,* art 40.

[441] Protocol of the Court of Justice of the African Union, art 18(1).

[442]*Ibid.,* art 18(2).

[443] *Ibid.,* art 52.

[444] Joanna Kyriakakis, Article 46C: Corporate Criminal Liability at the African Criminal Court (2016), 1, 1. Available at SSRN: https://ssrn.com/abstract=2970864.

the African Court of Justice and Human Rights, and entitled 'Corporate Criminal Liability', 'the Court shall have jurisdiction over legal persons, with the exception of States.'[445]

The African human rights regime needs to reinforce the host state duty to regulate the activities of corporate actors which have resulted in violations of human rights. Thus, it is contended that it is an approach which is more genuine and in fact the best in the pursuit for effective regulation of powerful corporate entities. A stringent and energetic application of the doctrine of state duty to regulate activities within its borders as provided under numerous international and regional human rights treaties would ensure that states abide by their treaty duties to regulate the activities of TNCs.

As discussed in section 3.3.4.1 above, the African Commission had cautiously shown such advancement in *SERAC* though this approach was diluted in the subsequent judgment of *Zimbabwe Human Rights NGO Forum v Zimbabwe*. Notwithstanding their potential, the ACrtHPR and the African Court of Justice (which is yet to be operational) may be less efficient because of the obstacles in accessing the Courts. Since individuals and NGOs are the most likely contenders to utilise the court system against corporate entities, the access hurdle needs to be overcome to make it more effective and accessible to individuals and NGOs.

In considering African regional and sub-regional Courts it is important to highlight that the ECOWAS Court has delivered various rulings relating to the status and implementation of the rights enshrine in the African Charter.[446] In the *Registered Trustee of the Socio-Economic*

[445] Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014), AU Doc. No. STC/Legal/Min 7(1) Rev.1, EX.CL/846(XXV) [hereinafter 'Malabo Protocol']. The AU Assembly adopted the Malabo Protocol on 30 June 2014 at its 23rd Ordinary Session. See, AU Doc. No. Assembly/AU/Dec.529 (XXIII).

[446] The ECCJ was established pursuant to Arts 6 and 15 of the Revised Treaty of the Economic Community of West African States of 1993 and is situated in Abuja, Nigeria. The ECCJ is the judicial body of the ECOWAS and was tasked with the mandate of interpreting and applying the Community's treaty, protocols and conventions, settling disputes between Member States and giving advisory opinions on legal issues that require interpretation. Member States include Benin, Burkina Faso (known as Upper Volta at the time of signing), Cape Verde, Ivory Coast, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Mauritania was a member from 1975 until it withdrew in 1999; Amos O. Enabulelea & Anthony Osaro Ewereb, 'Can the Economic Community of West African States Community Court of Justice Enforce the African Charter Replicas of the Non-Justiciable Chapter II Human Rights Provisions of the Nigerian

Rights and Accountability Project (SERAP) v Nigeria and Others,[447] SERAP filed a claim against Nigeria and six oil exploration companies over alleged widespread human rights violations in the Niger Delta region.[448] SERAP claimed that the Nigerian government and the oil companies had violated the right to an adequate standard of living, ranging from the right to life, food, water, work, development and health to human dignity and a clean environment. Both SERAP and the ECOWAS Court decision refer to the oil companies as the main perpetrators of human rights abuses in the Niger Delta. The ECOWAS Court decision regarded the government of Nigeria as complicit in the human rights violations committed by the oil companies in the Niger Delta because it failed to adequately regulate corporate activities that violated human rights.[449]

The Court ultimately dismissed the claims against the oil companies due to a lack of jurisdiction over them and considered the $1 billion in reparations for injury to the victims an impossible award to make.[450] Instead, the Nigerian government was held to account. The Court held that the Nigerian state should take all necessary steps to restore the environment of the Niger Delta, to avoid future damage and hold the oil companies accountable for human rights abuses they perpetrated.[451] The Nigerian government has not yet executed the decision

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Constitution against Nigeria' (2012) 1 *International Human Rights Law Review* 312, 325; Enyinna S Nwouche, 'The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights' (2013) 13 African Human Rights Law Journal 34, 31; Eghosa Osa Ekhator, 'The Impact of the African Charter on Human and Peoples' Rights on Domestic Law: A Case Study of Nigeria' (2015) 41(2) *Commonwealth Law Bulletin* 253, 267; Solomon T Ebobrah, 'Application of the African Charter by African Sub-Regional Organisations: gains, pains and the future' (2012) 16(1) *Law, Democracy & Development* 49, 58.

[447] *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* [2012] Case No. ECW/CCJ/APP/ 08/09.

[448] *Ibid,.*

[449] *SERAP v Nigeria* [2012] Case No ECW/CCJ/APP/08/09. See also, *Peter David v Ambassador Ralph Uwechue* [2010] ECW/CCJ/RUL/03/10; *Tandja v Djibo and Another* [2010] ECW/CCJ/05/10; *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* [2009] No ECW/CCJ/APP/0808.

[450] Solomon T Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54(1) *Journal of African Law* 1, 20; Solomon T Ebobrah, 'Rights-Protection Goldmine or a Waiting Volcanic Eruption: Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307, 321-2; Eghosa O Ekhator, 'Improving Access to Environmental Justice under the African Charter on Human and People's Rights: The Roles of NGOs in Nigeria' (2014) 22(1) *African Journal of International and Comparative Law* 63, 73.

[451] Karen J Alter et al, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *The American Journal of International Law* 737, 765.

in *SERAP* and this demonstrates enforcement struggles.[452] The Nigerian government has a long history of tolerating and not persecuting, and as many argue, even aiding and abetting oil companies within its territory to commit human rights abuses.[453] If the Nigerian government decides not to enforce the decision of the ECOWAS Court and hold the oil companies accountable, it will threaten to undermine the credibility of the ECOWAS Court and also establish a counter-precedent for ECOWAS Contracting Parties in the future.

However, in this context it would also seem that imposing and executing judgments against the TNCs directly, rather than the State, would have proved more effective. Many developing states fear that by compelling TNCs to comply with human rights standards they might relocate to a state with more lax regulations. Kearney observed that if all states within a region concurrently imposed the decision of a regional court, TNCs would have no option but to conform or depart the country.[454] For example, in West Africa, both Ghana and Ivory Coast may no longer be prepared to tolerate the child labour and slavery perpetrated by cocoa industry giants.[455] If the two countries concurrently enforce ECOWAS Court judgments, the Ivoirian authorities could make decisions against Hershey, for instance, without encouraging the company to move to Ghana.[456]

This judgment demonstrates the willingness of the ECOWAS Court to hold a State Party accountable for its human rights abuses. Essentially, it also enjoined the state to hold an actor *evidently outside* of the Court's jurisdiction accountable for its activities which cause harm to people and the environment. Therefore, TNCs may find themselves, through this backdoor avenue, within the ECOWAS Court realm. Given the lack of direct jurisdiction of the ECOWAS Court over corporate actors in TNCs, extending the authority of the Court to cover

[452] Rhuks Temitope, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India' (2010) 3 *National University of Juridical Sciences Law Review* 423, 435.
[453] See, for example, *Wiwa v Royal Dutch Petroleum/Shell* [2000] 226 F.3d 88.
[454] Kearney, (2013) *op. cit*., p. 31; Ekhator, (2014) *op. cit*., p. 75.
[455] Kearney, *Ibid.*, p. 31; *ExxonMobil* [D.C. Cir. 2011] 654 F.3d 11, 16.
[456] Brittany West et al, Regional Human Rights Systems (2013) 20(2) *Human Rights Brief* 65, 65-6.

corporations would provide a much-required measure of corporate accountability. This might be achieved if ECOWAS could adopt an additional Supplementary Protocol that explicitly extends the jurisdiction of the Court to cover corporate actors. The effective assumption of individual standing and a human rights obligation shows that widening the Court's jurisdiction is both feasible and needed.[457] ECOWAS NGOs should adopt the techniques that steered the ECOWAS Court to its first mandate extension: rigorous advocacy exertions by judges of the ECOWAS Court, civil society groups and the local mass media could prompt State Parties to subject corporate actors to the jurisdiction of the Court. Although businesses are not party to the ECOWAS Treaty and hence have not assented to its regulation, by operating within the borders of a State Party they must comply with the domestic laws of the state. If states inform businesses that their existence is based upon consenting to the authority of the ECOWAS Court, a company's continued business activity will indirectly indicate assent to the new mandate of the Court. As the CJEU reveals, private actors may be directly subject to the jurisdiction of a regional treaty body.[458]

3.4. Conclusion

It is clear that the courts have a residual role to play in providing remedies and justice for victims of human rights abuses by TNCs. Although other non-judicial instruments which aim to redress human rights abuses are available and would be clearly preferable, due to access to justice questions, the importance of courts in providing remedies for victims cannot be disregarded given that the UN Charter explicitly urges pacific resolution of international disputes in order to maintain international peace and security.[459] The peaceful resolution of disputes through the courts, whether international, regional or national, assists parties to set

[457] Enyinna S Nwouche, 'The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights' (2013) 13 *African Human Rights Law Journal* 34, 31.
[458] Ratner, (2001-02) p. 485; *Walrave v Association Union Cycliste Internationale* [1974] ECR 1419; Case 43/75 *Defrenne v Societe Anonyme Belge de Navigation Adrienne Sabena* [1976] ECR 455, 457-63.
[459] United Nations Charter, art 1.

out their respective standpoints. This is helpful as in this way the parties are 'forced to reduce and transform their sometimes overstated political assertions into factual and legal claims'.[460] Furthermore, seeking remedies through a court process is advantageous. By its nature, the judiciary has the power to establish competent jurisdiction, deliver judgments and impose compliance. This gives it dominance over extra-judicial redress.[461] The courts are not only competent to determine cases of human rights abuses and of rendering decisions but through them an enforceable award of damages can be obtained which makes it more valuable, promising and desirable.[462]Moreover, the courts are the only mechanism capable of providing different victims with specific redress, conceivably putting them in the position that they would have been in if the abuse had not befallen them. Enforcement of human rights standards through the courts would also more generally serve as a deterrent against future misconduct by the TNCs and others committing the same offence.

Since the ICJ is the principal judicial body of the UN and the most competent interpreter of international law, its opinion serves as a form of directive for states to follow.

This chapter has sought to analyse whether transnational bodies such as the ICJ and ICC and also regional bodies including the CJEU, ECtHR, IACtHR, IACHR, ACHPR, ACrtHPR and the ECCJ have the power to deal with human rights transgressions by TNCs. It first established the dynamics in these institutions and the way in which they interact. It then established why the ICJ and the ICC were not successful in holding TNCs accountable for misconduct committed in the course of their operations. It is proposed that broadening the jurisdiction of these courts to include legal persons will provide a deterrent benefit and hold

[460]Address by the Honourable Stephen M. Schwebel, Judge to the General Assembly of the United Nations, President of the International Court of the United Nations, President of the International Court of Justice (Oct. 27,1998) Online at: < http://www.icj-cij.org/presscom/files/7/3007.pdf?PHPSESSID= > (Assessed on 27 January 2016); Jacob Abiodun Dada, Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal (2013)10 *Journal of Law, Policy and Globalization* 1, 3.

[461] Dada *Ibid.*, p. 3.

[462] Iman Prihandono, 'Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries' (2011) 3(7) *Journal of Law and Conflict Resolution* 89, 89.

TNCs accountable for their actions and omissions. It has been shown that until the issue of whether international human rights law directly places legal obligations on corporate actors has been legally resolved, the conflicting discussion over business and human rights will probably not end.[463] Therefore, broadening the jurisdiction of the ICJ on advisory opinions together with expanding the possible parties who might be allowed to file such a claim are two ways in which Court proceedings could be advanced to handle the growing number of complex cases, including international corporate human rights violations.It proposed that an advisory opinion could be sought of the ICJ, to provide a definitive answer to the question of whether international human rights law directly places legal obligations on corporate actors. It is contended that, an ICJ advisory opinion has the advantage of consolidating different opinions that exist at the international level on the question of whether private actors including businesses are bound by international human rights law and also to gain a definitive legal answer to the question which has occupied many scholars, and for which we see do not see consistent *opinio jurist*.

The chapter further ascertained that, the involvement of corporate officials in international crimes should be a condition for the criminal liability of corporate entities. And that the well-known dictum of the IMT Nuremberg requires a certain amount of review.[464] Thus, the jurisdiction of the ICC needs be amended to include corporate entities and not to be limited to individual crimes. The French proposal to this effect is ripe for reconsideration.[465] Real international criminal justice involves not only prosecuting individuals but also the TNCs that are part of the ecosystem of global violence.

[463] Kamatali, (2012) *op. cit*., p. 454.
[464] Wilt, (2013) *op. cit*., p. 77.
[465] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court' (1998) UN Doc A/Conf./183/WGGP /L.5/Rev.2.

TNCs have actually been held responsible for their actions and omissions by the CJEU and remedies have been given to the European victims. However, the case of European countries is not the same as that of developing countries. These countries have developed economies that do not depend as heavily on TNCs as the economies of developing countries do.[466] In this way, it is proposed that the European Commission, with the help of the CJEU, develop some proper rules and regulations for the TNC which are necessary for them to follow extraterritorially. If these rules are violated and human rights are abused, these TNCs will be held to be accountable. By doing so, the CJEU will play a significant role in holding European companies accountable for human rights violations and abuses committed in developing host states. The ECtHR has been successful to some extent in dealing with TNCs and human rights transgressions but is limited by the fact that the European Convention offers very little scope for this. Hence, the jurisdiction of the Court needs to be amended perhaps through an additional protocol and this is the role of the States rather than the Court itself.

The IACHR was successful in its objective of dealing with human rights violations by TNCs and achieved this objective in multiple ways. Thus, no recommendations are required for this institution. The IACtHR is, on the other hand, burdened by the problem of lengthy trials which leads to a state of injustice for the aggrieved. Hence, the main recommendation is that the Court opens up separate channels so litigants can directly approach the Court. Despite the attempt of the ACHPR and the ECOWAS Community Court of Justice to hold TNCs accountable for their wrongdoing, they are less efficient because of issues of jurisdiction. Thus, the African system needs to be developed from its current position of state-centred approach of international law to protect human rights. Notwithstanding their potential, the ACrtHPR and the African Court of Justice (which is yet to be operational) may be less

[466] Meeran, (2011) *op. cit.*, p. 3.

efficient because of the obstacles in accessing the Courts. Therefore, it is proposed that since individuals and NGOs are the most likely contenders to utilise the court system against corporate entities, the AU needs to carry out institutional reform to overcome the access hurdle to make the Courts more effective and accessible to individuals and NGOs. Similarly, expanding the jurisdiction of the ECOWAS Community Court of Justice to cover corporate actors would sustain its substantive focus.[467]Having examined courts and determined that a key question remains "jurisdiction": the next chapter will examine the limits of jurisdiction as it applies to the regulation of TNCs in more detail, within the scope of public and private international law.

[467] *SERAP) v Nigeria* [2012] *Ibid*,.

CHAPTER 4
JURISDICTION IN INTERNATIONAL LAW

4.1. Introduction

Jurisdiction has traditionally been understood by reference primarily to territorial borders.[1] However, the issue of the extraterritorial application of domestic laws is assuming progressively greater importance in a world where businesses and individuals are increasingly operating in a global context.[2] The limit to which states can assert extraterritorial jurisdiction sits at the very heart of domestic and international law and can be a controversial issue as it depends, at least in part, on what form of jurisdiction is being exercised. As established in previous chapters, the state remains the principal holder of jurisdiction over the regulation of Transnational Corporations (TNCs).[3] Given the way that TNCs do business across borders on a global scale and the emergence of transnational criminal enterprises and activities, states have been encouraged to exercise jurisdictions extraterritorially as the limits of state jurisdiction has always posed difficulties for the regulation of foreign private actors and activities, contributing to tensions between states.[4] It needs to be noted that this cross-border jurisdictional issue has already extended to security services: where the perpetration of transborder crime, especially terrorism, has not prevented a state from exercising joint jurisdiction or at a minimum, cooperation with another to bring perpetrators to justice. The underlying purpose of those ventures is ultimately to engender a greater sense of human security. This thesis argues that such models ought to also be explored when the private actor concerned is a TNC, since the activities of such bodies, if unchecked and allowed to perpetuate with impunity has a similar effect on human security and human rights.The current

[1] Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 645; Ian Brownlie, *Principles of Public International Law* (7thedn, OUP 2008) 299.
[2] Steve Coughlan et al, Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization (2007) 6 (1) 6(1) *Candaian Journal of Law and Technology* 29, 30-1.
[3] Andrew Clapham, *Human Rights Obligation of Non-State Actors* (OUP 2010)526.
[4] See for example *The Barcelona Traction, Light and Power Co Ltd* Case (Belgium v Spain) [1970] ICJ Rep 105 para 70; *Reparation for Injuries Suffers in the Service of the United Nations* [1949] ICJ Rep 174.

lack of coherence in matters concerning jurisdiction not only impacts the quality of human rights of individuals. It also raises concerns for companies who are faced with legal uncertainties in terms of jurisdiction. In reality, states seek to regulate the activities of individuals and companies abroad in many different ways and for many different reasons, and the extent to which they are successful often depends on factors such as economic and political strength.

This chapter will commence by offering a brief definition of the concept of 'jurisdiction'. This will provide the backdrop for an articulation and analysis of the various theories and principles of jurisdiction in international law. The chapter will seek to demonstrate how traditional theories of jurisdiction were developed in the context of public international law. It will also pose the question as to the extent to which they have automatic application in private international law, which is scarcely discussed in traditional literature on this topic. This leaves a gap in the understanding whether, and if so, the extent to which domestic courts can rely on them to assert their jurisdiction in private law cases. The chapter argues that to fully address this question it is necessary to examine the subject of jurisdiction in public and private international law. As a consequence, this chapter aims, in succinct terms, to examine the limits of jurisdiction as it applies to the regulation of TNCs in more detail, within the scope of public and private international law.

4.2. Meaning and Nature of Jurisdiction

The term 'jurisdiction' is derived from the Latin *jus or juris* (law) plus *diction* (speak or pronounce); [5]so it literally means 'speaking the law'.[6] In international law, the jurisdiction of a state is broadly regarded as a certain 'power'[7]'authority'[8] or 'competence'[9]. In a similar

[5] Bryan A Garner, *A Dictionary of Modern Legal Usage* (2nd edn, OUP 1995) 488.
[6] Douzinas Costas, 'The Metaphysics of Jurisdiction' in Shaun McVeigh (edn), *Jurisprudence of Jurisdiction* (Routledge Cavendish 2007) 22.
[7] Joseph H Beale, 'Jurisdiction of a Sovereign State' (1922-1923) 36(3) *Harvard Law Review* 241, 262.

vein, Black's Law Dictionary defines 'jurisdiction' as 'a government's general power to exercise authority over all persons and things within its territory.'[10] The term is more generally described as the power of a state under international law to regulate or otherwise impact upon people, property and circumstances, and also reflects the basic principles of sovereignty of states, equality of states and non-interference in domestic affairs.[11]

The fundamental norm underlying domestic jurisdiction is that the state has power and authority over all persons, property and activities occurring within its territory. As a consequence of other states having similar right, it therefore follows that one state must not intervene in the domestic affairs of other states without justification.[12] Thus, non-intervention in the domestic affairs of states is a fundamental norm of state sovereignty and provides for the shielding of certain state activities from the regulation of international law, including from international organizations.[13] The UN General Assembly's *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation*,[14] considered by many to reflect norms of *jus cogens*, declares that: 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State'.[15] Likewise, the International Court of Justice (ICJ) in *Nicaragua v United States*[16] noted that 'the principle [of state sovereignty] forbids all States or groups of States to

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[8] John Westlake, *Public International Law* (CUP 1914) 135.
[9] Brownlie, (2008) *op. cit*., p. 299.
[10] *Black's Law Dictionary* (9thedn, 2009) 929.
[11] Shaw, (2008) *op. cit*., p. 645; United Nations International Law Commission, Report on the Work of its fifty-eight session (2006), U.N Doc A/61/10 Annex E, at 516; Coughlan, et al (2006) *op. cit*., p. 30.
[12] Donald Francis Donovan & Anthea Roberts Notes and Comments, The Emerging Recognition of Universal Civil Jurisdiction, (2006) 100 *The American Journal of International Law* 142, 142.
[13] Shaw, (2008) *op. cit*., p. 645; Brownlie, (2008) *op. cit*., p. 647; Scott Craig, Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harm, in Craig M Scott (ed), Torture as tort: Comparative Perspectives on the Development of Transnational Human Rights litigation (Oxford Hart Publishing 2001)53.
[14] (1970), UN Doc A/RES/25/2625.
[15] (1965), UN Doc A/RES/20/2131.
[16] *Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14 para 204 General list no 70.

intervene directly or indirectly in internal or external affairs of other States'.[17] This is also reflected in Article 2(7) of the UN Charter which provides that nothing in the Charter 'shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, apart from the application of enforcement measures under Chapter VII'.[18]

However, the context of Article 2(7) does not serve as an effective restraint on the activities of the UN due to narrowing of the phrase 'essentially within the domestic jurisdiction of any state'.[19] For instance, in the context of *apartheid*, the UN General Assembly condemned South Africa's discriminatory treatment of its own citizens.[20] Despite South Africa's assertion that the way it dealt with its own citizens within its own territory was clearly a matter of domestic jurisdiction, the General Assembly adopted Resolution 44(1) condemning South Africa's measures as violating the human rights provisions of Articles 55 and 56 of the Charter.[21]

A corollary to this territorial view of jurisdiction is the generally accepted presumption against state regulation of persons and conduct outside its territorial boundaries. By virtue of functional jurisdiction, a state may, through various legal and regulatory institutions, exercise

[17] The US breached its CIL obligation not to intervene in the affairs of another state when it trained, armed and financed the contra forces or encouraged, supported and aided military and paramilitary activities against *Nicaragua* [1986] ICJ Rep 14 para 205.
[18] United Nation Charter art 2 para 7; see also, Joshua Castellino, 'Territorial Integrity and The Right to Self-Determination: AN Examination of The Conceptual Tools' (2008)32(2) *Brooklyn Journal of International Law* 499, 402-3.
[19] James Crawford, *Brownlie's Principles of Public International law*, (8th edn, OUP 2012) 454.
[20] UNGA, Treatment of Indians in the Union of South Africa, 8 December (1946), UN Doc A/RES/44), The General assembly having taken note of the application made by the Government of India regarding the treatment of Indians in the Union of South Africa, and having considered the matter; states that, because of that treatment, friendly relations between the two Member States have been impaired and, unless a satisfactory settlement is reached, these relations are likely to be further impaired.
[21] Onyekachi Duru, The Shrinking Scope of the Concept of Domestic Jurisdiction in Contemporary International Law (2011) *Working papers* 2011, 6.

extraterritorial jurisdiction over actors and activities outside its own territorial boundaries.[22] When states assert such extraterritorial jurisdiction they could only do so as a consequence of their participation in an international process where they engage in activities that touch on the interests of other states. It has been argued that through the exercise of jurisdiction, by participating in the international process, states are 'implicitly participating in the definition of another states' jurisdiction'.[23]

Another aspect that needs to be highlighted here is the growth of international human rights law. Read at face value, human rights violations of the sort being protected by international human rights law, generally occur within the domestic jurisdiction of States. Theoretically a state ought to only be bound by those human rights issues that are considered norms of *jus cogens*, for instance the prohibition of torture and slavery. Yet the edifice of human rights pertains to a whole host of other behaviours that are equally well protected. This may seem on the face of it to be a defeat for the principle of domestic jurisdiction, however such a narrow interpretation would fail to realise that the methodology through which this compliance has been gained is by the state itself signing and ratifying human rights treaties and endorsing its underlying principles. Thus, a state has become bound to international human rights law by exercising its own consent that such law ought to bind it. Therefore, many seemingly visible elements of the waning of state sovereignty would fail to challenge the doctrine and as a consequence Article 2(7) retains legitimacy in recognising the basic fact that state sovereignty within its own territorial limits is the undeniable foundation of international law.[24]

[22]Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Responsibility Initiative Working Paper No 59, Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010)13.
[23]Andrew L Strauss, Beyond National Law the Neglected Role of International Law of Personal Jurisdiction in Domestic Court (1995) 36(2), *Harvard International Law Journal* 337, 406.
[24] Shaw, (2008) *op. cit*., p. 645; Brownlie, (2008) *op. cit*., p. 649.

The level at which a certain matter is part of a state's 'domestic affairs' depends on the international law at that time. Logically, once an issue has become subject to norms and obligations of international law there is a corresponding loss or shrinkage of exclusive domestic jurisdiction as in the case demonstrated above vis-à-vis the growth of international human rights law.[25] The second half of the last century witnessed a dramatic expansion of international law into areas that would once have been regarded exclusively as domestic affairs or the domain of states. For instance, many states have negotiated and developed a monitoring system for various treaties on workers' rights through the International Labour Organisation (ILO).[26]

In resolving jurisdictional problems, The *Third Restatement of the Foreign Relation Law of the United States of America* laid down a framework which takes into account the nature and subject matter of the regulations proposed as well as the interests those regulations were intended to protect. The 'reasonableness' of an exercise of jurisdiction extraterritorially 'is determined by evaluating all relevant factors' including 'the character of the activity to be regulated, the importance of the regulation to the regulating state, the limit to which other states regulate such activities and the degree to which the desirability of such regulation is generally accepted'.[27] The exercise of jurisdiction by a state is typically conceived of taking one of three forms: jurisdiction to prescribe (to make law); jurisdiction to adjudicate (to subject persons or things to its law); and jurisdiction to enforce (to compel compliance or punish non-compliance with its law) and hence will be examine in the next section.[28]

[25] Jennifer Zerk, Multinationals and Corporate Social Responsibility, Limitations and opportunities in International, (CUP 2006) 136.
[26] ILO currently administers about 155 international Conventions on labour standard in a range of different field. In addition, it has promulgated about 203 non-binding recommendations.
[27] Restatemen, Third, Foreign Relation Law of the United States (1987), § 403.
[28] John B Houck, Restatement of Foreign Relations Law of the United State (Revised): Issues and Resolution, (1986) 20(4) *The International Lawyer* 1361, 1367; United Nations International Law Commission, Report on the Work of its Fifty-Eight Session Annex E, (2006), 516 UN Doc A/61/10.

4.3. Forms of Extraterritorial Jurisdiction

The word 'jurisdiction' is used in a much broader sense in public international law than in private international law. In the context of the rules on regulatory power of states, three forms of jurisdiction in public international law are usually distinguished.[29] These frequently overlap and thus the distinction is not always easy to maintain, nor is it universally recognised as a reflection of international law.

The first of these is *prescriptive or legislative jurisdiction* which roughly equates to the power of a state under international law to assert the applicability of its national law to given conduct, whether by primary or subordinate legislation, executive decree or judicial ruling.[30]Although the normal ambit of prescriptive jurisdiction is 'the territory, over which a state is sovereign', states may make laws to apply outside their territory.[31]A noble example of prescriptive jurisdiction is the UK *Broadcasting Act 1990* which make it an offence under UK law to broadcast from the high seas in a manner which interferes with domestic broadcasting services.[32] As a matter of international law, extraterritorial prescriptive jurisdiction is only considered to be a legitimate exercise of state power when exercised in conformity with one or more internationally recognised bases for the assertion of jurisdiction. In the *Lotus* case, the Permanent Court of International Justice (PCIJ) articulated that a state has power under international law to prescribe laws on matters arising in and outside of its territory, irrespective of the nationality of the subject, unless a prohibition to such a prescriptive jurisdiction is proven.[33] The issue here lies in a determination of the permissible scope of the application of the laws of each state; in private law cases this may be viewed as related to the private international law problem of the determination of the applicable law.

[29] Restatement, Third, Foreign Relation Law of the United States 1986.
[30] Roger O'Keefe, 'Universal Jurisdiction Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 736.
[31]Dan E Stigall, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S Domestic Law' (2012)35(2) *Hastings International and Comparative Law Review* 324, 330.
[32] Schedule 16 of the UK broadcasting Act (1990).
[33] *S.S Lotus (France v. Turkey)* [1927] PCIJ Reports, Series A, No 10.

Stephens also confirms that there are no technical barriers that restrict the home state from imposing extraterritorial human rights responsibilities on their corporate entities abroad.[34] Since the emergence of the modern business entity, governments have viewed companies, those 'mere creatures of law',[35] as being accountable for their actions through a combination of criminal, civil and administrative sanctions. As Stephens argues, 'examples of such regulation, from legislation restricting companies' ability to discriminate or pollute at home, to laws prohibiting corrupt practices by corporations abroad, are too numerous to leave any room for doubting the legitimacy of government efforts to advance social policies in part by regulating corporate behavior'.[36] Many states make use of extraterritorial legislation in order to address problematic transnational conduct. For example, in the United States of America, the *Securities Exchange Act* of 1934,[37] the *Securities Act* of 1933,[38] and the *Foreign Corrupt Practices Act* of 1977 (FCPA)[39] all represent or have been interpreted to represent extraterritorial jurisdiction over corporate actors.[40]

Indeed, the mere fact that states have enacted extraterritorial legislation to tackle corporate conduct abroad does not imply that they will be keen to do so in order to protect human rights abroad. Although American law contains a veritable web of employment and social protections that apply on the territory of the USA, only a few apply outside its territorial boundaries.[41] Those that do extend beyond its territorial boundaries do so almost exclusively

[34] Beth Stephen, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) *20Berkeley Journal of International Law* 45, 60.
[35] *Trustees of Dartmouth College v. Woodward* [1819]17 U.S. 518, 634. Cited by Christen Broecker, 'Better the Devil You Know" Home State Approaches to Transnational Accountability' (2008) *41International Law and Politics* 159, 182-83.
[36] Stephen, (2002) *op. cit*., p. 63.
[37] 15 U.S.C § 78A-7lll (also called Exchange Act).
[38] 15 U.S.C§ 77a-77aa (also called Security Act).
[39] Pub. L. No. 95-213, 91 Stat. 1495 (codified as amended in scattered section of 15 U.S.C§ 78dd-1, et seq).
[40] Laurent Cohen-Tanugi, 'The Extraterritorial Application of American Law: Myths and Realities' (2015) 2-3 Available at SSRN: https://ssrn.com/abstract=2576678.
[41]Christen Broecker, 'Better the Devil You Know" Home State Approaches to Transnational Accountability' (2008) 41 *International Law and Politics* 159, 182.

for the protection of American citizens working for American employers abroad.[42] One notable example of such extraterritorial legislation is the controversial *Cuban Liberty and Solidarity (LIBERTAD) Act*, commonly known as the *Helms-Burton Act*, passed by the USA Congress in 1996, which bars USA nationals including businesses from trading with Cuba.[43] The *Helms-Burton Act* has included loud-mouthed protest from USA and international business interests decrying the Act as extraterritorial, a danger to the international legal order, and tantamount to a secondary boycott practice which the USA itself has criticised.[44] To a large extent EU announce a blocking Regulation, Council Regulation 2271/96, and to initiate procedures for the establishment of a Special Group within GATT/WTO for solving controversies.[45] Despite these restrictions, the fact remains that American law regulates corporate activity abroad, as do the rules of other states including Australia and States with the EU. Corporate entities incorporated in such states are accustomed to complying with certain dictates of their home governments in their overseas operations.

The second form of jurisdiction is *executive or enforcement jurisdiction* which roughly equates to the limit of a state's authority under international law to induce or compel compliance with its laws or regulations.[46] This limit is directly concerned with the acts of

[42] Symeon C. Symeonides, 'Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey' (2015) 63 *American Journal of Comparative Law* 299, 310.

[43]Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (1996), Pub. L. No. 104, 114, 110 Stat (codified at 22 U.S.C. §§ 6021-6091); Controversial Title IV of the of the Helms Act, the State bar USA national and shareholders of companies using confiscated property in Cuba, and their minor children, from entry into the USA. The Act also codified prior restrictions on USA trade with Cuba. Title III of the Act is also contraversial in which USA citizen may claim damages in a USA Court from non-USA companies which own, manage or use property "wrongfully" confiscated from US nationals by the Cuban Government after 1 January 1959; August Reinisch, 'Widening the US Embargo against Cuba Extraterritorially: A Few Public International Law Comments on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 Kaleidoscope '(1996)7(4) *European Journal of International Law* 545, 546-7; Antonella Troia, 'The Helms-Burton Controversy: An Examination of Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 Violates U.S. Obligations under NAFTA'(1997) 23(2) *Brooklyn Journal of International Law* 603, 604.

[44] Anthony M Solis, 'The Long Arm of the US Law: The Helms-Burton Act' (1997)4(1) *Loyola of Los Angeles International and Comparative Law Review* 709 736; Bret A Sumner, 'Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996' (1997)46(3) *Catholic University Law Review* 907, 912-3.

[45] Zamora Cabot and Francisco Javier, 'Kiobel and the Question of Extraterritoriality' (2013). *Working Paper* 2/2013, 1 6.

[46] Alex Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law,* (CUP 2009) 229.

authorities when implementing laws, such as arresting, detaining, prosecuting, imposing fines or imprisoning and punishing persons for breaching those laws.[47] In private law disputes, this is related to the pragmatic issue of whether the court can enforce any judgement by exercising physical power over the defendant or their property.[48] Thus, the limit on the jurisdiction to enforce provides policy reasons why a municipal court might decide not to exercise jurisdiction, even when it had jurisdiction make such a prescription under the international law. If there were reasons why judgements could be consistently enforced with international law as neither the persons nor their property were present in the territory, then the court might consider whether or not that Court was the suitable or appropriate forum to hear the dispute in question. The limit on the jurisdiction to enforce connotes that a judgement is only directly effective within the territory of the judgement state; it also requires an adequate mechanism for the enforcement of foreign judgements in private international law cases.[49] In the case of *Hape,* the Supreme Court of Canada viewed enforcement jurisdiction as the most contentious form.[50] In that case the court stated that enforcement jurisdiction is permissible either if it is based on the consent of the territorial state or based on a 'permissive rule derived from international custom or from a convention'.[51]

In the sphere of economic regulation, the legal separation between parent and subsidiary in a transnational corporate group may be used as justification by courts of the home state for refusing to enforce a judgement issued against a subsidiary in a foreign host jurisdiction with the aim of holding the parent company responsible.[52] For instance, in *Adams v Cape plc*[53] the

[47] Roger S Clark, 'Some Aspects of the Concept of International Law: Suppression Conventions, Jurisdiction of Submarine Cables and the Lotus' (2011) 22(3) *Criminal Law Forum* 519, 522.
[48] Mills, (2009) *op. cit*., p. 229.
[49] Third, Restatement, Foreign Relation of the United States (1987).
[50] *R v Hape* [2007] SCR, 292 para 64.
[51] *Ibid*., para 65.
[52] Peter T Muchlinski, *Multinational Enterprise & the Law*, (2nd edn, OUP 2007)161.
[53] [1991] 1 All ER 929.

UK Court of Appeal refused to lift the corporate veil between a UK parent company and its US sales subsidiary, or to treat the two companies as a single economic entity so as to allow the enforcement in the UK of the USA default judgement against the parent.

The final form of jurisdiction is the *jurisdiction to adjudicate*, or in other words the competence of municipal courts under international law to adjudicate certain matters in which a foreign element is present.[54] This form applies in both public and private law cases.[55] In the context of extraterritorial adjudicative jurisdiction, a state may attribute the adoption of decisions which concern situations that have arisen in a foreign state, to its own jurisdictional power. This would usually occur either where criminal procedures may lead to convictions for acts committed abroad, or where municipal courts declare themselves competent to adjudicate in matters that relate to extraterritorial situations.[56] For instance, the decision of USA District Court in *United States v. Yunis*[57] indicates the acceptance of certain principles of extraterritorial jurisdiction which allow for the adjudication of terrorists in American courts. The court relied on section 32(b) of the *Destruction of Aircraft and Aircraft Facilities Act 1988*[58] and extends jurisdiction over an alleged offender who commits offenses against an airplane located in another country's airspace and has no other nexus to the USA other than the offender later found in the USA.[59] Where criminal proceedings are concerned, the domestic criminal law of the Forum State will necessarily be applied although in certain cases it may be required for that criminal law to apply to acts committed abroad when the criminal

[54] O'Keefe, (2004) *op. cit*., p. 773; Zerk, (2010) *op. cit*., p. 13.
[55] Clark, (2011) *op. cit*., p. 522.
[56] Olivier De Schutter, Extraterritorial Jurisdiction as Tool for Improving the Human Rights Accountability of Transnational Corporations Seminar Paper Prepared for the Office of the UN High Commissioner for Human Rights, Brussels, 2006) 9.
[57] [1988] 681 F. Supp. 896, 82 ILR, 344.
[58] (1988), 18 U.S.C. § 32(b), it gives the USA jurisdiction over anyone who "(1) performs-an act of violence against any individual on board any civil aircraft registered in a country other than the United States **. . .;** [or] (2) destroys a civil aircraft registered in a country other than the United States . . .; if the offender is later found in the USA.
[59] *Yunis*, [1988] 681 F. Supp. at 905; Also, Adam W Wegner, 'Extraterritorial Jurisdiction under International Law: The *Yunis1* Decision as a Model for the Prosecution of Terrorists in US Court' (1991) 22 *Law & Policy in International Business* 409 436-7.

law of the territorial state defines the same behaviour as an offence.[60]By contrast, where civil proceedings concern extraterritorial situations, the applicable law will be either the law of the forum state or the law of the territorial state, depending on the rules relating to conflict of laws contained in the private international law of the forum state.[61]

It should be highlighted however that while the exercise of prescriptive extraterritorial jurisdiction may, in theory, be separated from the exercise of adjudicative extraterritorial jurisdiction, in practice, it occurs more often than not that they are applied together.[62] For instance, when a state adopts extraterritorial legislation to influence situations outside its territorial boundary, they automatically allow their domestic courts to hear on claims based on that legislation. [63] This view was adopted by the committee on Economic, Social and Cultural Rights in the general comment in which states parties are required to respect the enjoyment of a right stated in the covenant by preventing third parties in another country from abusing these rights through legal and political means.[64] It is hardly conceivable for a state to seek to influence conduct outside its territorial boundary by the adoption of legislation with an extraterritorial scope, while at the same time denying its courts the power to accept jurisdiction over cases relating to such conduct to which such legislation is applicable. In that respect, there is an intimate connection between adjudicative and

[60] For example, Articles 5 and 7, of the French Criminal Code provides that, 'while a French citizen can always be prosecuted in France for any crime and sometimes for a delict committed abroad,7 a foreigner can only be prosecuted in France for a crime' committed abroad against the safety or the finaricial credit of the' French nation'; see also, Georges R. Delaume, 'Jurisdiction over Crimes Committed Abroad: French and American Law' (1952) 21(2) *George Washington Law Review* 173, 176.

[61]De Schutter, (2006) 9.

[62]Katherine Florey, 'State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation' (2009) 84(3) *Notre Dame Law Review* 1057, 1068.

[63] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary,* New York: (2nd end, CUP 2010) 163.

[64] CESCR, General Comment 14: 'Article 12, 'The Right to the Highest Attainable Standard of Health' (2000), UN Doc E/C.12/2000/4, para 39; CESCR, General Comment No. 15: 'Article 11 and 12 (2003), UN Doc E/C. 12/2002/11 para 31.

prescriptive extraterritorial jurisdiction.[65] The next section will assess some domestic laws with extraterritorial effect.

4.4. Domestic laws with Extraterritorial Implications

States do apply their laws extraterritorially to exert international influence and seek to solve or impact trans-boundary challenges.[66] This inevitably means that jurisdictional issues and tensions between states are inevitable. The use of direct extraterritorial jurisdiction is the most obvious way that states can regulate corporate actors and activities abroad, subject to the international law limitations discussed below. The bulk of academic literature under public international law on extraterritorial jurisdiction is written against the background of the controversial assertion of extraterritorial jurisdiction in areas such as antitrust, anti-corruption, securities, and merger and takeover laws.[67] For instance, in the context of antitrust law (also known as competition law in the EU), the antitrust laws of a number of states such as the US, the EU, Australia, Brazil, Canada, China, France, Germany, Japan, Korea and the UK, create the possibility of direct assertions of extraterritorial jurisdiction over foreign parties and activities.[68] However states differ in their willingness to enforce their antitrust laws against foreign parties in respect of overseas activities.[69]

The USA has been the most active state in the extraterritorial application of its antitrust law.[70] The reach of American antitrust law is not limited to conduct located within the territory of the USA. In particular, under the *Sherman Antitrust Act of 1890,* conduct relating to American imports that harm consumers in the USA may be subject to the jurisdiction of

[65] Olivier, (2006) *op. cit*., p. 10.
[66] Austen L Parrish, Reclaiming International Law from Extraterritoriality (2009) 93 *Minnesota Law Review* 815, 818.
[67] Philip I. Blumberg, The Multinational Challenge to Corporation Law, the Search for New Corporate Personality, (OUP 1993)192-93.
[68]International Bar Association, 'Report of the Task Force on Extraterritorial Jurisdiction' (IBA Task Force Report, February 2009) 48.
[69] Zerk, (2010) *op. cit*., p. 92.
[70] Erica Siegmund, 'Extraterritoriality and Unique Analogy between Multinational Antitrust and Securities Fraud Claims' (2011) 51 *Virginia Journal of International Law*1048, 1048.

American antitrust laws irrespective of where such conduct occurs or the nationality of the parties involved.[71] Conduct relating to non-import foreign trade is not subject to American law unless such conduct has a 'direct, substantial and reasonably foreseeable' effect on non-import trade or commerce.[72]

This extraterritorial application of the *Sherman Act* is known as the 'effects doctrine', a reference to the effects of conduct outside the USA on American persons.[73] This doctrine was established in the 1945 case of *United States v Aluminium Co of America (Alcoa),* where the Second Circuit recognised that 'any state may impose liabilities … for conduct outside its borders that has consequences within its borders which the state reprehends'.[74] Under this rationale, the court concluded that the *Sherman Act* covered agreements that took place outside the territory of the USA, 'if they were intended to affect imports and did affect them'.[75] Applying this doctrine, the court in *Alcoa* found that the *Sherman Act* could be enforced against the agreements that occurred entirely in Canada but had an anticompetitive effect in the US.[76]

Extraterritorial application of domestic laws may, however, be problematic.[77] Individual states are able to use their domestic laws to influence international policy in a non-transparent manner. For instance, American courts have been forced to modify the extraterritorial aspect of their orders after diplomatic intervention by the foreign states concerned.[78] The USA's effort to enforce judicial decisions against non-resident TNCs has not only been opposed by

[71] Rodney Falvey and Peter John LIoyds, 'An Economic Analysis of Extraterritoriality' (1999) *Research Paper* 99/3, p. 4.
[72] *Ibid,*.
[73] Richard W Beckler and Mathew H Kirtland, 'Extraterritorial Application of US Law: What is a Direct, Substantial and Reasonable Foreseeable Effect" Under the Foreign Trade Antitrust Improvement Act' (2003)38 *Texas International Law Journal* 11, 11.
[74] United States v. Aluminium Co. (the Alcoa) [1945] 2d Cir, 148 F.2d, 416, at.444; Herbert J. Ovenkamp, 'Re-Imagining Antitrust: The Revisionist Work of Richard S. Markovits, (2016) 94 *Texas Law Review* 1221, 1231.
[75] *The Alcoa* [1945] 2d Cir, 148 F.2d, 416, at.444; Russell J. Weintraub, 'The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a Choice-of-Law Approach' (1992) 70 *Texas Law Review* 1799, 1808.
[76] *The Alcoa* [1945] *Ibid.*, at. 444.
[77] Parrish, (2009) *op. cit*., p. 820.
[78] Muchlinski, (2007) *op. cit*., p. 160.

diplomatic measures from the target states but also with a legal response. A number of states, including Canada,[79] Australia,[80] South Africa[81]and the UK[82], have passed so-called blocking legislation which refuses recognition of foreign judgements that adversely affect trade or the commercial policy of the legislating state or a principle of international law.[83] The UK enacted a law that provides protection from extraterritorial measures taken or proposed to be taken by any foreign country for regulating or controlling trade, which, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the UK, are threaten to damage the trading interests of the UK.[84]In such circumstances, the Secretary of State for Trade and Industry may direct UK nationals to refuse to comply with those measures either generally or in their application to such cases as may be specified in the order.[85]

Byers argues that blocking statutes have, in most instances, discouraged American courts from further attempts to assert extraterritorial jurisdiction over unfair business practices without the consent of the state whose territory is at issue.[86] Blocking statutes have also led 'to a series of international agreements concerning the prevention of unfair business practices'.[87] Some of these are: the *Australia-United States Agreement Relating to Cooperation on Antitrust Matters*;[88] the *Canada-United States Memorandum of Understanding on Antitrust Laws*;[89] the *Federal Republic of Germany-United States Agreement relating to Mutual Cooperation Regarding Restrictive Business Practices*;[90] and

[79] Foreign Extraterritorial Measures Act, (1984), c 49, SC; Troia, (1997) *op. cit*., p. 605.
[80] Foreign Antitrust Judgement Restriction of Enforcement Act, (1979), No 13 of 1979.
[81] Act to Restrict Enforcement of Certain Foreign Judgement, Arbitration Award and Letters of Request, Business Protection Act (1978) No 99.
[82] UK Protection of Trading Interest Act (1980).
[83] *Ibid,*.
[84] *Ibid.,* S 1(1) (3).
[85] *Ibid,*.
[86] Michael Byers, *Custom, Power and the Power and the Rules: International Law* (CUP 1999) 67.
[87] *Ibid,*.
[88] (1982), 21 ILM 702.
[89] (1984), 23 ILM 275.
[90] (1976), 15 ILM 1282.

the *UN General Assembly Resolution 35/63* of 5 December 1980 adopting the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*.[91] These agreements show that unilateral assertion of the power advantage of jurisdiction can facilitate if not force the making of bilateral and international agreements addressing the subject area at issue.

Similarly, extraterritoriality in European Union competition law appears to apply quite widely such as through the *Treaty of Rome*.[92] The European Commission has made it clear that EU competition law applies to conduct and parties that are wholly outside the EU jurisdiction which affect imports (but not exports).[93] In the landmark *Wood Pulp* case, the CJEU clarified the use of the extraterritoriality principle by the Commission.[94] In 1984, companies in the US, Canada, Norway, Portugal and Spain were accused of price fixing in the European wood pulp market by the Commission. This practice infringed Article101 (then Article 85(1)) of the EC Treaty and as a consequence fines were imposed on them.[95] Many appealed, including on jurisdictional grounds, claiming that the EU lacked jurisdiction over them since they were not established within the EU.[96] They also maintained that applying EU competition laws to them was contrary to the public international law principle of non-interference in domestic jurisdiction of other States.[97] The CJEU rejected these claims, asserting that jurisdiction was justified on the ground that 'the producers implemented their pricing agreement within the common market, [and that] it is immaterial whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community'.[98] The CJEU therefore seems

[91] (1980), UN Doc TD/RBP/CONF/10.
[92] Falvey and Peter LIoyds, (1999) *op. cit*., p. 5.
[93] *Ibid*,.
[94] *Ahlström Osakeyhtiö v. Commission f the European Communities* (The Woodpulp) [1988] 89, 104, 114, 116, 117 and 125 to 129/85.
[95] *Ibid.*, para.1.
[96] *Ibid.*, para 5 and 6.
[97] *Ibid.*, para. 7.
[98] *Ibid.*, para 17.

to have explicitly asserted jurisdiction based on the effects of their actions within the EU and not on the actual activity within the EU. In this regard, the Court formulated the so-called regarded as the 'implementation doctrine'.[99]What matters in these cases is not the place where the agreement or the decision is taken, but where it is implemented, i.e. where the products are sold. In this case, the pricing agreement was implemented within the EU.[100] The doctrine is more limited than the US explicit 'effects' doctrine in that it does not apply to conduct wholly outside the EU and it does not apply to exports.[101]

According to Zerk, states have acted in many different ways to try to influence conditions, standards and behaviour in other countries using domestic laws.[102] One example of 'domestic laws with extraterritorial implications' is where compliance requirements are addressed to a locally incorporated parent company, which as a matter of law, the parent is then required to implement throughout a multinational group. This regulatory method is referred to as 'parent-based' regulation.[103] As will be noted, parent-based regulation may specifically be aimed at regulating the conduct of foreign subsidiary companies, or this may be an effect of regulation for some other purpose (e.g. access by investors to accurate information on the financial performance and prospects of a multinational group). What all these examples have in common is that states, acting either unilaterally or in order to implement international agreements, have established their jurisdictions over the activities of legal persons, including TNCs, in situations where such activities have taken place, in totality or in part, outside the national territory. The next section examines jurisdictional issues under public international law.

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[99] *The Woodpulp*, [1988], para 16. On the case see also, Olivier Bertrand & Marc Ivaldi, 'Competition Policy Europe in International Markets', (2006) A Contribution *for the BRUEGEL's project on Europe and The Global Economy* 1, 9; Evan Breibart, 'The Wood Pulp Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings' (1989) 19(1) *Georgia Journal of International and Comparative* Law 149, 166.
[100] *The Woodpulp*, [1988], para 16; Bertrand & Ivaldi, (2006) *op. cit*., p. 9.
[101] Falvey and LIoyds, (1999) *op. cit*., p. 6.
[102] Zerk, (2010) *op. cit*., p. 15.
[103] *Ibid*,. p. 16.

4.5. The Treatment of Jurisdictional Issues Under Public International Law

The exercise of jurisdiction by a state over activities that took place in the territory of another has been 'seen to impinge upon the sovereignty of the state in which the conduct took place'.[104] Thus, as a matter of policy, assertions of 'extraterritorial' jurisdiction are generally prohibited unless they can be justified by reference to one or more of the established principles of customary international law. These include the (i) territoriality principle; (ii) the active personality or nationality principle; (iii) the passive personality and the (iv) universality principle and, most controversially, (v) acts which have effects within that territory.[105] These principles have usually been formulated in the context of criminal proceedings, and most seem to apply to natural persons. According to Jennifer Zerk, one of the difficulties in relying on such bases concerning legal persons is the assumption that international rules on jurisdiction are centred solely on 'command and control' forms of regulation.[106] This Part will access these principles in more detail.

4.5.1. The Principle Territoriality

The concept of 'territoriality' has a venerable history spanning *jus gentium* and modern public international law. It comes to prominence around 1648 with the *Treaty of Westphalia* where it was determined that a nation's power ended at its borders.[107] Territorial jurisdiction, also called domestic jurisdiction, national jurisdiction, sovereignty and state jurisdiction,

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[104] Deborah Senz, and Hilary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2 (1) *Melbourne Journal of International Law* 69, 70.

[105] Vaughan Lowe and Christopher Staker, "*Jurisdiction"* in Malcolm D Evans, International Law, (3rd edn. OUP 2010) 315; Shaw, (2008) *op. cit*., p. 652-673; Brownlie, (2008) *op. cit*., p. 301-306.

[106] Zerk, (2006) *op. cit.,* p. 105.

[107] Daud Hassan, 'The Rise of the Territorial State and The Treaty of Westphalia' (2006)9 *Yearbook of New Zealand Jurisprudence* 62, 64; *School*; Surya P. Subedi, 'The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States '(1994) 37 *German Yearbook of International Law* 162, 174. The 'Treaty of Westphalia', is a Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, 24 October 1946.

invests the state (or sovereign) with the power to assert jurisdiction over activities in its own territory.[108] This is the case irrespective of the nationality of the subject concerned and it is uncontroversial and universally recognised.[109] For instance, in the *Lockerbie* case,[110] the Scottish Solicitor General made it clear that a Scottish court had jurisdiction over the alleged bombers of the aircraft which exploded over the Scottish town of Lockerbie as the locus of the offence.[111] Historically, territorial jurisdiction is considered the most fundamental forms of jurisdiction and one of the oldest of all principles governing jurisdiction.[112] The principle accords with international practice and the greater part of private and public law jurisdiction exercised by states is based on this principle.[113] Because a territory has well-defined and easily identifiable boundaries, territoriality has much value as a conflict-avoidance instrument providing legal certainty. Gerber also notes that 'relevant conduct can be identified, the task of identifying the territory in which it occurred is easy enough, and thus it avoids jurisdictional overlaps'.[114]

In the landmark case of *Schooner Exchange v McFadden* occasioned by the lawsuit filed by the ship's original owner in an attempt to regain its possession, the court stated the basic rule that 'the jurisdiction of a nation within its territory is necessarily exclusive and absolute, and thus, susceptible of no limitation not imposed by itself'.[115] The court was considering the case

[108]M Cherif Bassiouni, 'The History of Universal Jurisdiction, in Universal Jurisdiction' in Stephen Macedo, (edn), *Universal Jurisdiction National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2004)40; Anni-Maria Slaughter, 'Defining the Limit: Universal Jurisdiction and National Courts', in Stephen Macedo (edn) *Universal jurisdiction* (University of Pennsylvania Press 2004)171-72; Rachel J Anderson, 'Reimaging Human Right Law: Toward Global Regulation of transnational Corporations', (2010) 88(1) *Denver University Law Review* 183, 211.

[109] Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law' (2012) 13 *Melbourne Journal of International Law* 1, 10.

[110]*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.),* [1992] ICJ Rep 3 *Provisional Measures* (Lockerbie).

[111] Shaw, (2008) *op. cit*., p. 645; Brownlie, (2008) *op. cit*., p. 654.

[112] Bassiouni, in Macedo, (edn), (2004) *op. cit*., p. 40.

[113] Michael D Ramsey, 'International Law limit on Investors Liability in Human Rights Litigation' (2009)50(2) *Harvard International Law Journal* 271, 271-2.

[114]David Gerber, 'Beyond Balancing: International Law Restrains on the Reach of National Law' (1984 1985) 10 *Yale Journal of International Law* 185,293; Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008)27.

[115] *The Schooner Exchange V. McFadden* [1812] 11 U. S 116 (7 Cranch) at 136.

of a ship named the Schooner Exchange that had been captured by France only to find its way again to a USA port where, to the chagrin of the original owner, it was docked under a French flag and bore the name The Balaou.[116]

Territoriality is thus a corollary of states sovereignty exercisable within its borders.[117] That a state should be able to enact and enforce laws regarding activities, persons natural or arthificial and events and within its territorial boundaries.[118]The court in *Island of Palmas* stated that 'sovereignty … in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state'.[119] A state cannot assert territorial jurisdiction if the state lost its formal sovereignty over any part of its territory boundaries.

For a state to claim jurisdiction under the territoriality principle, the prosecution must prove that the alleged conduct took place within the territory of the trial state or the act took place partly in their state and partly in another.[120]In practice, it often occurs that some crime took place in more than one state that is partly in one state and partly in another.[121]For instance, the Lockerbie explosive is said to have been loaded on-board the aircraft in Malta, before it entered the UK; and the September 11 attacks are said to have been planned and arranged by people in different countries.[122] Some scholars have contended in favour of conferring jurisdiction to the state where an offence was commenced, while others have argued in favour of the state where the act was concluded.[123]Thus, territorial connections between the conduct or events constituting the act and the territory of the regulating state do not necessarily have to be very great. For instance, some states in their criminal law have based jurisdiction over foreign elements on seemingly slight connections, such as the use of a bank account within its

[116] *Ibid,.* at 117.
[117] Lowe and Staker, in Evans (2010) *op. cit*., p. 320.
[118] Shaw, (2008) *op. cit*., p. 652-653.
[119] *Island of Palmas (the Netherlands* v USA) [1928] RIAA, 2 829 at 838.
[120] Michael Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 *British Year Yearbook of International Law* 145, 152.
[121] Akehurst, (1972-1973) *Ibid.,* p. 152.
[122] Lowe and Staker, in Evans (2010) *op. cit*., p. 321.
[123] Akehurst, (1972-1973) *op. cit*., p. 152.

territory to transfer money, or making a phone call or sending an e-mail to or from the territory of the regulating state.[124]

To cope with such situations, domestic laws often provide that states have jurisdiction when one of the constituent elements of the act occurred within their territory.[125] When the state where the act began claims jurisdiction, the link between the state and the act is the occurrence (the beginning) of this act in the territory, even though the act was completed in another state as well. A partial territorial link of this kind is widely regarded as a legitimate basis for claiming jurisdiction. This is one of the extended forms of territorial jurisdiction and is called the subjective territorial principle.[126] A specific example of this is stated by the UK's *Terrorism Act 2000* which gives jurisdiction over certain incitements to commit proscribed terrorist offences, if the incitement occurs wholly in the UK, even if the crime occurs partly outside the territory.[127] Equally, the state where an act was completed may assert jurisdiction over an act even if it was initiated abroad. Likewise, there is a partial territorial link in this case, and the justification of this type of claim is called the objective territorial principle.[128] The decision concerning *SS Lotus* rendered by the PCIJ is commonly refer to as the authority for the objective territorial principle. This entitled Turkey to exercise jurisdiction by virtue of the fact that a constituent element in the offence of manslaughter-death had occurred in Turkish territory.[129]

Theoretically, territorial jurisdiction makes it possible, to make and enforce laws that govern TNCs in the jurisdictions in which they are incorporated, operate, or have assets.[130] For instance, under American law, a state always has jurisdiction over corporations incorporated

[124] Zerk, (2010) *op. cit*., p.121.
[125] Mika Hayashi, 'The Information Revolution and the Rules of Jurisdiction in Public International Law', in Myriam Dunn et al (edn), *The Resurgence of the States: Trends and Processes in Cyberspace Governance* (Ashgate Publishing Company 2007)62.
[126] *Ibid.*,
[127] Section 59, of the UK Terrorism Act 2000.
[128] Hayashi, in Dunn et al, (2007) *op. cit*., p. 62.
[129] *S.S Lotus (France v. Turkey)* [1927] PCIJ Reports, Series A, No 10 p. 23.
[130] Anderson, (2010) *op. cit*., p. 210.

within its territory or the state where it has a place of business.[131] In part this is because respect for state sovereignty remains a central tenet of international human rights law.[132] Thus, domestic securities regulation, intellectual property, labour, corporate governance and antitrust laws, etc., primarily govern TNCs. This does not mean that these laws do not sometimes have extraterritorial reach, but rather that in most cases they are dependent on domestic enforcement.[133] In practice, territorial jurisdiction has however been proven to be a limited tool, because TNCs often operate in the global context. This includes multiple entities incorporated in and subject to the laws of multiple jurisdictions because they work with various partners and suppliers.[134]

In addition, this relatively uncomplicated doctrine has been supplemented by an ancillary principle, known as the 'effects doctrine'.[135] This extends territorial jurisdiction to include 'conduct outside the state's territory with substantial effect within its territory'.[136] Zerk often refers to the effects doctrine as an additional basis for asserting extraterritorial jurisdiction.[137] In the famous *Lotus* case the PCIJ laid the groundwork for the subsequent development of this doctrine by establishing a presumption in favour of a nation's prescriptive jurisdiction, even over conduct that occurred abroad.[138] Jurisdiction on the basis of conduct that merely produced effects on their territory has been claimed by various states, including the USA,[139] the UK, [140] Switzerland, [141] Germany, [142] The Republic of Korea, [143] China [144] and

[131] USA Code and Statute 28 U.S.C. §1332 (c) (1) (2006); 28 U.S.C§ 1391(c) (2006).
[132] Anderson, (2010), *op. cit*., p. 210.
[133] Parrish, (2009), *op. cit*., p. 845-6.
[134] Rachel Anderson, Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law (2009)18(2) *Michigan State Journal of International Law* 1, 2.
[135] Lowe and Staker, in Evans (2010) *op. cit*., p. 322.
[136] Blumberg, (1993) *op. cit*., p. 175.
[137] Zerk, (2010) *op. cit*., p. 19.
[138] *S.S Lotus (France v. Turkey)* [1927] PCIJ Reports, Series A, No 10 p 16; SVA Vidyasagar, Jurisdictional Issues in Cyber Space (2010)5(1) *Acta Juridica Olomucensia*, 29, 35. See also, Austen Parrish, 'The Effect Test: Extraterritoriality's Fifth Business' (2008) 61(5) *Vanderbilt Law Review* 1456, 1471.
[139] Restatement, Third, Foreign Relations law of the United States (1986) § 402(1) (c) (Setting forth the Effect Test); *The Alcoa* [1945]148 F.2d 416, 443.
[140] The case of *R v Sansom* [1991]2 All ER 145, where jurisdiction was established on the basis of extraterritorial conspiracy which, if carries, would produce effect within the UK.

Australia.[145]An example of the same approach can be seen in the *English Perjury Act 1911*, which provides that perjury by a person giving evidence before British authorities in foreign countries for the purposes of judicial proceedings in England will be treated as if the perjury were committed in England.[146]

4.5.2. The nationality principle

The nationality principle, sometimes called 'active nationality principle', is widely accepted as a basis for jurisdiction over extraterritorial conduct. This principle entitles a state to exercise extraterritorial jurisdiction over its nationals irrespective of where their acts may occur.[147] Essentially, according to this principle the jurisdiction claimed may not be exercised until the national is physically present within the territory of his or her home state, and it may be that the state takes no action because the matter has already been dealt with by the state where the act took place.[148]

Typically, States around the world base nationality of individuals on the birth of a person within the territory of the state, on descent from persons who are already nationals of the state *(jus soli*), and on naturalization after birth following fulfilment of laid down residency

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[141] See *Bell v Novic* [1955] ILR vol 22 515. Article 7 of the of the Swiss Penal Code states that an offence is presumed to have been committed not only not only in the place where it occurred but also in the place where it produces effect.

[142] German Act Against Restraints of Competition was initially enacted in 1957 and had several major revisions, the last one in 1998, with a last amended in 1999: Article 130 (2), states that "this Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area".

[143] Recently, the Republic of Korea has also given an extraterritorial application of its domestic antitrust law. On 1 April 2005, the amended Monopoly Regulation and Fair Trade Act, providing for an extraterritorial application of the Act entered into force.

[144] Article 2 of the new China Anti-Monopoly Law applies to anticompetitive conduct that occurs outside of China but has "eliminative or restrictive effects" on the Chinese domestic market.

[145]Section 5 of the Australian Competition and Consumer Act (ACCA) 2010, extended the application of the Act to anti-competitive behaviour outside Australia by bodies corporate incorporated in or carrying on business in Australia, Australian citizens and persons who are ordinarily resident in Australia.

[146] English Perjury Act (1911) Chapter 6 1 and 2 Geo 5, Section 1(5).

[147] Gerber, (1984-1985) *op. cit*., p. 190.

[148] Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013)9(4) *Utrecht Law Review* 68, 73; Paul Arnell, 'The Case for Nationality Based Jurisdiction' (2001) 50(4) *International and Comparative Law Quarterly* 955, 959-961.

requirements (*ius saguinis*).[149] International law is neutral about the granting of nationality provided the granting state does not breach certain international obligations, such as those under the *Convention on the Reduction of Statelessness*.[150] This means that the determination as to who is a 'national' for the purposes of the nationality principle is a matter largely left to the domestic jurisdiction of individual states. [151]

For example, the OECD *Anti-Bribery Convention*, which seeks to criminalise the bribery of foreign officials, requires signatory states to exercise its jurisdiction over transnational bribery if they exercise such jurisdiction over other extraterritorial crimes.[152] Most of the signatory states have certainly extended their jurisdiction to bribery of foreign officials even though a number of states have established additional conditions, including dual criminality, for actual prosecution.[153] The nationality principle may possibly be used to prescribe laws that extend the application of domestic regulations to the foreign operations of their TNCs.[154] For instance, the UK has prescribed jurisdiction on its courts in respect of *inter alia*: bigamy, [155] murder, [156] manslaughter, [157] treason, [158] soccer hooliganism, [159] breach of the *Official Secrets Act*,[160] and child sexual abuse,[161] wherever these are committed by British

[149] Lowe and Staker, in Evans, (2010) *op. cit*., p. 323; Under the Constitution of the Federal Republic of Nigeria, for instance, a person is a citizen of Nigeria if: (a) the person was born in Nigeria after September 30th 1960;(b) the person was born outside Nigeria after September 30th1960 if at the time of his birth one of his parents was a citizen of Nigeria or by virtue of Section 7(2) of the Constitution;(c) the person has been granted or acquired citizenship pursuant to a naturalization process in accordance with the act and, in the case of one who has not attained the age of twenty-one (other than a married woman) an application may be made on his behalf by his parents or guardian...[149]

[150] Convention on the Reduction of Statelessness (1961), 989 UNTS 175.

[151]*Nationality Decrees in Tunis and Morocco* [1923] PCIJ, Series B, No 4, 2 AD, p. 349.

[152] OECD Convention on Bribery of Foreign Officials in International Business Transactions, (1997), DAFFE/IME/BR (97), art 4(2), (hereinafter OECD Anti-bribery Convention).

[153]Tsetsuya Morimoto, 'Growing Industrializations and our damaged Planet, The Extraterritorial application of Developed Countries Domestic Environmental laws to Transnational Corporation Abroad' (2005)1(2) *Utrecht Law Review* 134, 147.

[154]Luis Benevides, 'Universal Jurisdiction Principle Nature and Scope' (2001) 1 *Anvario Mexico de Derecho Internacional* 19, 23.

[155]Offences Against the Peoples Act (1861) s .9.

[156] *Ibid,*.

[157] *Ibid,*.

[158] *Ibid,*.

[159] Football Spectators Act (1989) s.22.

[160] Official Secrets Act (1989) s.15.

[161] Sexual Offences Act (2003) Schedule 2 s.72.

nationals or residents. As such, in the *Trial of Earl Russell*, the defendant, a UK national, was convicted of bigamy even though his second marriage took place outside the UK.[162]

Although states are free to make conditions for the grant of nationality, international law is relevant, especially where other states are concerned.[163] This was stated in Article 1 of the *1930 Hague Convention on Certain Questions Relating to Conflict of Nationality Laws*:

> It is for each State to determine under its own laws who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.[164]

Although this stipulation of The Hague Convention is 'not particularly significant in its own right' by reason of the limited number of ratifications of the Convention, it accords with the 'fundamental starting point' in international law.[165] Equally, Article 3 of the *1997 European Convention on Nationality* provides that:

> Every state shall determine under its own law who are its nationals. This law shall be accepted by other states in so far as it is consistent with applicable international conventions, customary international law and principles of law generally recognised with regard to nationality'.[166]

It needs to be emphasized that states have free discretion in the determination of who its nationals are (as long as such rules are not discriminatory, as reflected in article 1(3) of the *International Convention for the Elimination of All Forms of Racial Discrimination*).[167] The PCIJ in its aforementioned advisory opinion noted that, in a matter like nationality which, in principle, is not regulated by international law, the discretionary power of a state is nevertheless limited by obligations that the state may have incurred towards other states, so that it can be said that it is circumscribed by rules of international law.[168]

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[162] [1901] AC 446.
[163] Shaw, (2008) *op. cit*., p. 645; See also Brownlie, (2008) *op. cit*., p. 660.
[164] (1930), 179 LNTS 89(LoN-4137).
[165] John Currie et al, *International Law: Doctrine Practice and Theory* (Toronto: Irwin Law 2007) 453.
[166] (1997), ETS No 166. There are 20 state parties. Also League of Nations, Convention Concerning Certain Questions Relating to Conflict of Nationality Laws (1930), 179 LNTS 89, Art 1, 12.
[167] International Convention on the Elimination of All Forms of Racial Discrimination (1965), UNGA Res 2106 (XX), UN Doc A/6014.
[168] *Nationality Decrees in Tunis and Morocco* [1923] PCIJ, Series B, No 4, 2 p. 24.

4.5.2.1. Nationality of Corporations

Corporate nationality is a concept tied to that of natural persons and is one that stems from it.[169] With the growth in international trade and investment, states began to allocate nationality to corporations, for example for conflict-of-law purposes, to establish jurisdiction, or to determine whether a state can exercise diplomatic protection.[170] Corporate nationality is derived but only to a limited extent by analogy to the nationality of individuals.[171] On the basis of the nationality principle, states are entitled to regulate the activities of businesses incorporated under its laws, and state practice in this regard diverges.[172] Common law states tend to confer nationality on the basis of incorporation within their territories regardless of where the business or management is carried out. By contrast, civil law countries accord nationality on the basis of where the corporation has the seat of its management or principal place of business.[173]

According to the nature of the interest that a state has in a company, an international approach is concerned with whether there exist pre-agreed upon rules governing state determination of corporate nationality. Williams and Chrussachi note that in the early days of joint-stock companies, when the express consent of the state was needed for the creation of a company, it was universally accepted that a company was a national of the state in which it had been incorporated.[174] In 1918, a journal edition of Yale Law stated that 'there are no internationally accepted rules in existence with respect to the nationality or domicile of

[169] Ricardo Letelier Astorga, The Nationality of Juridical Person in the ICSID Convention in Light of Its Jurisprudence (2007) 11 *Max Planck Year Book of United Nation Law* 417, 426.
[170] *Barcelona Traction, Case* [1970] para 42.
[171] *Ibid*,.
[172] Zerk, (2006) *op. cit*., p. 106.
[173] Sara L Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining' (2008) 11 *Yale Human Rights & Development Law Journal* 177, 187.
[174] Vaughan William & Mathew Chrussachi, 'The Nationality of Corporation' (1933) 49 *Law Quarterly Review* 334, 334.

corporate bodies'.[175] Nationality imposes duties which can only be performed by individuals, and confers rights which only individuals can enjoy.

Modern international law has developed rules to help determine the nationality of corporations. On the basis of the nationality principle, states are entitled to regulate the activities of corporations incorporated under their law.[176]The ICJ decision in *Barcelona Traction*[177] is currently the most important and emblematic authority on modern international law of corporate nationality. The Barcelona Traction Company was incorporated in 1911 in Toronto, Canada, where it had its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed several subsidiaries located across the country with one subsidiary formed pursuant to Spanish law and carrying on business in Spain. Some years after the First World War, eighty-eight per cent of the company's share capital was owned by Belgian nationals. The company was declared bankrupt by a Spanish court and expropriated by the Spanish government. The bankruptcy was caused by financial restrictions imposed by the Spanish government on the company's assets. Belgium's informal diplomatic overtures, alongside those of the USA and the UK, were rejected, as Spain repealed all efforts by Belgium to resolve its interests in the case. This drove Belgium to seek diplomatic protection for the Belgian shareholders by filing a claim against Spain at the ICJ.[178]

The court resolved *Barcelona Traction* by analysing general principles of international law. The court started its reasoning by noting that corporations are legal subjects of the states in which they are incorporated and are thus subject to the principle of diplomatic protection in

[175] 'In an American Corporation Substantially owned by German Stock Holders an Alien Enemy' (Unsigned Note), *Yale Law Journal*, (1917-1918), (Cited by Robert HW, Note 195, p. 73).
[176] Zerk, (2006) *op. cit.*, p. 106.
[177] *Case Concerning the Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)* [1970] ICJ Rep. 3.
[178] *Barcelona Traction Case Ibid.*, para 1-8; Stephen R. Layne, 'Corporate Responsibility for Human Rights Violations: Redressability Avenues in the United States and Abroad' (2015) 18(2) *Gonzaga Journal of International Law* 1, 7.

public international law. [179] It noted that state practice required the existence of a 'genuine link' between the state that sought the diplomatic protection and the corporation, but stressed that 'no absolute test of the "genuine connection" has found broad recognition'.[180] As a result, the court reviewed the concept of the corporation in municipal law to determine the nature of corporate personhood. It affirmed the distinction, between corporate personality and that of its shareholders, in order to shield them from liability beyond their shareholdings, but also to prevent these shareholders from having access to the assets of the corporation.[181] According to the court, a company's creditors may not as a general rule lift the corporate veil except in some circumstances of fraud or malfeasance and, thus, shareholders may not pierce the corporate veil to recover damages from the corporation in international claims except under certain situations, [182] which were not applicable in the *Barcelona Traction* case. [183] Accordingly, the court concluded that the 'traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office'.[184]

Thus, the judgment shows that a state would be entitled to bring an action if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law.[185] In such circumstances a state would have a right to seek diplomatic protection when foreign

[179] *Barcelona Traction Case Ibid.,* para 70.
[180] *Barcelona Traction Case Ibid.,* para 70; Ricardo Letelier Astorga, 'The Nationality of Juridical Persons in the ICSID Convention in Light of its Jurisprudence' (2007) 11 *Max Planck Yearbook of United Nations Law* 417,428.
[181] *Barcelona Traction Case Ibid.,* para 41.
[182] *Barcelona Traction Case* [1970] *Ibid.,* para 56; see Lee Lawrence Jahoon, 'Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years' (2006) 42 *Stanford Journal of International Law* 237, 242.
[183] *Barcelona Traction Case* [1970] *Ibid.,* para 64. The Court considered only two exceptions to the rule of incorporation: when the corporation 'ceased to exist' and when the company's state of incorporation 'lack[s] capacity to take action on its behalf' *Id.* at 64. Another basis for admissibility of a claim, but not an exception to the general rule, is when shareholders suffer a direct injury, but Belgium did not make this argument, *Barcelona Traction Case* [1970] *Ibid* para 92.
[184] *Barcelona Traction,* [1970] *Ibid.,* para 70.
[185] *Barcelona Traction,* [1970] *Ibid.,* para 86.

investments by its nationals, and is part of that state's domestic economic resources, are prejudicially interfered with in abuse of the right of the state itself to allow its nationals to enjoy a certain treatment.[186] However this contention was negated by the court, which held that such a right, must be founded on 'treaty stipulations or special agreements directly concluded between the private investor and the state in which the investment is placed'.[187] Since no such mechanism existed between Belgium and Spain the right was determined as being non-existent. Instead the court considered the theory of diplomatic protection of shareholders, by opening the door to competing diplomatic claims. The opinion was informed by the reasoning that the adoption of this theory would result in competing claims on the part of different states whose nationals held shares in the corporation. This in the Court's view could create an atmosphere of confusion and insecurity in international economic relations.[188] In connection with the nationality of juridical persons, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention) put into consideration the fact that the majority of investments are made by corporate investors, most commonly through locally incorporated affiliates as they might be required to do by their host states. The Convention states that, 'national of another Contracting State' means:

> Any juridical person which had the nationality of a Contracting State other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the contracting state party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.[189]

In *Azurix Corporation v. The Argentine Republic*, the ICSID tribunal held that reliance on *Barcelona Traction* in order to deny the possibility that action by the host state against the activities and assets of a locally incorporated company fully owned or controlled by the

[186] *Barcelona Traction*, [1970] *Ibid.*, para 86.
[187] *Barcelona Traction*, [1970] *Ibid.*, para 90.
[188] *Barcelona Traction*, [1970] *Ibid.*, para 96.
[189] Convention on the Settlement of Investment Dispute between State and National of Other States (1965), 575 UNTS 159 art 25(2) (b), (ICSID Convention); See also, Astorga, (2007) *op. cit*., p. 438.

foreign investors may constitute a breach of the bilateral investment treaty (BIT) in question would be inappropriate.[190] Though the tribunals sometimes referred to the controlling majority of the foreign investor in the local company, practice shows that even minority shareholders have been accepted as claimants and have been granted protection under the respective treaties.[191] Nevertheless, Article 25(2) (b) of the Convention does not provide a method to determine corporate nationality, the rule that the nationality of a corporation is determined on the basis of its place of incorporation or its *siege social* seems to be accepted, even if it remains implicit.[192]

In the *ELSI* case, a Chamber of the ICJ allowed the US to bring a claim against Italy under their 1948 *Treaty of Friendship, Commerce and Navigation* (FCN). ELSI was a company incorporated in Sicily (Italy) whose shares were wholly owned by two US companies, Raytheon and Machlett. At the end of the 1960s, the company experienced serious financial problems, and the management decided to close the main company's industrial unit located in Italy. Prior to the closure, the Italian government took over the factory with all its assets. The company was declared bankrupt and the bankruptcy procedure took several years. The subsequent liquidation left no money for the US owners. The US used diplomatic protection on behalf of ELSI shareholders due to the violation of the FCN treaty allegedly committed by the Italian government. In this way, the shareholders of a foreign company were protected by their country (the US) against the state of incorporation (Italy). Based on the provisions of the treaty related to foreign investment, the court ruled that such provisions conferred rights on the shareholders even in respect of acts committed against the corporation.[193]

The court avoided pronouncing on the compatibility of its findings with those of *Barcelona Traction* despite the fact that Italy formally objected that the company whose rights were

[190] [2003] ICSID Case No ARB/01/12 para 63 and 65.
[191] Markus Burgstaller, 'Nationality of Corporate Investors and International Claims against the Investor's Own State' (2006) 7 *Journal of World Investment and Trade* 857, 858.
[192] *Ibid*.
[193] *Case Concerning ElettronicaSicula SPA (ELSA) (United States of America v. Italy*) [1989] ICJ Reports, 15.

alleged to have been violated was Italian, and the US sought to protect the rights of shareholders in the company.[194] Although Italy lost the case due to lack of evidence about some factual issues, the court deemed that there was a genuine connection between the company and the state of nationality of the shareholders.[195]The Court allowed the US to exercise the diplomatic protection on behalf of the shareholders, as long as the corporation whose rights were at stake was incorporated in the defendant state, a common situation when talking about foreign investment.[196]

As a general rule, states do not prescribe laws for foreign affiliates of locally incorporated parent companies. However, under certain circumstances, it might be reasonable for a state to treat as nationals any entities, including corporations that are owned or significantly controlled by its true nationals.[197] The American position is set out in Paragraph 414(2) of the *Restatement (Third) of Foreign Relations Law* of the US which provides that, for limited purposes, a state may regulate the activities of corporations organised under the law of a foreign state 'on the basis that they are owned or controlled by nationals of the regulating state'.[198] Relying on this extended version of the nationality principle, the US has exercised extraterritorial jurisdiction over foreign subsidiaries and other foreign affiliate corporations primarily to enforce economic sanctions against hostile countries. The European Community (EC) has fiercely challenged this approach.[199]

However, in other issues the USA has desisted from resorting to this extensive interpretation of the nationality principle. For instance, the USA Congress did not rely on it when it enacted and amended the FCPA, which criminalises the bribery of foreign officials. Under the FCPA, extraterritorial jurisdiction can only be exercised over the conduct of US nationals and US-

[194] *Ibid.* para. 64-69.
[195] *Ibid*; also, Astorga, (2007) 426
[196] Astorga (2007) *Ibid.* p. 430.
[197] Zerk, (2006) *op. cit.*, p. 106.
[198] Restatement, Third, Foreign Relations Laws of the United States 1987.
[199] Morimoto, (2005) *op. cit*., p.148.

based corporations. The USA Congress may have been concerned about possible violations of foreign state sovereignty.[200] The same concern may affect the exercise of jurisdiction over foreign subsidiaries and other foreign affiliate corporations for the purpose of applying environmental regulations. In 2000, a Bill for a *Corporate Code of Conduct Act* was introduced in the USA House of Representatives.[201]Although the Act aims to regulate TNCs' conduct in foreign countries, its legal mandate extends only to USA nationals and US-based corporations.

4.5.3. The Passive Personality Principle

Under this principle, a state may assert extraterritorial jurisdiction over an act committed abroad which has affected or will affect nationals of the state.[202] The *IBA Task Force Report* defined the passive personality principle more broadly to include jurisdiction over an act committed against residents and domiciliary of a state.[203] On this particular principle, the leading case is the 1887 *Cutting* case.[204] In the case, a Mexican court exercised jurisdiction over the publication of a defamatory statement about a Mexican national by Mr Cutting, an American citizen, in a Texas newspaper. Cutting was arrested and convicted for the offence (a crime under Mexican Law) while in Mexico, with Mexico maintaining its right to jurisdiction on the basis of passive personality. The judgment led to a diplomatic protest from the United States. However, the dispute concluded without a decision on the validity of the passive personality principle because each country dropped the issue after Mr Cutting was released for diplomatic reasons.[205] In the *US v Yunis (No. 2)*[206] the court held that although

[200] *Ibid*,.
[201] Corporate Code of Conduct Act (2000) HR 4596, 106th Cong. 2000.
[202] Shaw, (2008) *op. cit*., p. 664; Ryngaert, (2008) *op. cit*., p. 92.
[203] IBA Task Force Report, (2009) *op. cit*., p. 147-8.
[204] *Cutting case,* in US Department of State Foreign Relations Law [1887]751 -867, in. Moore B, Digest of International Law, Washington (1906) vol. 11, p.228.
[205] *Ibid*,.
[206] [1988] 681 F. Supp. 896, 82 ILR, 344.

the passive personality principle was regarded as a controversial principle of jurisdiction in international law, it was still recognised as a legitimate principle of jurisdiction.[207] The case concerned the arrest/detention of a Lebanese national by a US agent in international waters for alleged involvement in the hijacking of a Jordanian airliner. The only connection between the hijacking and the US was that several American citizens were on the flight. The court accepted that both the principle of universality and passive personality provided an appropriate basis for jurisdiction.[208]

Nevertheless, recent state practice indicates a growing acceptance of this practice. A clear example is when the USA hunted, found and convicted individuals who were alleged to have bombed its embassies in Nairobi (Kenya) and Dares Salaam (Tanzania).[209] Passive personality jurisdiction has also been put forth as a 'basis for US jurisdiction over Saddam Hussein' because of 'offenses that he committed against the United States and coalition forces'.[210] Another example is the *Australian Criminal Code Act 1995* (Cth) which makes it an offence to recklessly or intentionally harm, or seriously injure an Australian national anywhere in the world.[211] While this may be true generally, assertions of passive nationality jurisdiction are not always limited to these categories. This is particularly the case for states who are less likely or who refuse to extradite their nationals for offences committed overseas. For example, French criminal law applies to crimes committed outside French territory by any foreign national where the victim is a French national.[212]

[207] *Ibid.*, para 349.
[208] *Ibid,*. (1988); Eric Talbot Jensen, 'Exercising Passive Personality Jurisdiction Over combatants: A Theory in Need of a Political Solution' (2008)3 The International Lawyer 1107, 1114.
[209] See Secretary of State Madeline K Albright, "Remarks on the apprehension of suspect in bombing of US embassies", FBI Headquarters, Washington DC, 27 August 1998, online: US Department of State, http://secretary.state.gov/www/statements/1998/980827.html > accessed 14 May 2014.
[210] Jensen, (2008) *op. cit*., p.1117.
[211] Piper (2012), *op. cit*., p.14.
[212] France Penal Code (1810) art 113-7.

This trend is discernible in Article 5(1) (c) of the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),[213] which requires state parties to establish jurisdiction for torturers through various methods, including passive personality jurisdiction if that state considers it appropriate. Similarly, the UN *Convention Against Corruption 2003*[214] established a rather extensive jurisdictional basis, and in contrast to previous treaties it specifically includes passive personality jurisdiction. The UN *Convention Against Transnational Organized Crime* also allows for the use of passive personality in establishing jurisdiction.[215]

It is possible for a company to be legally responsible under the passive personality principle since what is required is that the victim of the act committed is a national of the forum state. For instance, where a Canadian company involves in serious human rights abuses in foreign countries and the victim is an American, the US may exercise jurisdiction under the passive personality principle and hold such company to account. Nonetheless, this principle may not work perfectly in relation to a weak developing state like Nigeria due to its inadequate legal regime, and lack of economic and political will coupled with weak governance system.

4.5.4. The protective principle

This principle allows a state to exercise jurisdiction over extraterritorial conduct that threatens its security, integrity, or its vital economic interests irrespective of where the act was committed or who committed it.[216] Zerk gives the example of coastal states having the right to enforce internationally agreed anti-pollution standards within their Exclusive Economic Zone (EEZ).[217] The protective principle has been used as a ground for jurisdiction under which a state may exercise jurisdiction over extraterritorial conduct, such as the selling

[213] (1984), Res 39/46 UN Doc A/39/51.
[214] United Nation Convention against Corruption (2003), UN Doc A/58/422, art 42 (2) (a).
[215] (2000), UN Doc A/55/388 at 25.
[216] Piper, (2012) *op. cit*., p.16; Zerk, (2010) *op. cit*., p.19.
[217] Zerk, (2010) *op. cit*., p.19.

of state secrets; spying or the counterfeiting of its currency or official seal; political offences (such as treason); economic crimes; forgery of official documents (such as passports and visas); and desecration of flags.[218] It has been argued that what distinguishes the protective principle from the effects doctrine is that although both are concerned with acts that take place wholly outside the territory of the state asserting jurisdiction, the protective principle does not require any actual or potential adverse effect of the extraterritorial conduct within the territory.[219] If the act constitutes an adverse effect on or poses a danger to the state's security, integrity, sovereignty, or governmental function, the protective principle would be activated.[220]

The case of *DPP v Joyce*[221] represents a classical application of the protective principle. In this case, Joyce, an American citizen, had gained a British passport by fraudulent means. He left Britain and worked for German radio during World War II where he claimed to have acquired German nationality. He was convicted for propaganda broadcasting against Britain for the enemy in war time, a conviction which he appealed. It was argued on behalf of the accused that the UK did not have jurisdiction to try a non-national for a crime committed outside British territory. The court rejected this argument on the basis that:

> No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws.[222]

The District Court of the United of New Mexico Court in *United States v Reumayr*[223] exercised extraterritorial jurisdiction based on the protective principle in order to convict a Canadian national of attempting to blow up the Trans-Alaska Oil Pipeline. The defendants had planned the attack wholly in Canada. In holding that extraterritorial jurisdiction was

[218] Piper, (2012) *op. cit*., p.16
[219] Christopher C Blakesley, 'United States Jurisdiction over Extraterritorial Crime' (1982) 72(3) *Journal of Criminal Law and Criminology* 1109 1136.
[220] *Ibid.* 1136.
[221] *Joyce v DPP* [1946] A.C. 347 (HL).
[222] *Ibid*,.
[223] [DNM 2008] 530 F Supp 2d 1210.

appropriate, the court held that 'an attempt to destroy a domestic energy facility, with the purpose of disrupting the oil supply and as a corollary US financial markets, is a crime that implicates a security interest of the US and is thus cognizable within the protective principle of extraterritorial jurisdiction'.[224]

In view of the fact that the protective principle simply requires that the conduct be directed against the interest or security of the state seeking to exercise jurisdiction, it offers a possible theory for the exercise of extraterritorial jurisdiction over corporate entities. All that would be required is to show that the corporation participated in an act or activity resulting in harm to the security or economic interests of a state. The corporation's participation need to be direct that threatens national security, integrity, or its vital economic interest irrespective of where the act took place or who committed it or the nationality of the company.

4.5.5. Universal jurisdiction

This principle is considered to be among the most controversial bases of jurisdiction, yet all States have agreed to it in the Geneva Conventions for grave breaches.[225] It is controversial because it allows the exercise of jurisdiction over an act without regard to any nexus with the territory or national interests of the sovereign.[226] It is an exercise of jurisdiction over serious international crimes, considered crimes against humanity, regardless of where the conduct occurs, or the nationality of the perpetrators.[227] Just as with the territoriality principle, universal jurisdiction has an ancient pedigree.[228]

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[224] *United States v Reumayr* [DNM 2008]530 F Supp 2d 1210, 1222; Alejandro Chehtman, *The Philosophical Foundation of Extraterritorial Punishment* (OUP 2010)70-1.
[225] Akehurst, (1972-1973) *op. cit*., p.160.
[226] Stigall, (2012) *op. cit.*, p. 334; Kendra Magraw, Universally Liable? Corporate Complicity Liability under the Principle of Universal Jurisdiction, (2009) 18(2) *Minnesota Journal of International Law* 458 460.
[227] Piper, (2012) *op. cit*., p. 15; Farhad Malekian, 'Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal' (2005) 33 *Cornell International Journal* 673, 699; Willard B Cowles, Universality of Jurisdiction over War (1945) 33(2) *California Law Review* 177, 181.
[228] Donovan & Roberts, (2006) *op. cit*., p.143.

The underlying aim of universal jurisdiction is the international interest in deterring and punishing acts viewed as an 'attack upon the international order as a whole'.[229] As universal jurisdiction was created to be applied to certain international human rights cases, the rationale has remained the same, focusing on 'offenses against the conscience of the civilized world', and 'signalling that they are so appalling that they represent a threat to the international legal order'.[230] Thus, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) were the first tribunals to punish violations of international human rights after the Nuremberg Trials.[231]The ICTR was created in response to genocide, and the ICTY was created in response to the dissolution of a state and the resulting ethnic cleaning and violence.[232]

Today, universal jurisdiction is a product of both treaty and customary international law.[233] A number of treaties now require the exercise of universal jurisdiction. The most well-known of these treaties are the Geneva Conventions[234] and the *CAT.*[235] The Geneva Conventions impose universal jurisdiction for 'grave breaches', including wilful killing, torture and inhuman treatment, and wilfully causing great suffering.[236] The CAT requires state parties to

[229] Beth Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27(1) *Yale Journal of International Law* 2, 41.
[230] *Ibid.,* p. 42.
[231]Philippe Ferlet, & Patrice Sartre, The International Criminal Court in the Light of American and French Position< http://www.diplomatie.gouv.fr/fr/IMG/pdf/The-InternationalCri156AB.doc.pdf> assessed 27 July 2014.
[232] Statute of the International Criminal Tribunal for Rwanda (1994), UN Doc S/RES/955, art 61; Statute of the International Tribunal of the Prosecution of Persons Responsible for Violation of International Humanities Law Committed in the Territory of the Former Yugoslavia since 1991 (1993), UNSC, Res 1660, UN Doc. S/25705, art 7(1).
[233] Stephens (2002) *op.cit.* p. 42.
[234] Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, (1949), 75 UNTS 31 (First Geneva Convention); Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949), 75 UNTS 85 (Second Geneva Convention); Convention Relative to the Treatment of Prisoners of War (1949), 75 UNTS 135 (Third Geneva Convention); and Convention Relative to the Protection of Civil Persons in Time of War (1949), 75 UNTS 287 (Fourth Geneva Conventions).
[235] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984), Res 39/46, UN Doc A/39/51.
[236] First Geneva Convention, (1949), *Ibid.*, art 50; Second Geneva Convention (1949), *Ibid.*, art 51; Third Geneva Convention (1949), *Ibid.*, art 130; Fourth Geneva Convention (1949), *Ibid.*, art 147.

either extradite or prosecute an alleged offender that is present in their territories.[237] In addition, customary international law, at a minimum, allows all states to apply universal jurisdiction over genocide, war crimes, crimes against humanity, and torture.[238] In *Filartiga*, Judge Kaufman affirmed that 'the torturer has become like the pirate and slave trader before him, *hostis humanis generis*, and an enemy of all mankind'.[239]

Domestic legal systems have relied upon universal jurisdiction to support criminal prosecutions for human rights abuses. For instance, universal jurisdiction was used in the trial of Adolf Eichmann.[240] Eichmann, a high-ranking Nazi official who escaped the Nuremberg trials by hiding in Argentina, was arrested by Israeli agents and taken to Israel to stand trial for war crimes. Israel based its jurisdiction on a statute that gave its court's jurisdiction over 'crimes against the Jewish people' regardless of territoriality or nationality. [241] Since *Eichmann*, several states have established laws on universal jurisdiction. Belgium has been one of the most active states in the application of universal jurisdiction. Notable cases tried under Belgium's law of universal jurisdiction include the case *of Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC) Ndombasi Yerodia*; [242] the trial of the *Butare four*;[243] and the case against *Hissene Habre,* former President of Chad.[244]

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[237] Torture Convention (1984) *Ibid.*, art 5 and 7(1), these articles are often cited as standing for the principle of universal jurisdiction.
[238] Stephens (2002) *op.cit.* p. 42.
[239] Filartiga [1980] 2d Cir 630 F 2d 876 at 106.
[240] *Attorney General of the Government of Israel v Adolf Eichmann* [1961] 36 ILR 298.
[241] *Ibid,*.
[242] In 1998 Congolese citizen filled an action in Belgium against Abdoulaye Yerodia Ndombasi, the then Minister of Foreign Affairs of DRC for war crimes in an internal armed conflict and crimes against humanity. Belgium issued an arrest warrant against the then minister for offences constituting breaches of Geneva Conventions of 1949 and the Additional Protocols, as well as with crimes against humanity. On the case see Kevin R Gray, 'Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*)' (2002)13(3) *European Journal of International Law* 723, 723.
[243]Assize Court of Brussels, Judgement of 8 June 2001, The Butare four involved four Rwandan civilians who were accused of committing war crimes during Rwandan civil war. Also, available at http://asf.be(assessed 23 June 2014); Roozbeh Rudy Baker, 'Universal Jurisdiction and Case of Belgium: A Critical Assessment' (2009-10) 16(1) *ILSA Journal of International & Comparative Law* 141 143.
[244]For a discussion on Habr6 cases see Moghadam T, Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunal as Applied to the Case of Hiss6ne Habr6 (2008) 39 *Columbia Human Rights Law Reviews* 471; Tanaz Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunal as Applied to the Case of Hiss6ne Habr6' (2008) 39 *Columbia Human Rights Law Review*, 471,467.

A number of states, including Canada, Australia, the Netherlands, and the UK have enacted domestic ICC-implementing statutes which allow corporations to be the subject of universal jurisdiction proceedings.[245] As part of their ratification of the Rome Statute of the ICC, they introduced offences equivalent to the ICC statute offences of genocide, crimes against humanity and war crimes into their domestic laws and which were also applicable to legal persons.[246] The Australian criminal law, which mirrors the ICC Statute, recognised the principle of universal jurisdiction by establishing that anyone, anywhere, regardless of citizenship or residence, can be tried for war crimes, offences against humanity and genocide.[247] The Australian Criminal Code also explicitly states that the code applies to corporations in the same way as it applies to individuals, and corporations may be found guilty of any offence, including one punishable by imprisonment.[248] These legislations make it possible for Australian courts to hold corporate entities legally responsible for human rights violations. For instance, the Australian prosecutors took steps to investigate allegations of international criminal conduct by Anvil Mining Ltd in the DRC over an event known as the 'Kilwa Incident'.[249] While the Australian prosecutor was investigating the incident, a military court in the DRC brought charges against three Anvil members of staff in their individual capacities. The three members of staff were acquitted, and shortly thereafter, the Australian

[245] Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes, The Potential of Criminal Common Wealth Code' (2007) 5 *Journal of International Criminal Justice* 809 819; Mugambi Jouet, 'Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America China and Beyond Prosecution' (2007) 35 *Georgia Journal of International & Comparative Law* 496,498.
[246] Kyriakakis, (2007) *op.cit.* p. 819.
[247] Australian Common Wealth Criminal Code (1995) Division 268 offences; Kyriakakis, (2007) 819.
[248] See Australian Common Wealth Criminal Code (1995), Part 2.5, Division 12, Section 12.1 and 12.2; Kyriakakis, (2007) *op.cit.* p. 815.
[249] Kyriakakis, (2007) *op.cit.* p. 819; Magraw, (2009) *op.cit.* p. 468. Anvil Mining is a transnational enterprise whose parent company is incorporated in Canada, with the company's head office in Australia and mining operations in the DRC. It allegedly aided and abetted in the military suppression of a local uprising. Anvil allegedly provided company trucks, drivers and airplanes to transport troops during the operation and distributed food and payments to the soldiers who allegedly committed rape, murder and enforced disappearances in the town of Kilwa.

Federal police closed the case without filing any charges.[250] Even though Anvil Mining is incorporated in Canada and Canada has a similar law in place that implements its responsibilities under the Statute of the ICC, Canada does not appear to have initiated any similar investigation.[251]

The Australian example demonstrates that home states can enact legally binding regulation for companies operating internationally to force them to conform with international human rights norms, particularly where the conduct at issue breaks universally recognised international criminal law norms. As states enact domestic ICC-implementing statutes, universal jurisdiction will enable states to hold companies legally responsible in ways that these treaties do not in their present form. The International Criminal Tribunal do not exercised universal jurisdiction. It is said to be nascent, yet it has existed for centuries as part of customary international law and for many decades in the treaties just referred to.

4.6. Jurisdiction under Private International Law.

Despite the broad similarities between 'private' international law and 'public' international law, most modern international law scholars consider there to be a sharp distinction between the two in the same way that there is a public/private divide in municipal law.[252] However, making a distinction between the two hierarchically equal systems of law is itself an oversimplification given that public international law is generally involved with the rights and obligations of states against other states and complaints by an individual against a state, whereas private international law has in fact been viewed as an emanation of municipal law

[250] Magraw, (2009) *op.cit.* p. 468; Anvil Mining Report 2006 at 20 (2006). Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008)11 *Yale Human Right & Development Law Journal* 127, 133.
[251] Seck, (2008) *op.cit.* p. 183.
[252] Mills, (2009) *op.cit.* p. 1. See also, Benedict Wray and Rosa Raffaelli, 'False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations' (2012) 6(1) *Human Rights and International Legal Discourse* 108 112.

and is not truly international law at all.[253] Instead its aim is to resolve private disputes in which a foreign element is involved, based on a domestic conception of justice and fairness.[254] Generally, this concerns private law cases with foreign elements, as cases of purely domestic matter that do not invite or raise the interests of other states, and so do not ordinarily involve international law concerns. The jurisdictional rules in private law cases involving foreign element or activity seems to be more flexible over the 'connecting factors' between the dispute and the forum state; these include the presence of the parties, and the subject matter of the dispute and state.[255]

Private international law is concerned with issues of jurisdiction of municipal courts, such as whether or not it is appropriate for a court to assume jurisdiction in a case with foreign actors, the domestic law applicable to the case, the rights and liabilities of the parties, and the extraterritorial recognition and enforcement of judgements in international private law disputes before national courts.[256] As a consequence, each state has the propensity to approach issues of jurisdiction differently, depending on whether the rule is derived from public law (e.g. a legal obligation in anti-competitive behaviour) or from a private relationship between parties (e.g. based on negligence in tort or in contract).[257] For municipal courts to be able to determine private disputes with a foreign actors, some level of direct extraterritorial civil jurisdiction is often required.[258] Nevertheless, such claims can still raise important policy questions for various states. Several legal theories have been developed to deal with this problem, to help balance the litigants' needs with public policy concerns, and to help resolve competing jurisdictional claims.[259] However, the rules concerning to civil jurisdiction over TNCs are complicated. Many legal regimes appear to take the position that

[253] Wray and Raffaelli, (2012) *op.cit.* p. 112.
[254] Zerk, (2010) *op.cit.* p. 144; Mills, (2009) *op.cit.* p. 1; Wray and Raffaelli, (2012) *op.cit.* p. 112.
[255] Zerk, (2010) *op.cit.* p. 8.
[256] Zerk, (2006) *op.cit.* p. 113; Crawford, (2012) *op.cit.* p. 474; Mills, (2009) *op.cit.* p. 1.
[257] Zerk, (2006) *Ibid,.*
[258] Zerk, (2010) *op.cit.* p. 9.
[259] *Ibid,.*

private actors including businesses domiciled within their territory that have a controlling power in a foreign subsidiary will not justify taking direct extraterritorial jurisdiction over the foreign subsidiary. However, such jurisdiction may be equally claimed where the foreign subsidiary is an appropriate co-defendant (i.e. where there are genuine territorial connections between the foreign subsidiary and the forum state, in addition to any ownership links).[260]

As far back 1920s, Wigmore contended that 'there is no international rule as to the jurisdiction of courts. Each system has developed, and naturally clings to, those rules for the jurisdiction of its own courts which are considered to be in the interests of the population normally dealt with by them.'[261] The authors of the *USA Restatement of the Foreign Relations Law* also stated that there were 'no rules of international law specifically governing the jurisdiction of a state to prescribe rules for the adjudication or other determination of claims of a private nature'.[262] Although this view was then recognised, it lost its position in the 1987 *USA Third Restatement of the Foreign Relations Law* which states that:

> The exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement. States have long maintained the right to refuse to give effect to judgments of other states that are based on assertions of jurisdiction that are considered extravagant; increasingly, they object to the improper exercise of jurisdiction as itself a violation of international principles.[263]

Some scholars are of the view that private international law may be influenced by the rules of public international law although how certainly this will occur depends on domestic constitutional provisions of the relevant states.[264] According to Mills, the assumption of a systematic international perspective on private international law reveals that the distinction

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[260] *Ibid,.*

[261] John Wigmore, 'The Execution of Judgements: A Study in the International Assimilation of Private Law' (1927) XXI (1) *Illinois Law Review* 1, 9.

[262] Restatement, Third, Foreign Relation Law of the United States 1962, §19 comment d at 63, cited in Arthur Lenhoff, 'International Law and Rules on International Jurisdiction' (1965)50 *Cornell Law Quarterly* 5, 7.

[263] *Restatement of the Law, the Foreign Relations Law of the United States Volume 1: As Adopted and Promulgated* (American Law Institute, 1987) 304.

[264] Zerk, (2006) *op.cit.* p. 115.

masks a significant confluence in public and private international law.[265] Crawford added that they do share 'similar intellectual progenitors'.[266] Akehurst describes this as 'an extreme view'.[267] Likewise, Moore argues that 'the rules of jurisdiction in private and in public international law are founded in many respects on radically different principles, and ... an assertion of jurisdiction over an alien in the one case is not to be made a precedent for a like assumption in the other.'[268] Rosa and Wray argue that there is a strict divide between private and public international law in the same way that there is a private/public divide in domestic law.[269]

4.6.1. Personal Jurisdiction

Personal jurisdiction refers to the jurisdiction enjoyed by a court over the parties to a dispute, the ability to require attendance and the production of evidence as well as make enforceable judgments. In most common law countries, such as the UK and Canada, the usual ground for jurisdiction in private law cases remains the serving of a writ upon the defendant within the country, whether the presence of the defendant is temporary or coincidental, although other bases of jurisdiction have been added by statute.[270] Service of process is often required to give the defendant notice of proceedings but it does not create jurisdiction; jurisdiction must exist already before a writ can be served.[271] At common law, extraterritorial personal jurisdiction is established if plaintiffs can show a 'real and substantial connection' between the parties, the claim, and the forum.[272]

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[265] Mills, (2009) *op.cit.* p. 298.
[266] Crawford, (2012) *op.cit.* p. 474.
[267] Akehurst, (1972-1973) *op.cit.* p. 170.
[268] See Moore Bassett J, Foreign Relation of the United State (1887) 757 and 806 (cited in Akehurst, 1972-1973)170.
[269] Wray and Raffaelli, (2012) *op.cit.* p.112.
[270] Shaw, (2008) *op.cit.* p. 651.
[271] Akehurst, (1972-1973) *op.cit.* p. 171.
[272] Francois Larocque, 'Recent Development in Transnational Human Rights Litigation: A Postscript to Torture as Tort' (2008) 46 *Osgoode Hall Law Journal* 605, 630.

For corporate entities, 'presence' is established where the entity carries on business at a fixed and definite place, including where it uses a local agent. A corporate activity within the jurisdiction need not constitute a substantial part of, or even be incidental to, its principal objective in order to be considered present within the jurisdiction for purposes of service. Where a defendant is present in the forum, courts in common law countries automatically have jurisdiction; courts may only exercise their discretion to stay the proceedings, for example, on grounds of *Forum Non Convenience* (which will be discussed in more detailed in section 5.6.1) [273] Presence in a jurisdiction can also be established through the subsidiary company provided that the subsidiary is not merely a subsidiary but also an 'agent' or 'alter ego' of the parent, in particular, by the links of ownership and control between parent and subsidiary company, or by other significant contact with the jurisdiction, such as presence of corporate officers within the forum jurisdiction of the subsidiary company, or of a product made by that entity.[274] Under the Federal Civil Procedure Rules, a process of the proceedings can be served upon a foreign company with the leave of the court if the foreign company is a proper co-defendant through an officer, or agent authorised by appointment to receive service.[275]

In the United States, presence-based jurisdiction is embedded in the principle of 'tag jurisdiction' which is now absorbed into the 'minimum contacts test'.[276] The US Court rooted the minimum contacts test in the Fourteenth Amendment Due Process Clause and penned it in the 1945 decision in *International Shoe Co v Washington*[277] where it was stated that a state's exercise of personal jurisdiction over a foreign defendant must satisfy two requirements. First, the state must have a statutory basis for asserting adjudicatory authority over a foreign defendant. Second, if the claims satisfy the statutory requirements for

[273] IBA Task Force Report, (2009) *op.cit.* p. 98.
[274] Muchlinski, (2007) *op.cit.* p. 140.
[275] United States Federal Civil Procedure Rules, rule 4(e) (1).
[276] Strauss, (1995) *op.cit.* p. 398.
[277] *International Shoes* [1945] 326 US 310.

jurisdiction, the state must further determine whether the foreign defendant has established 'minimum contacts' with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.[278] A US court may exercise jurisdiction over a US national including a company incorporated in the US even for their extraterritorial activities. Foreign parties companies are subject to the general jurisdiction of the US courts if they do business in the forum, that is, if they have substantial, ongoing business in the forum.[279]

Apart from presence and minimum contacts, courts may also assert personal jurisdiction extraterritorially based on consent. This consent can be shown by the defendant's appearance in court without contesting the jurisdiction of the court. In the USA, defendant consent to jurisdiction can be explicit or implicit. Parties may explicitly agree to submit their dispute to the jurisdiction of courts through a forum-selection clause whose scope applies to any dispute between the parties, including tort claims. Consent may also be implicit: a person not otherwise subject to the jurisdiction of a particular court may preclude himself, by his own conduct, from later objecting to it. Implied consent has been applied mostly to corporations as a result of the difficulty in applying the territorial principle of jurisdiction to corporations; state assertions of jurisdiction over corporations were based on the fiction that corporations had impliedly consented to the jurisdiction of every state where they conducted business.[280] In *World-Wide Volkswagen Corp v Woodson*,[281] the USA Supreme Court stated that defendants who had 'availed themselves of none of the privileges and benefits' of the forum state could not be properly brought under the personal jurisdiction of that forum.

[278] *Ibid.*, para 316 (quoting *Milliken v Meyer* (1940) 311 US 457, 463; Jonathan Spencer Barnard, A Brave New Borderless World: Standardization Would End Decades of Inconsistency in Determining Proper Personal Jurisdiction in Cyberspace Cases (2016)40 *Seattle University Law Review* 449, 254.
[279] Sarah Joseph, *Corporation and Transnational Human Rights Litigation* (Hart 2004) 83.
[280] Strauss, (1995) *op.cit.* p. 398.
[281] [1980] 444 US 286, 295.

The approach to personal jurisdiction in civil law countries varies from state to state. In the EU, these rules have been harmonised by treaties and subsequently EU regulation.[282] In some countries, personal jurisdiction is decided on the basis of the nationality of the parties.[283] For instance, the French Civil Code grants French court's jurisdiction over any suit brought by a French national or against a French national.[284]A similar rule existed in medieval Belgium, until 1942, and in the Netherlands and Greece until 1946. At present, courts in the Netherlands exercise personal jurisdiction on the grounds of the plaintiff's nationality or residence.[285] In some other countries, personal jurisdiction is even tied to the existence of the defendant's property within the forum. For instance, German courts claim personal jurisdiction over non-German domiciliary or residents that own property in Germany.[286] This jurisdictional basis does not depend on the value or nature of the property and permits issuance of judgments *in personam* in any amount, even exceeding the value of the defendant's property in Germany.[287] In Sweden, this rule has been dubbed the 'Swedish umbrella rule' meaning that you should not even leave your umbrella in Sweden lest you may find yourself subject to suits in Swedish courts for any and all claims.[288] Austria,[289]

[282] Gary B. Born, *International Civil Litigation in Us Courts: Commentary and Materials* (3rd edn, Kluwer Law International 1996) 93.
[283] Akehurst, (1972-1973) *op.cit.* p. 172-3.
[284]Article 14 and 15 of the French Civil Code. See also, Beth Stephens, Corporate Liability: Enforcing Human Right through Domestic Litigation (2001) 24 *Hasting International & Comparative Law Review* 401, 410.
[285]Article 14, Luxembourg Civil Code; Article 126(3), Dutch Code of Civil Procedure.
[286] Under the doctrine of Vermögensgernrichtstand, defendant's ownership within a German forum was sufficient for the exercise of personal jurisdiction over a defendant regardless of his place of domicile. Christopher Kunere, Personal Jurisdiction Based on the Presence of Property in German Law: Past, Present and Future' (1992) 5 *Transnational Lawyer* 691 691. This doctrine is codified in section 23 of the German Code of Civil of Civil Procedure that remains in force.
[287]Gary B Born, Reflection on Judicial Jurisdiction in International cases (1987) 17(1) *Georgia Journal of International and Comparative Law* 1 14.
[288] The danger of leaving one's umbrella in Sweden is known the world over. If a non-resident leaves his umbrella in Sweden it creates the authority for Swedish court to cast him personal jurisdiction for debt obligation in any amount; Also, Stephen, (2001) *op.cit.* p. 410.
[289]Lother Hoffman L, 'Austria' in Christian Campbell (ed), *International Civil Procedure*, vol 1 (Salzburg Yorkhill Law Publishing 2007)1/24. (citing s 99 of the *jurisdiktionsnorm*)(Provided that against natural and legal entities who do not have another venue inside Australia, pecuniary claims may be filed at any court where property owned by them is found or where a debtor of them is located provided the defendants' property inside Austria is not disproportionately lower than the dispute.

Denmark[290] and Switzerland[291] apply similar jurisdictional rules. For corporate entities, domestic courts in EU states enjoy personal jurisdiction as of right over corporations 'domiciled' in their jurisdiction. According to the *Brussels Regulation*, the domicile of a company is the place where the company has its statutory seat, is incorporated, under whose law it was formed, where it has its central administration or where its business or activity is principally carried out.[292]

Some civil law countries have enacted 'retaliatory' jurisdictional provisions.[293] These provisions allow domestic courts to exercise jurisdiction over a foreigner in circumstances where the courts of the alien's home state would have asserted jurisdiction. For example, Italian courts will exercise jurisdiction over actions by Italian citizens against aliens provided that the alien's home state courts would entertain claims against Italians in like circumstances.[294] Likewise, a Belgian domiciliary can bring actions in Belgian courts against foreign defendants if they can demonstrate that the courts of the foreigner's domicile would entertain a comparable action against a Belgian defendant.[295] As with presence-based jurisdiction, judgments that arise from nationality, domicile and property-based jurisdictions may not be recognised extraterritorially. It has been suggested that some additional connection is required for the judgment to be accorded respect by other states.

However, the question is whether the fact that so many states have adopted either or a combination of the presence-based, contacts-based, consent-based, nationality-based residence or domicile-based and property-based personal jurisdictional standards means that an assumption of a general rule of private international law jurisdiction could be possible.

[290] Article 248 of the Danish Law on Civil Procedure; Born, (1987) *op.cit.* p. 15.
[291] Law on Civil Procedure, Article 248 (Den); Swiss Debt Collection Statute, SCHKG, SSBGV, § 271; Born, (1987) *op.cit.* p.15.
[292] Regulation (EU) No 1215/2012 of the European parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgement in civil and Commercial Matters (recast) (2012), OJ L351/1.
[293] Born, (1987) *op.cit.* p. 15.
[294] Article 4(4) Italian Civil Procedure Code, cited in Born, (1987) *Ibid.*, p.15.
[295] Articles 630 and 638 Belgium Judicial Code cited in Born, (1987) *op.cit.* p.15.

Lenhoff is of the view that this fact 'precludes any assumption that a general rule of international law exists to the contrary'.[296] He argues that: 'Only a practice accepted as law by general consent can be regarded as a rule of customary, that is, general international law'.[297] At present, there seems to be no uniformity in state practice in this area to say that, contrary to the rules of international law, they should be assumed to be prohibited.

The conclusion that state practice on personal jurisdiction is not sufficiently uniform to amount to a general principle of international law is further strengthened by the fact that the jurisdictional bases are not reflected in the treaties and conventions that deal with jurisdiction and the recognition and enforcement of foreign judgments to which most of the states discussed are parties. Had the states wished that the jurisdictional standards they practiced locally be generalised, especially in international cases, the jurisdictional treaties they entered into would have reflected that wish. However, what may be assumed as the general rule of international law is that each state is free to fashion its jurisdictional rule as it pleases, subject to the clear restriction imposed by the rules of public international law and state diplomatic immunity. Although this amounts to 'no rule', it is consistent with the *Lotus* view that states do not derive their jurisdiction from international law, but have their jurisdictions limited by international law.[298] These limits are to be found in treaty law, outside of which a state is free to determine its jurisdictional policy, subject to its constitution. The next section will examine the condition under which an EU Member State court recognize jurisdiction under the EU regulation.

4.6.2. Establishing Jurisdiction through European Union Regulations

In considering the development of the law relating to the limit of jurisdiction in private international law, various models may be put forward. One such model which exists in

[296] Lenhoff, (1965) op.cit. p 8.
[297] *Ibid*.
[298] *S.S Lotus (France v. Turkey)* [1927] PCIJ Reports, Series A, No 10.

Europe is provided by two international conventions. First, *Regulation No 1215/2012 (EU)* of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), otherwise called 'Brussels I Regulation' as amended applicable from 10 January 2015.[299] The Convention was signed by the then members of the European Community in 1968 and came into force in 1973.[300] Article 1 of the Regulation declares that it applies to civil and commercial matters regardless of the nature of the court or tribunal,[301] although Article 1 goes on state that it does not apply to customs or administrative matters, wills and succession, revenue, matrimonial matters, insolvency proceedings and arbitration proceedings.[302] The rationale for these exclusions has been said to be that either they occupy a grey area within the private/public law divide or the laws of the state parties were highly inconsistent prior to the 1968 Convention.[303]

The basic jurisdictional principle of the Regulation is that the defendant can be sued in a contracting state where he or she is domiciled regardless of his or her nationality.[304] This is irrespective of the plaintiff's domicile. Even if the plaintiff is domiciled in a non-contracting state, jurisdiction remains provided the defendant is domiciled within a contracting state. In contrast, where the plaintiff is domiciled within a contracting state there is no jurisdiction unless the defendant is also domiciled within a contracting state. This rule, however, does not prevent a contracting state from asserting jurisdiction, pursuant to its national law, over a defendant who is not domiciled within its territory, but it expresses the territorial limits of the

[299] Regulation (EU) No 1215/2012 of the European parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgement in civil and Commercial Matters (recast) (2012), OJ L351/1.
[300] Convention on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters (1968), OJ L304 (Brussels Convention). Since then, various amendments have been made to the original text, as new Member States have joined the Community.
[301] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001), OJ L12/1, art 1 (Hereinafter Brussels 1 Regulation).
[302] *Ibid.*, art 1(2) (b).
[303] John F Powell and Chris Burt, Brussels and Lugano Convention: What They Do (1994) *Defence Council Journal* 371 372.
[304] Brussels 1 Council Regulation, (2001) *Ibid.*, art 2 (1).

Regulation.[305] The term 'domiciled' has not been defined by the Regulation, and the definition has been left to national law.[306] The Regulation does however deal with the issue of which member state's definition of domicile is to be used.[307]Article 59 provides that the court of the Member State which first seised the matter shall apply its own definition of domicile to determine whether a person is domicile in that Member state and if the defendant is domiciled in another Member State the court first seised must apply the of that other state definition of domicile. For instance, if a UK court after using its own definition of domicile found that a person was not domiciled in the UK, and wanted to know whether the defendant was domiciled in Germany then they must apply the German definition of domicile.

Cheshire, North & Fawcett, argue that harmonization of the rules on jurisdiction will seriously be undermined if the English concept of domicile is used in this regard. [308] Thus, the *Civil Jurisdiction and Judgments Order 2001*[309] encompass a special provision on the meaning of the domicile of an individual for the purpose of the Regulation.[310] It equates an individual habitual residence with his domiciled but this was not possible because of the separate reference in the Regulation to habitual residence.[311] Paragraph 9 of Schedule 1 of the Civil Jurisdiction and Judgments Order 2001 adopts different rules for each of the contexts under the Regulation in which an individual's domicile has been ascertained. Thus, the rules state when an individual is domiciled: (i) in the United Kingdom; (ii) in a particular part of the United Kingdom; (iii) in a particular place in the United Kingdom; (v) in a state other than a Regulation state.[312] On most occasions domicile is equated with the state where a person is resident. However, the nature and circumstances of residence indicate that the

[305] *Ibid.*, art 4 (1).
[306] *Ibid.*, art 2 (1).
[307] *Ibid.*, art 9.
[308] James Fawcett, Janeen M Carruthers and Sir Peter North, *Cheshire, North & Fawcett*: *Private International Law* (14th edn, OUP 2008)210.
[309]SI 2001/3929.
[310] Schedule 5 part 1 of the Jurisdiction of Court and Enforcement of Judgements (European Communities) Act (1988) No 3. In Ireland, for instance, domicile is equated with ordinary residence.
[311] *Ibid.*, Schedule 2 para 9(2) to 7.
[312] *Ibid*,.

person has a substantial connection with it. Showing substantial connection is made easier by the use of presumption based on residence which is available under some of these rules but not others. The onus is on the claimant to show a good arguable case that the defendant is domiciled in a particular state. However, the law to be applied to define domicile is the law of the country where the defendant is alleged to be domiciled, not necessarily the law of the forum court.

With regard to the domicile of corporations and other legal persons, Article 60 of the Regulation gives its own definition rather than leaving this to the domestic law of contracting states to apply their rules of private international law. It provides a freestanding rule in Paragraph 1 where it fixes a legal person's domicile as the place where it has its 'statutory seat' or central administration or principal place of business.[313] This concept of statutory seat is well known in civil legal systems but has no equivalent under English or Irish law which tends to refer to the place of incorporation of a company. Article 60(2) states that for the purposes of UK and Irish law 'statutory seat' means the registered office or where there is no such office anywhere, the place of incorporation or where there is no such place anywhere, the place under the law of which the formation took place. The significance of this provision for the purposes of jurisdiction over a foreign subsidiary of a UK or Irish corporation is that if it can be shown that the foreign subsidiary's central management and control is exercised by the UK or Irish parent company domiciled in the UK or Ireland then a UK or Irish court (as the case may be) has jurisdiction over such a foreign corporation.

When there are multiple defendants, the plaintiff may sue in the court of domicile of any one of them.[314] This option may give some scope for 'forum shopping'. In *Kalfelis v Bankhaus Schroder and others*[315] the European Court advocated an interpretation that avoided the abuse of this option to oust the jurisdiction of the courts of the contracting state in which the

[313] Brussels 1 Council Regulation, (2001) *Ibid.,* art 60(1).
[314] *Ibid.*, art 6.
[315] [1988] Case 189/87ECR 5565.

defendant was domiciled. In fact, it was held in *Kalfelis* that the option would be applicable only insofar as it was expedient to hear and determine two actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. The courts have stated that they will not allow a plaintiff to invoke this head of jurisdiction in order to get around an exclusive jurisdiction clause. Thus, a court that has jurisdiction over one defendant has automatic jurisdiction over all the other defendants provided the claims against the defendants are so closely related that it is expedient to adjudicate them together to avoid the risk of conflicting rulings from separate proceedings.[316] A court hearing original proceedings equally has jurisdiction to hear third party proceedings related to the same facts unless the proceedings were instituted solely with the object of removing him from the jurisdiction which will be competent in his case.[317] Counterclaims arising from the same facts, on which the original claim was based, are also to be decided by the court deciding the original claim. It will be possible for a person or body corporate to have more than one domicile.[318] For example, in the case of a corporation or association, Section 42 of the 1982 Act provides for domicile in the UK if (1) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address there; or (2) its central management and control is exercised in the United Kingdom.

The Regulation establishes alternative bases of jurisdiction to domicile. In matters relating to contract, the defendant may be sued in the court of the state party where the contract is to be performed.[319] In matters relating to tort, delict or quasi-delict, the defendant may be sued in the contracting state 'where the harmful event occurred'.[320] In *Kalfelis*[321] the CJEU defined this as an expression covering 'all actions which seek to establish the liability of the

[316] Brussels 1 Council Regulation, (2001) *Ibid.,* art 6(1).
[317] *Ibid.*, art 6(2).
[318] *Ibid.*, art 6(3).
[319] *Ibid.*, art 5.
[320] *Ibid.*, art 5(3).
[321] *Bier v Mines de Potasse* [1988] Case 189/87 ECR 5565.

defendant which are not related to a "contract" within the meaning of Article 5(1)'.[322] Thus, 'relating to tort' is given a Convention interpretation. EU and EFTA pollution liability claims may be governed by this provision. The Court has also ruled that 'place' has a Convention interpretation and that 'place where the harmful event occurred' must be interpreted so as to give the plaintiff an option to commence proceedings either at the place where the damage occurred or at the place of the event that gave rise to the damage. In the *Bier v Mines de Potasse*[323] the CJEU also stated that 'place' has a Convention interpretation and that 'place where the harmful event occurred' must be interpreted so as to give the plaintiff an option to commence proceedings either at the place where the damage occurred or at the place of the event that gave rise to the damage.[324] Even where the damage is economic loss, the plaintiff's place of business will not of itself confer jurisdiction. According to the European Court, this rule 'must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it'.[325] Thus, plaintiffs have an option of suing in either forum. The first alternative where the damage occurred has received considerable attention from the CJEU which has limited it to the place where the direct physical injury or economic loss from an act or omission was first suffered. In some instances where it is difficult to determine where the damage actually occurred, the CJEU has been prepared to find a workable solution that satisfies the tests of feasibility and certainty. For example, in *Reunion Europeenne SA and others v Spliethoff'sBevrachtingskantoor BV and the Master of the vessel Alblasgracht,*[326] the CJEU permitted the person receiving cargo that had been damaged on the high seas to sue in the place where the goods were meant to be delivered. The concept does not extend to damages inflicted on indirect victims or

[322] *Ibid.*, paras 15-16.
[323] *Ibid,*.
[324] *Ibid.*, para 14.
[325]*Ibid.*, paras 24-25.
[326][1998] 1 ECR 6511 paras 33-37.

consequential damages even if suffered by the direct victim. There is little direct authority on the meaning of the second alternative where the event gave rise to the damage occurred.

An exception to the domiciliary rule is Article 5(4) which provides that a person domiciled in a Member State may be sued in another Member State 'as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings to the extent that the court has jurisdiction under its own law to entertain civil proceedings'.[327] Thus, in an *action civile* brought in a criminal preceding the court may order compensation in a case in which it would not otherwise have jurisdiction under the Brussels Regulation.

In sum, the Brussels I Regulation is a jurisdictional expression of the EU and EFTA member states. The basic jurisdictional nexus is domicile, and the regulation is limited to international cases. Although the judgment recognition arm of the jurisdictional expression could have unacceptable effects on non-states parties, the Regulation has no force outside the EU and EFTA region. Whilst the Regulation does not require a link between the plaintiff and the forum, the requirement of a link between the disputes, the defendant and the forum prevent it from being regarded as creating a true universal jurisdiction. With regard to extraterritorial corporate activities, the Brussels regime is a possible instrument for the assumption of jurisdiction over a European parent corporation implicated in the extraterritorial activities of its foreign subsidiary. This will come under Article 2 of the Regulation which allows the court where the defendant is domiciled to take jurisdiction. Article 60 will be invoked to determine the domicile of the corporation. This will be the statutory seat or central place of administration or principal place of business of the corporation. The jurisdiction of a Dutch District Court over a case against Royal Dutch Shell (RDS) by Akpan, a Nigerian plaintiff, was based on the fact that Shell had its principal place of business in the Netherlands and

[327] Regulation (EU) No 1215/2012 of the European parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgement in civil and Commercial Matters (recast) (2012), OJ L351/1, art 5(4).

restated its jurisdiction over RDS, citing Article 2(1) and Article 60(1) of the Regulation.[328] A similar legal action was brought by Nigerian plaintiffs in the UK against Shell where Shell was incorporated, as the statutory seat of the company. In the landmark legal ruling, the UK High Court decided that Shell Nigeria could be legally liable for illegal bunkering of its pipelines if it had failed to take reasonable steps to protect its infrastructure.[329]

4.7. Conclusion

The conclusion that can be drawn is that the decision in *Lotus* still remains good law. International law leaves states a margin of appreciation in determining the scope of their own jurisdiction. It is indicative that modern jurisdiction goes beyond the strict territoriality principles. Even the argument that some territorial connection is always required is not completely consistent as an argument in law. Its veracity however lies in the practicalities of claiming, accessing and addressing such jurisdiction. As such, in war crimes and crimes against humanity, a suspect in transit through the territory of a state may be apprehended and prosecuted by that state. It is not the temporary presence that gives jurisdiction in criminal law; this only facilitates the suspect's apprehension for possible prosecution. Jurisdiction is already in existence, it only needs to be established.

On the private law face, there is nothing in the rules of public international law that forbids a state from extending the reach of its private laws extraterritorially any more than it imposes limits on states in the exercise of extraterritorial jurisdiction. On the liability of companies for human rights violations, the argument of this chapter is that insofar as the particular corporate misconduct committed abroad is at the same time a breach of international law norms; home states may exercise extraterritorial jurisdiction to prevent and punish such conduct within the

[328] *Akpan v Royal Dutch Shell & SPDC* District Court of the Hague LJN: BY9854, C/09/337050/HAZA/09-1580 <http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo> accessed 3 July 2013.

[329] *The Bodo Community, Gokona Local Government Area, Rivers State, Nigeria v. Shell Petroleum Development Company of Nigeria Ltd* Claim No. HQ11X01280 <http://platformlondon.org/wp-content/uploads/2012/06/The-Bodo-Community-and-The-Shell-Petroleum-Development-Company-of-Nigeria-Ltd.pdf> accessed 3 July 2014.

limit of the international law. The fact that corporate entities cannot be held accountable for human rights violating they committed is international, and not a domestic legal principle. Corporations, as domestic and international actors, have the ability to violate both domestic and international, and domestic courts should assume their responsibility.

CHAPTER 5
EXTRATERRITORIAL HOME STATE REGULATION OF TRANSNATIONAL CORPORATIONS

5.1. Introduction

The quest for corporate accountability for human rights violations demonstrates the increasing belief that the home state has an important role to play in filling the regulatory gaps that exist in this regard.[1] The idea that these states should regulate the activities of TNCs has received much attention due to the recent unanimously endorsed Guiding Principles and Framework put forward by John Ruggie for addressing the problems of business and human rights.[2] It was concluded in the preceding chapter that international law leaves it to states to determine the scope of their own jurisdiction – subject to certain restrictions.[3] Therefore, home states through some form of extraterritoriality, can regulate and adjudicate the international activities of TNCs registered in their territory.[4] However, the critical issue that remains uncertain is whether states have an *obligation* to regulate the activities of their companies abroad.[5] Despite uncertainties on this question, in recent times there have been legislative attempts by some home states to regulate the behaviour of their TNCs abroad.

The exercise of extraterritorial home state adjudicative jurisdiction is based on the idea that the parent company of the group may ultimately be held liable for actions and omissions of

[1] Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 145.
[2] UNHRC, Report of the UN Special Representative of the Secretary-General on the issue of human rights and Transnational Corporations and Other Business enterprises; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (2011), A/HRC/17/ 31.
[3] Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 645; See also Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 299.
[4] UNHRC, Report of the United Nation Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Protect Respect and Remedy: A Framework for Business and Human Rights' (2008), A/HRC/8/5, para 19; Shaw, (2008) *op.cit.* p.645; Brownlie, (2008) *op.cit.* p. 647; Olivier De Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (Seminar Paper Prepared for the Office of the UN High Commissioner for Human Rights, Brussels, 2006) 29.
[5] Christen Broecker, 'Better The Devil You Know: Home State Approaches to Transnational Corporate Accountability' (2008) 41 *Journal of International Law and Politics* 160, 180.

its subsidiary abroad.[6] Generally, as a matter of law, a subsidiary is a separate and distinct legal unit from its parent company, with each entity subject to regulation by their respective state.[7] It follows that the parent company can be held liable for human rights violations committed by its subsidiary abroad as long as the home state regulation conforms to the 'reasonableness test' which includes non-interference in the domestic affairs of other states.[8]

This chapter proceeds as follows. The first part analyses whether states have an extraterritorial obligation to prevent and remedy human rights violations perpetrated by TNCs abroad. It examines the recent legislative attempts made by some home states to regulate the conduct of their TNCs abroad in conformity with international human rights standards. The next part of the chapter evaluates the technique currently in use in the exercise of extraterritorial home state adjudicative jurisdiction based on the idea of holding the parent company liable for human rights violations committed by its subsidiary only on limited grounds. The chapter also examines the current state of play concerning the continued development of more conventional tort law remedies and their relative success. The next part assesses various tort law theories with which a parent company could be held liable for the extraterritorial conduct of its subsidiary. In what follows, the chapter evaluates the existing state of affairs in foreign liability cases and recent developments in the home state courts of TNCs. Lastly, the chapter looks at critical substantive, procedural and practical issues affecting access to justice in the home state courts of TNCs. The main aim of the chapter is to evaluate whether home states have a role to play in holding TNCs registered within their jurisdiction liable for human rights violations they commit abroad and whether international human rights law *requires* them to do so. It also evaluates whether the techniques used by

[6] De Schutter (2006) *op.cit.* p. 28.
[7] Philip I Blumberg, *The Law of Corporate Groups: Problems of Parent and Subsidiary Corporations Under Statutory Laws of General Application* (Little Brown and Company 1989) 611; Philip I Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (OUP 1993) 21-26.
[8] UNHRC, Protect, Respect and Remedy, (2008) *op.cit.* para 19.

home states to regulate the extraterritorial activities of their TNCs provide adequate remedy and justice for victims of human rights violations by TNCs.

5.2. Extraterritorial State Obligation to Prevent and Remedy Human Rights Violations by Transnational Corporations

The question of whether a state has an obligation to prevent and remedy human rights violations perpetrated by TNCs in a foreign country is a contentious issue and one which is frequently overlooked by advocates of direct corporate accountability.[9] As Bernaz points out, while this may have been a controversial issue historically, international human rights law makes it increasingly clear that there is an obligation on states to protect human rights extraterritorially, and this has had a significant effect on regulating the activities of businesse abroad.[10] She also notes that the idea of state obligations to supress and remedy human rights abuses perpetrated by TNCs overseas offers the possibility of holding a state responsible for failing to regulate the foreign operations of TNCs registered in their territory, when it is generally recognised that states only have human rights obligations to protect individuals within their territory by preventing private actors including businesses from abusing such rights.[11] The principle which confers on the state obligations towards individuals subject to its jurisdiction has been clearly articulated in the *International Covenant on Civil and Political Rights* (ICCPR) when it calls on states to 'respect and to ensure to all individuals within its territory and subject to its *jurisdiction* the rights recognised in the present Covenant'.[12]

[9] Broecker, (2008) *op.cit.* p. 180; Eric De Brabandere, 'Human Rights and Transnational Corporations the Limits of Direct Corporate Responsibility' (2010) 4 *Human Rights & International Legal Discourse* 66, 72-73.
[10] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 *Journal of Business Ethics* 493, 503.
[11] *Ibid*,.
[12] International Covenant on Civil and Political Rights (1966), 999 UNTS 171, art 2; International Convention on the Elimination of All Forms of Racial Discrimination (1965), UNGA Res 2106 (XX), UN Doc A/6014. art 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984), Res 39/46, UN Doc A/39/51, art 2; Convention on the Rights of the Child (1989), UNGA Res 44/25, UN Doc A/44/49, art 2; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), UNGA Res 45/158, UN Doc A/45/49, art 7; European Convention on Human Rights,

Under international law, a state has an obligation to regulate the activities of private actors extraterritorially, 'within the power, effective control or authority of that State, as well as within an area over which that State exercises effective control'.[13] This was inspired by the position taken by the International Court of Justice (ICJ) in *Nicaragua v United States of America.*[14] The case involved alleged violations of customary international law as a result of the United States' military and paramilitary activities within Nicaragua. The ICJ held that although the US could be held responsible for violating principles of customary international law, there was not enough evidence to prove that the US had 'exercised such a degree of control in all the fields as to justify treating the contras as acting on its behalf [and thus] that the United States directed or enforced the commission of the act contrary to international human rights law' as purported by Nicaragua.[15] This position was reaffirmed by the ICJ in its ruling on the *Democratic Republic of Congo (DRC) v Uganda*, where it stated that the ICCPR, the *Convention on the Rights of the Child* (CRC) and the *African Charter on Human and Peoples' Rights* (ACHPR) were applicable to Uganda's conduct within the DRC's territory.[16] The Court also held that 'international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories'.[17] However, the general principle of international law has not made it clear whether states can incur extraterritorial obligations to prevent and punish the negative activities of their TNCs abroad. It may be argued that a state may incur extraterritorial

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Council of Europe Treaty Series, (1950), No 5, 213 UNTS 221, art 1;American Convention on Human Rights, OAS Treaty Series No 36; (1969), 1144 UNTS 123; art 1.

[13] ILC, 'Commentary- Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), UN Doc A/56/83, arts 4 and 8; Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *The Modern Law Review* 598, 605; De Schutter, (2006) *op.cit.* p. 18.

[14] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14.

[15] *Ibid.*, paras 109 and 115.

[16] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) (2005) ICJ Rep 168 para 217.

[17] *Ibid.*, para 216.

obligations for activities carried out by private actors including TNCs that are in fact acting under the instruction or control of that state.[18]

Certain human rights instruments and interpretations by treaty bodies expressly extend state obligations to prevent and remedy human rights violations by private actors, including businesses, beyond their territorial borders.[19] Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) explicitly requires States Parties to take all appropriate measures either through legislation or international assistance and cooperation to achieve the full realisation of the rights preserved in the present Covenant.[20] In essence, the principle requires States Parties to regulate the activities of private actors including TNCs that, if left uncontrolled, might violate the enjoyment of those rights enshrined in the Covenant, irrespective of their geographical location.

The Committee on Economic, Social and Cultural Rights (CESCR) which is in charge of monitoring the implementation of the ICCPR by its States Parties also endorses this argument. For example, in General Comment 12, the Committee stated that 'the obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food'.[21] In General Comment 14, the Committee pointed out that:

> In order to conform 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 by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.[22]

[18] ILC, Report on the Work of its Fifty-Eight Session Annex E (2006), 516, UN Doc A/61/10, art 8 stated that: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct' (emphasis added).
[19] Broecker, (2008) *op.cit.* p. 180.
[20] International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3.
[21] UN Committee on Economic, Social and Cultural Rights (UNCESCR), General Comment 12: 'Article the Right to Adequate Food' (1999), UN Doc E/C.12/ 1999 /5, para 15.
[22] UNCESCR, General Comment 14: 'The Right to the Highest Attainable Standard of Health' (2000), UN Doc E/C.12/2000/4, para 51.

The Committee in General Comment 15 also stated that 'steps should be taken by States parties to prevent their own citizens and *companies* from violating the right to water of individuals and communities in other countries'.[23] The Committee made similar statements in General Comment 17[24] on the right of every person to be protected from the moral and material interests proceeding from any scientific, literary or artistic production of which he or she is the author. So too in General Comment 23[25] the right to work was analysed while General Comment 21[26] considered the right to take part in cultural life. Significantly, the term 'extraterritorially' was explicitly stated in General Comment No. 19 on the right to social security.[27] Although the Committee's General Comments and Statements are not legally binding, they can have a valuable importance, establishing interpretive situations in which State practice may unite.No State party has ever disagreed formally to the General Comments or Statements, seemingly signifying broad recognition of the Committee's Comments and Statements by States.[28]

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) in its Concluding Observations stated 'with concern' reports of the negative effects of the activities of TNCs headquartered in Canada on the rights of indigenous peoples in host states. The CERD strongly encouraged Canada 'to take appropriate legislative or administrative measures to prevent activities of TNCs registered in Canada which negatively impact on the

[23] UNCESCR, 'General Comment 15: 'The Right to Water' (2002), UN Doc E/C.12/2002/11, para 33. emphasis added.
[24] UNCESCR, 'General Comment 17: 'Article 15 (1)(c) On the Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author' (2006), UN Doc E/C.12/GC/17, para 55.
[25] UNCESCR, 'General Comment 23: 'Artcle 7 Right to Just and Favourable Conditions of Work' (2016), UN Doc E/C.12/GC/23.
[26] UNCESCR, 'General Comment 21: 'Right of Everyone to Take Part in Cultural Life' (2009), UN Doc E/C.12/GC/21.
[27] UNCESCR, 'General Comment 19: 'Artcle 9 The Right to Social Security' (2008), UN Doc E/C.12/GC/19, para 54.
[28] Sarah Joseph and Adam McBeth, *Research Handbook on International Human Rights Law* (Edward Elgar Publishing 2010) 42.

enjoyment of rights of indigenous peoples in territories outside Canada'.[29] The CERD has made the same comments with regard to the United States.[30] In a similar vein, the CESCR in response to the UK's 6th periodic report roundly condemned the effects of austerity measures on the human rights of the underprivileged and most vulnerable individuals and groups.[31] Although the Committee did support the implementation of the 'National Action Plan on Business and Human Rights, the Committee was specifically concerned over the lack of a regulatory regime' to guarantee that corporations registered within their territory that operated abroad respected human rights.[32] In particular, the Committee recommended that State Parties:

> To take appropriate steps either through legislation or administrative means to ensure legal liability of companies domiciled under the State party's jurisdiction, regarding violations of economic, social and cultural rights in their projects abroad, committed directly by these companies or resulting from the activities of their subsidiaries.[33]

International organisation has also lent its support for the use of extraterritorial state obligation to prevent and remedy human rights violations by TNCs. There exists an earlier example by the United Nations Security Council (UNSC) of a state obligation to guarantee that businesses incorporated within their jurisdiction respect human rights, especially those included in the *Universal Declaration of Human Rights*, while operating abroad. In 1972, following the South African illegal occupation of Namibian territory and subsequent industrial actions of African contract workers in the country, the UNSC adopted a resolution in which it requested South Africa 'to end immediately these repressive measures and to abolish any system of labour which may be in conflict with basic provisions of the Universal

[29] UN Committee on the Elimination of Racial Discrimination, 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Canada' (2007), UN Doc CERD/C/CAN/CO/18, para 17.
[30] Committee on the Elimination of Racial Discrimination, 'Concluding Observations for the United States of America' (2008), UN Doc CERD/C/USA/CO/6, para 10 and 30.
[31] UNCESCR, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland of the United Nation Committee on Economic Social and Cultural Rights' (2016), UN Doc E/C.12/GBR/CO/6, para 18.
[32] *Ibid.*, para 11.
[33] *Ibid.*, para 12(b); Penelope Simonsa and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State* (Routledge 2014) 185.

Declaration of Human Rights'.[34] In the same resolution, the UNSC also called 'upon all States whose nationals and corporations are operating in Namibia … to use all available means to ensure that such nationals and corporations conform in their policies of hiring Namibian workers to the basic provisions of the Universal Declaration of Human Rights'.[35]It is important to note that the idea of state extraterritorial obligations arises from the resolution: 'the Security Council treated respect for the … provisions [of the UDHR] as a legal obligation of States as well as of their nationals'. In doing so, it referred to the 'relevant provisions of the Charter'.[36]

The idea of state extraterritorial obligations to ensure TNCs registered in their territory do not commit human rights violations has also been adopted by a group of independent legal experts. In 2011, these legal experts adopted the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (ESCR).[37] Although the Principles have not been endorsed by states and thus are not legally binding, they provide a significant and comprehensive range of extraterritorial state obligations in the ESCR sphere. For instance, Principle 24 of the *Maastricht Principles* expresses a useful and broad extraterritorial state 'obligation to regulate' in the following terms:

> All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures.[38]

Moreover, Principle 25 makes it clear that home states should prevent and remedy human rights violations perpetrated in a host state, whenever victims cannot have access to effective

[34] UNSC, (1972), UN Doc S/RES/310, para 4.
[35] *Ibid.*, para 5.
[36] Egon Schwelb, 'An Instance of Enforcing the Universal Declaration of Human Rights Action by the Security Council' (1973) 22(1) *International and Comparative Law Quarterly* 155, 162; Bernaz, (2013) *op.cit.* p. 506.
[37] Olivier De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34(4) *Human Rights Quarterly* 1084.
[38] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht ETO Principles, 2011).

remedy and justice in that state.[39] The main aim of the Maastricht Principles is to elucidate the legal framework of extraterritorial state obligations to fulfil economic, social and cultural rights with the hope of fostering and creating the full effect to the United Nations Charter and international human rights.[40] Although the existence of an extraterritorial state obligation to protect against human rights violations by TNCs abroad is still not certain, the principle may serve as a tool to inspire developments of international law in the field.[41]

On this point, De Schutter, McCorquodale and Simons argue that there is no general home state extraterritorial obligation to prevent and redress corporate human rights violations committed by its TNCs abroad except under certain restricted circumstances.[42] They point out that a home state can incur extraterritorial obligations for the acts of its companies abroad only where the company is operating 'under the instructions of, or under the direction or control of, that state in carrying out the conduct or where a state allows a company to apply elements of public authority'.[43] It is important to note, however, that this argument was made a decade ago and things have developed since then. However, De Schutter later in 2010, suggested an "International Convention on Combating Human Rights Violations by TNCs".[44] According to him, the instrument could provide that, a home state is required to take all necessary steps, in conformity with its legal framework, to prevent and punish serious human rights violations by its TNCs abroad, except the host state has acted so as to protect these rights within its territory as well as to provide adequate redress for the victims are where such

[39] *Ibid.,* Principle 25 pointed out that, 'States must adopt and impose measures to protect economic, social and cultural rights through legal and other means, including diplomatic means ... [where] the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned.'
[40] *Ibid.,* Preamble.
[41] Bernaz, (2013) *op.cit.* p. 507.
[42] McCorquodale and Simons, (2007) *op.cit.* p. 605; De Schutter, (2006) *op.cit.* p. 18.
[43] McCorquodaleand Simons, *Ibid.,* 606.
[44] Olivier De Schutter, 'Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations '(2015) *CRIDHO Working Paper* 5/2010, 21.

violations take place.[45] The importance of such mechanism is that it would assist in creating a clear apportionment of duties between the home State and host State the in the regulation of TNCs.[46]

Nevertheless, recentlty De Schutter is of the view that the expected change had come to pass. According to him, the UNGP has established clearly below the current position of international human rights law: the state obligations to regulate and punish human rights violations committed by their TNCs abroad.[47]Ruggie in his 2011 Guiding Principles he eventually adopted a conservative position on this which he summarises in general terms in Foundational Principle 2: 'States should clearly set out the expectation that all companies domiciled in their territory and/or jurisdiction respect human rights throughout their operation.'[48] The Commentary to this Principle confirms the uncertainty under international law regarding extraterritorial home state regulation of businesses registered under their own law.[49] However, it also indicates the need for high 'policy reasons' for home states to clearly state the expectation that their corporations will respect human rights in a foreign country, particularly where the state is either involved in the business or supports it, justified by the need to sustain the behaviour of the home state itself.[50] Ruggie's view on this particular issue has been criticised by a number of NGOs, including the International Federation for Human

[45] *Ibid,.*
[46] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach' (2016) *DIHR Matters of Concern Human Rights Research Papers* 04/2016, 8.
[47] De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1(1) *Business and Human Rights Journal* 41, 45; Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' Become 'Duties': The Extraterritorial Obligations of States that Bind Corporations' (2012) *Legal Studies Research Paper* 71/2012, 22.
[48] UN Guiding Principles.
[49] UN Guiding Principles, Commentary to Principle 2.
[50] *Ibid,.*

Rights (FIDH), ESCR-Net, CIDSE, Amnesty International, International Commission of Jurists, Accountability in Development (RAID) and Human Rights Watch.[51]

From the above analysis, it is reasonable to conclude that extraterritorial home state regulation is lawful and permissible. Article 23 of ICESCR specifies various kinds of international actions that States Parties can undertake to show their commitment to the promotion and protection of international human rights norms. Among other things, these include methods such as the conclusion of conventions; adoption of recommendations; providing technical support; and organising regional meetings for the purpose of consultation and study held in conjunction with the governments concerned.[52] Therefore, in keeping with Article 23, it is proposed that states should jointly adopt an international instrument in the form of a declaration which elucidates its nature and extent, and where appropriate broadens the ever-increasing home state obligations to prevent and remedy the negative activities of their TNCs overseas. Although the existence of the state obligation to prevent and punish human rights violations perpetrated by TNCs overseas is still controversial, the international declaration will clarify instances where home states may have an obligation to prevent and punish human right violations committed by their TNCs abroad and to specify guidance on how such regulations will be realised.[53]

It is also recommended that the home state through the extraterritorial tool should adopt laws at the domestic level which cement the obligations of parent companies regarding the effect of the activities of their subsidiaries overseas. Recent attempts to implement the Guiding

[51] 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights' (*Business and Human Rights Resource Centre*, January 2011) <http://business-humanrights.org/en/ critiques-of-guiding-principles-by-amnesty-intl-human-rights-watch-fidh-others-debate-with-ruggie> accessed 6 June 2016; Olivier

[52] International Covenant on Economic, Social and Cultural Rights (1966), *Ibid,*.

[53] A declaration by the United Nations General Assembly is not legally binding; the term is often deliberately chosen to show that the Member States do not intend to make binding obligations but merely want to declare certain objectives. Those who may have argued for the proposal of a non-binding international instrument are reminded of the 1948 Universal Declaration of Human Rights (UDHR), which was not originally intended to have binding force but many of its provisions have since been accepted by many scholars as binding customary international law. Moreover, the principles in the UDHR arguably laid the foundation for the creation of binding international human rights instruments such as the ICCPR.

Principles and Framework by some states offer an ideal opportunity which could inspire states to act to that effect.

As highlighted by Bernaz, state obligations to control the foreign activities of TNCs registered in their territory may be lacking at the moment but the practice is evolving gradually. She further pointed out that once the exercise of extraterritorial home state obligation to act takes root and becomes commonplace, it could bring about the development of a customary rule of international human rights law by which states would be required to control the foreign behaviour of businesses registered within their jurisdiction. Lastly, she stressed that effective mainstreaming of business and human rights in the work of the UN Human Rights Council through the Universal Periodic Review, and in the work of the numerous UN treaty bodies and regional human rights bodies, will be pivotal to realise this effort.[54]

5.3. Legislative Attempts by Home States to Regulate the Extraterritorial Conduct of Transnational Corporations Registered within their Jurisdictions

As stated above, a precise extraterritorial state obligation to regulate the international activities of TNCs registered within their jurisdictions has not yet crystallised.[55] Having said that, there have been several attempts by home states to enact legislation designed to regulate their TNCs' foreign operations with a view to protecting human rights. These have been done in the United States, Belgium, Australia, the United Kingdom, Sweden and the Netherlands. Recently in February 2017, French National Assembly adopted a law on 'duty of vigilance'

[54] Bernaz, (2013) *op.cit.* p. 507; See also, Institute for Business and Human Rights, 'Submission to the United Nations Office of the High Commissioner for Human Rights concerning inputs to the Secretary-General's Report on Business and Human Rights and the UN System' (March 2012) <http://www.ihrb.org/pdf/2012_03_26_Submission_to_the_UNHCHR-SG_Report.pdf> accessed 7 July 2015; University's submission on the Business and Human Rights Resource Centre's website <http://business-humanrights.org/sites/default/files/media/documents/middlesex-submission-unsg-report-business-human-rights-mar-2012.pdf> accessed 7 July 2015.

[55] Olivier De Schutter, *International Human Rights Law* (2nd edn, CUP 2014) 188; De Schutter, (2006) *op.cit.* p. 18.

for French parent companies and their subcontractors.[56] The law which is only applicable to the largest French multinationals aims to create a binding legal obligation on to identify and prevent human rights violations and damage to the environment arising from their operations, the activities of corporations they control, their subcontractors and supply chain, with whom they have a business relationship.[57]

This section seeks to analyse the attempt made by four home states to enact laws to regulate the activities of their TNCs abroad, namely, the *Corporate Code of Conduct Bills* introduced to the American Congress (2000), *Australian Corporate Code of Conduct Bill*, presented to the Australian Parliament in September 2000, the United Kingdom *Corporate Responsibility Bill* introduced to the UK House of Commons in 2002, and the *Canadian Bill (Bill C-300)* presented to the House of Commons in 2009.

5.3.1. The American Corporate Code of Conduct Bill (2000)

This Bill had an extraterritorial effect in that it was intended to be applied to American nationals and corporations operating abroad. The Bill was proposed in 2000, in the American House of Representatives,[58] only to be proposed again in 2001 and annually until 2006[59] when its sponsor desisted. As the Bill never became an Act, it could not be determined whether it was 'robust' enough for use in practice. Unfortunately, the Bill kept being passed between various committees and sub-committees.

The Bill required every American registered company that employed more than 20 people overseas, directly or through subsidiaries, subcontractors, partnerships or licensees to comply

[56] European Coalition on Corporate Justice, 'France Adopts Corporate Duty of Vigilance Law: A Historic Step Towards Better Human Rights and Environmen' (23 February 2017).
[57] *Ibid*,.
[58] United States Corporate Code of Conduct Act (2000), HR 4596.
[59] United States Corporate Code of Conduct Act (2006), HR 5377.

with a broad range of human rights obligations.[60] In its application to American parent companies, the proposed Bill sought to impose a full range of human rights responsibilities including providing a safe and healthy workplace; fair employment; prohibition of the use of child and forced labour; the right to collective bargaining; good governance and business practices; compliance with workers' rights and labour standards;[61] respect for minimum international human rights standards; and responsible environmental protection and environmental practices.[62] In many instances, the responsibilities were specified in the Bill itself while in others they were to be assumed by allusion to the international human rights agreements stated in the Bill.[63]

The American Bill largely depended on the use of incentives to persuade corporations to adhere to the code through preferential treatment in the award of contracts and foreign trade and investment support.[64] The preferential treatment could be cancelled, suspended or restricted if the company was found to be in violation of its requirements.[65] This preferential status prompted reporting duties on the part of the companies.[66] In addition, the Bill also provided civil liability for damages before American courts to the injured party or corporation in breach of an obligation.[67] Due to growing public interest in both the increasing application of economic clout of TNCs and falling corporate accountability across the globe, the Bill had a strong moral base.[68]

[60] *Ibid.,* clause 3(a). The USA Bill (known as the McKinney Bill) was introduced in June 2000 by Democratic Representative, Cynthia McKinney of Georgia.
[61] *Ibid.,* clause 3(b).
[62] *Ibid,.*
[63] *Ibid.,* clause 3(b)(2)(B), 3(b)(2)(A), 3(b)(2)(C).
[64] *Ibid.,* clause 4.
[65] *Ibid.,* clause 5.
[66] *Ibid.,* clause 7.
[67] *Ibid.,* clause 8(b)(2).
[68] Ciprian Radavoi and Yongmin Bian, 'Enhancing the Accountability of Transnational Corporation: The Case of Decoupling Environmental Issues' (2014) 16 *Environmental Law Review* 168, 176.

Despite its wide-ranging scope, the Bill was not comprehensive enough to include sufficient construction of fundamental human rights norms in relation to its applicability to TNCs.[69] The Bill also failed to consider the potential liability of a parent company for a human rights violation committed by one of its affiliates abroad as well as the procedure for enforcing orders and judgments and the role that consumers, investors, NGOs and the media could play in ensuring that TNCs complied with their human rights responsibilities.[70] The Bill could also be regarded as 'more a carrot than a stick' as it stressed curtailing access to government fundsrather than negative consequences as a means of enforcement.[71]

5.3.2. Australian Corporate Code of Conduct Bill (2000)

Australia is perhaps the world leader in regulating the extraterritorial activities of its companies, both in terms of initiatives and in its toughness of approach. However, its approach in regulating the activities of TNC subsidiary companies overseas is a different matter entirely.[72] In September 2000, a Corporate Code of Conduct Bill was introduced. The Bill purported to impose standards on Australian companies with regard to their operations abroad.[73] In contrast to the American Bill, the Australian Bill did not require the covered businesses to conform to the Australian standards. However, it did explicitly require the corporations targeted to comply with international human rights standards regarding the environment,[74] health and safety,[75] consumers,[76] and minimum international labour[77] and

[69] Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell The Cat' (2004) 5 *Melbourne Journal of International Law* 37, 55.
[70] *Ibid.*, p. 55-6.
[71] Adam McBeth, 'A Look at Corporate Code of Conduct Legislation' (2004) 33 *Common Law Review* 222, 248.
[72] Radavoi and Bian, (2014) *op.cit.* p. 177.
[73] Australian Corporate Code of Conduct Bill (Cth) 2000. The Bill was introduced by an Australian Democrats Senator in the Australian Senate.
[74] *Ibid.*, art 3.
[75] *Ibid.*, art 8.
[76] *Ibid.*, art 12.
[77] *Ibid.*, art 9.

human rights[78]. Also, it imposed an obligation to comply with the taxation laws of the country of operation[79] and to abstain from indulging in unjust or anti-competitive trade behaviours.[80] The companies were to present a compliance report annually to the Australian Securities and Investment Commission (ASIC) which would then be forwarded to Parliament.[81]

Compliance with the requirements of the Bill could be imposed by civil liabilities by the Australian regulatory authorities or by a legal action brought by any party that suffered injury as a result of the violation whether or not they were resident in Australia.[82] The Australian Federal Court was given the right to issue an injunction to prevent future injuries that may result from the breach of these requirements.[83] However, in comparison with the American Bill, the health and safety standards in the Australian Bill were well defined and wider in scope. The Australian Bill was more extensive in that the beneficiaries were not only employees but it ensured that the activities of their businesses did not violate the rights of a range of stakeholders including consumers, the public and even NGOs.[84] Like the American Bill, the Australian Bill was defeated so it never became law as the parliamentary committee that refused it regarded it to be redundant, unrealistic and unworkable.

5.3.3. UK Corporate Code of Conduct Bill (2002)

In the UK, the Corporate Responsibility Bill (CORE) was introduced by a coalition of prominent environmental, human rights and development NGOs in reaction to the government's failure in a White Paper to stipulate guidelines which would have made UK

[78] *Ibid.*, art 10.
[79] *Ibid.*, art 11.
[80] *Ibid.*, art 13.
[81] *Ibid.*, art 14.
[82] *Ibid.*, arts 16 and 17.
[83] *Ibid.*, arts 17(3) and (4).
[84] Deva, (2004) *op.cit.* p. 53-4.

TNCs more transparent and accountable to their wider stakeholders.[85] The founding members of the CORE coalition included Amnesty International UK, Christian Aid, Friends of the Earth, the New Economics Foundation and Tradecraft, and it was vigorously supported by over 50 organisations comprising NGOs, church groups and trade unions.[86]

The CORE coalition strongly advocated the adoption of such a Bill, also referred to as Bill 145, and as a result it was presented to the British House of Commons for deliberation in 2003.[87] The Bill will therefore need to be reintroduced if it is to become law. It was introduced by Labour MP Linda Perham as a private members' bill. Unlike the sponsors of the American and Australian bills, she was a member of the governing party. Even though an Early Day Motion expressing support for the Bill attracted 282 signatures and significant support from members of the opposition parties, the Bill lapsed in November 2003 when it did not reach a second reading during the time allocated for debate.[88]

The UK Bill obliged TNCs incorporated in the UK whose annual turnover was £5 million or more to carry out their activities in accordance with international agreements, responsibilities and standards as well as the laws of host countries with respect to environmental protection, public health and safety, employment and human rights, and consumer protection.[89] Like the Australian Bill, the UK Bill proposed a parent-based method of extraterritorial regulation.[90] The Bill established that the UK parent company would be directly liable for damages for the actions of its foreign subsidiaries where such actions caused serious human and environmental harm whether in the UK or overseas.[91]

[85] UK Corporate Responsibility Bill (2003).
[86] Radavoi and Bian, (2014) *op.cit.* p. 174; See also, 'New Bill Call for Corporate Responsibility' (*Friends of the Earth*, Press Release, 12 June 2002) <http://www.foe. co.uk/resource/press_releases/20020612123459.html> accessed 20 January 2015.
[87] Radavoi and Bian (2014) *op.cit.* p. 174.
[88] McBeth, (2004) *op.cit.* p. 245.
[89] UK Corporate Responsibility Bill (2003), clause 2.
[90] Zerk, (2006) *op.cit.* p. 169.
[91] UK Corporate Responsibility Bill (2003), clause 6 (1) (c) (i) – (iii).

The proposed sanctions were quite radical and much broader than the Australian Bill's which only employed them in connection with the reporting duty.[92] The UK Bill included criminal liability for any individual who contravened the provisions of the Act and directed companies to stop operations.[93] The Bill was intended for direct extraterritorial application, both by referring to the UK parent company liability and actions of their foreign subsidiaries and by providing access to UK courts for citizens of third countries.[94] According to clause 10(4), 'any stakeholder shall ... have a right of action against a company to which this Act applies above and any directors thereof for any breach of duty owed towards him as a result of this Act and the courts in the UK shall have jurisdiction to hear any such case'. However, the Bill was never formally debated and the proposal was quietly withdrawn from the parliamentary agenda.

5.3.4. Canada C-300 Bill (2009)

Most of the world's mining corporations are Canadian and some of its corporations have a record of human rights abuses. Bill C-300 was a Canadian effort to provide ways through which Canadian mining companies could be held accountable for their activities overseas. Bill C-300 was a private member's bill presented to the House of Commons by Liberal MP John McKay in 2009.[95] It recommended measures that extractive industries would need to fulfil to be entitled to funding and political backing from the Canadian Department of Foreign Affairs, Export Development Canada and International Trade and the Canada Pension Plan.[96]

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[92] McBeth, (2004) *op.cit.* p. 245.
[93] UK Corporate Responsibility Bill (2003), clause 11(1) and (2).
[94] UK Corporate Responsibility Bill (2003), clause 6.
[95] Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 40th Parliament, 3rd Session, 2009 [Bill C-300]; Penelope Simons and Audrey Macklin, 'Defeat of Responsible Mining Bill is Missed Opportunity' *The Globe and Mail* (Canada, 3rd November, 2010).
[96] Canadian Bill C-300, art 8-10; Alicia Grant, 'Global Laws for a Global Economy: A Case for Bringing Multinational Corporation Under the International Law' (2013) 6(2) *Studies by Undergraduate Researchers at Guelph* 14, 16; Daniel M. Firger, 'Transparency and The Natural Resource Curse: Examining The New Extraterritorial Information Forcing Rules in The Dodd-Frank Wall Street Reform Act of 2010' (2009) *Georgetown Journal of International Law* 1043, 1091.

It suggested the establishment of a medium through which complaints could be lodged with the Department of Foreign Affairs and International Trade. It additionally suggested the creation of an instrument to put the Ministers of Foreign Affairs and International Trade in charge of receiving and dealing with complaints about Canadian extractive industries submitted by either Canadians or by citizens of a developing host state who were victims of such acts and omissions.[97] Ministers could also investigate whether the actions in question violated international human rights law.[98]

When investigating the complaints, the Ministers were to abide by rules that were substantially similar to those used by the International Finance Corporation (IFC). The IFC is the private sector arm of the World Bank. It provides business entities with loans to carry out development projects, usually in partnership with host countries.[99] If a company was found to be in violation of the rules, the results of the investigation would be published within eight months in the Canadian Gazette, and notification of this would be made to the President of Export Development Canada (EDC) and the Chairperson of the Canada Pension Plan Investment Board (CPPIB), with the intention of actuating punishment.[100]

The Bill got to the third reading in Parliament but was defeated by a narrow margin. It was strongly opposed by Canadian extractive companies. They claimed that appropriate corporate responsibility standards and frameworks were already in place.[101] The Canadian authorities supported the mining industry by levelling the traditional criticism about the adoption of extraterritorial binding regulations to control foreign investors. One of the strongest arguments concerning Bill C-300 was that it would place Canadian businesses at a

[97] Canadian Bill C-300, art 4(1).
[98] Canadian Bill C-300, art 4(5).
[99] Alice de Jonge, *Transnational Corporations and International Law* (Edward Elgar 2011) 180.
[100] 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 Failed Initiative' (2010) 6(2) *McGill International Journal of Sustainable Development Law & Policy* 97, 101.
[101] Radavoi and Bian, (2014) *op.cit.* p. 174.

disadvantage when competing in the international market with other corporations that were not subject to this kind of regulation.[102]

The main issue raised by those who opposed to these legislations was that it would curtail economic opportunities. As Morimoto observes, the UK, USA and Australian lawmakers were afraid that the unilateral application of extraterritorial legislation would put their TNCs at a competitive disadvantage in the global market.[103] However, two facts may be invoked against the opportunity argument. First, extraterritorial legislation that is focused on the environment may be less injurious to the competative advantage of the TNCs than, for example, a wide range of international human rights norms and standards.

After considering the failed Bills, it can be concluded that they represented genuine efforts to resolve an existing issue over the period of a decade (2000-2010) by four home states of TNCs in order to meet their human rights responsibilities by regulating the activities of their TNCs overseas through the adoption of laws which enforced extraterritorial liability on the foreign operations of TNCs. Although the Bills were all defeated, this does not necessarily imply that extraterritorial home state regulation itself is inadequate. The American Bill was possibly the most promising but least enthused about of all the proposed codes of conduct. It was a combination of principles, treaties and 'internationally agreed standards' involving all sorts of human and environmental rights.[104] The next section evaluates the technique currently in use in the exercise of extraterritorial home state regulation for the acts of foreign subsidiaries of transnational corporations.

5.4. Parent Company Liability for Human Rights Violations Committed by Foreign Subsidiaries of Transnational Corporations

[102] *Ibid,.*

[103] Tetsuya Morimoto, 'Growing Industrialisation and Our Damaged Planet. The Extraterritorial Application of Developed Countries' Domestic Laws to Transnational Corporations Abroad' (2005) 2(1) *Utrecht Law Review* 134, 159.

[104] Radavoi and Bian, (2014) *op.cit.* p. 176-77.

In principle, the exercise of extraterritorial home state regulation takes the form of either foreign direct liability or parent-based extraterritorial regulation.[105] Put briefly, foreign direct liability allows a home state to hold a parent company of a group which is headquartered within its territory directly responsible for human rights abuses perpetrated in the course of the activities of its subsidiaries abroad on the basis that both the parent company and the subsidiary effectively form one single transnational corporate group.[106] While parent-based extraterritorial regulation requires a home state to impose certain due diligence obligations on the parent company to monitor and control the behaviour of its foreign affiliates,[107] from a human rights perspective, imposing liability directly on the parent company seems to be preferable mainly because it is possible to hold parent companies liable by proving that they were in real control of the acts of their foreign subsidiaries that led to the human rights violations perpetrated.[108]

The typical organisation of a TNC comprises a parent company, which is the centre of decision-making, and is situated in its 'home' state from which it exercises substantial power and control but not always over its affiliates located in 'host' states. As a matter of law, in relation to the issue of establishing jurisdiction and considering legal personalities, subsidiaries operating abroad are independent of their parent companies as separate corporate entities and each is subject to the rules and regulation of the respective state but they may be subject to uniform control.[109] For the purpose of this thesis, it is essential to distinguish between 'affiliates'and 'subsidiaries'. The terms affiliates refer to an entity whose parent

[105] De Schutter, (2006) 52.
[106] Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting Corporate Social Responsibility and Accountability* (Eleven International 2012) 92; Liesbeth Enneking, Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases (2009) 40 *George Washington International Law Review* 903, 903-904.
[107] De Schutter, (2006) *op.cit.* p. 52.
[108] Peter Muchlinski, 'The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post Financial Crisis World' (2011) 18(2) *Indiana Journal of Global Legal Studies* 665, 684.
[109] Marion Weschka, 'Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 *ZaöRV 625, 630*.

company owns a minority stake in the ownership of the enterprise, while a subsidiary is a company whose parent company possesses majority shareholder and holds a controlling interest.[110]This was established in the 1897 landmark decision of the House of Lords in *Salomon* v *A Salomon & Co Ltd*,[111] which centred on both corporate personality and limited liability in English company law. As Lord MacNaughton stated:

> [T]he company is at law a different person altogether from the subscribers to the memorandum and, though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.[112]

Salomon is regarded by many scholars as a landmark case in English company law.[113] Firstly, it acknowledged that a company could legally be set up to protect its shareholders and directors from liability. Secondly, the case indirectly recognised the legitimacy of the 'one-man business' almost a century before single person corporations could formally be established. Finally, it clarified that a company is not an agent of its members even though it did not exclude the possibility of an agency relationship.[114] There is no doubt that for these three reasons the *Salomon* case is the basis upon which English company law is built.

Although these subsidiaries are frequently registered in the host country, they may be controlled by the parent company through ownership and management control. [115] Accordingly, the most apparent problem is that parent companies are legally separated from their subsidiaries by a 'corporate veil'. The veil serves to establish that the parent company and its foreign subsidiaries form two separate legal entities, each with its own legal

[110] Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalisation* (Martinus Nijhoff Publishers 2002)102.
[111] *Salomon* v *A Salomon & Co Ltd* [1897] AC 22.
[112] *Ibid.*, para 51.
[113] Chrispas Nyombi, 'Lifting the Veil of Incorporation Under Common Law and Statute' (2014) 56(1*) Journal of Law and Management* 66, 67; Peter Nygh, 'The Liability of Multinational Corporation for the Torts of their Subsidiaries' (2002) 3(1) *European Business Organisation Law Review* 51, 65.
[114] Nyombi, (2014) *op.cit.* p. 67.
[115] Philip I Blumberg, *The Law of Corporate Groups: Problems of Parent and Subsidiary Corporations under Statutory Laws of General Application* (Little Brown and Company 1989) 611; Sara L Seck, 'Environmental Harm in developing Countries Caused by Subsidiaries of Canadian Mining Company: The Interface of Public and Private International Law' (1999) 37 *The Canadian Year Book of International Law* 139, 144.

personality, and the companies' relationship to each other is often difficult to discern.[116] As a result of corporate legal personality, companies can enter into legal agreements, sue and be sued and be responsible for paying taxes and complying with rules and regulations.[117] Nevertheless, the corporate veil has made it difficult to hold a parent company legally responsible for the acts or omissions of its foreign affiliate companies.[118] The next section aims to evaluate the grounds in general law under which the corporate veil can be 'pierced' or 'lifted'.

5.4.1. Grounds under General Law for Lifting the Corporate Veil

An accepted exception for when the 'corporate veil' can be 'pierced' or 'lifted' is on the grounds of a 'sham' and a 'fraud'.[119] Apart from statute, an English court has allowed the lifting of the veil of incorporation only in exceptional situations where the company is used as 'a mere façade' to defraud others or defeat their legitimate acquired rights.[120] In such a case, the subsidiary is regarded as the agent of the parent company acting on its behalf and the parent corporation becomes accountable on the grounds that the behaviours of its affiliate should be regarded as its behaviour.[121] The creation of subsidiaries by TNCs is usually presumed to be done for commercial purposes, whether formed for taxes advantages or in conformity with local requirements, and so cannot be regarded as fraudulent or evasive.[122] In *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation*, Jenkinson J stated that:

> [T]he separate legal personality of a company is to be disregarded only if the court can see that there is, in fact or in law, a partnership between companies in a group, or that there is a mere sham or facade in which that company is playing a role, or that

[116] Seck, (1999) *op.cit.* p. 144; De Schutter, (2006) *op.cit.* p. 36.
[117] Jonathan Macey and Joshua Mitts, 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil' (2014) *Cornell Law Review* 100, 104.
[118] Sarah Joseph, *Corporation and Transnational Human Rights Litigation* (Hart 2004) 131.
[119] Richard Meeran, 'Tort litigation against Corporations for Violations of Human Rights: An Overview of the Position outside the United States' (2011) 3(1) *City University of Hong Kong Law Review* 1, 5; Chrispas (2014), *op.cit.* p. 70.
[120] *Willcox Pty Ltd v Federal Commissioner of Taxation* [1988] 79 ALR 267.
[121] Meeran, (2011) *op.cit.* p. 5.
[122] Nygh, (2002) *op.cit.* p. 66.

> the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.[123]

In such a case, the subsidiary is regarded as the agent of the parent company acting on its behalf and the parent corporation becomes liable because the behaviours of its affiliate will be seen as its behaviours.[124]

A sham is used as a ground to lift the corporate veil if the subsidiary company was formed and used as a 'mask' to cover the real objective of the parent company.[125] In *Sharrment Pty Ltd v Official Trustee in Bankruptcy*, Lockhart J. stated that:

> A 'sham' is … something that is intended to be mistaken for something else or that is not what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or real, but something made in imitation of something else or made to appear to be something which it is not. It is something that is false or deceptive.[126]

In *Jones v Lipman,*[127] the defendant contracted to sell a property and tried to avoid the contract by conveying the property to a company formed solely for that purpose and controlled by him. The court said that specific performance could be ordered against the corporation. Russel J. described this as 'the creature of the First Defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity'.[128] The plaintiff was awarded nominal damages for breach of contract.

For fraud to be established as an exception to the principle of separate legal entity, the parent company 'must have the intention to use the corporate structure in such a way as to deny the plaintiff some pre-existing legal right'.[129] For instance, the decision in *Stone & Rolls Ltd v Moore Stephens*[130] clearly illustrates that the corporate veil cannot be used to assist a company to recover damages which have come about due to its illegal conduct. In this case, a

[123] [1988] 79 ALR 267.
[124] Meeran, (2011) *op.cit.* p. 5.
[125] Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 Companies and Security Law Journal 250, 261.
[126] [1988] 82 ALR 530, 537; *Trustor AB v Smallbone* (No 2) [2001] 3 All ER 987.
[127] [1962] 1 All ER 442.
[128] [1962] 1 WLR 832, 836.
[129] Ramsay and Noakes, (2001) *op.cit.* p. 260.
[130] [2009] UKHL 39.

one-man company was specifically used to defraud banks of tens of millions of dollars, after which the plaintiff (a European bank) sued and was awarded substantial damages. The House of Lords held that the company was solely responsible for the fraud perpetrated by the director instead of being vicariously liable. The company was refused the plea of *turpi causa* (a wrongdoer cannot benefit from the wrongdoing) when they shifted the liability onto company auditors for not detecting the illegal activities that the company was endeavouring to engage in.

Similarly, in *Standard Chartered Bank v Pakistan National Shipping Corp*[131] the court lifted the veil of incorporation and made the director personally liable for a false statement to a bank on behalf of a company. In this case, the director issued a bill of lading to a bank when he was fully aware that it was an outdated document and that by relying upon the document the bank would undergo a loss when paying the company. This principle was also applied in *Kensington International Ltd v Congo* where the Congo tried to avoid debts it owed to oil businesses through a web of companies. The court stated that these companies and the relevant transactions were found to be a sham, set up with an intention to mislead and defeat existing claims of creditors against the Congo.[132] In fraud cases, such as *Stone & Rolls Ltd, Standard Chartered Bank*[133] and *Kensington International Ltd*, sham businesses were formed to cover fraud or breach an existing obligation.

The argument of fraud is closely related to the case that the corporate form is a sham or façade. Therefore, both fraud and sham companies, as exceptions to the principle of separate legal entity, should no longer be viewed in isolation. In this way, rather than focusing on *fraud and sham* as a ground under which the courts could lift the veil and establish liability

[131] [2002] UKHL 43.
[132] [2005] EWHC 2684 (Comm).
[133] *Standard Chartered Bank v Pakistan National Shipping Corp* [2002] UKHL 43; *Kensington International Ltd v Congo* [2005] EWHC 2684 (Comm).

on a parent company for an act of its subsidiary abroad, hence, the next section will assess the potential role of tort law in regulating the activities of TNCs abroad.

5.4.2. The Leading Role of Tort Law in Regulating the Extraterritorial Activities of Transnational Corporations that Impact Human Rights: Focus on Tort of Negligence

Cases against TNCs have been pursued on the basis of tort, precisely the law of 'negligence' or 'delict' which arises from a breach of 'duty of care', whether through specific legislative provisions such as the *Alien Tort Claims Act* (ATCA) or through the general principles of tort law that are contained in the domestic laws of the home or host states concerned.[134] Tort law is generally perceived as having two objectives: firstly, it offers compensation as a remedy in issues where damage arises; and secondly, it serves as a deterrent to discourage or stop particular dishonest conduct that raises the risk of unwanted damage.[135] In principle, these objectives are in perfect harmony with the idea of good corporate behaviour. Tort law allows victims of corporate human rights abuses to bring an action against the company and to obtain redress for the injury caused by the corporate activities. This effect is not only in the direct reparation of victims but also obligates businesses to consider the negative impact of their activities on human rights. This provides a deterrent to the externalisation of risks and discourages businesses from getting involved in illegal behaviours. It also encourages companies to operate within certain corporate standards.[136]

In a 2008 International Commission of Jurists' (ICJ) report on civil liability for corporate complicity in gross human rights abuses; the panel established that 'civil liability is increasingly important as a means of assuring legal accountability when a company is

[134] George P Fletcher, *Tort Liability for Human Rights Abuses* (Hart Publishing) 1-11.
[135] Liesbeth Enneking, 'The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and The Rome 11 Regulation, An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporation Through Tort Law' (2008) 2 *European Review of Private Law* 283, 290; Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997)96-122.
[136] Bastian Reinschmidt, 'The Law of Tort: A Useful Tool to Further Corporate Social Responsibility' (2013) 34(4) *Company Lawyer* 103, 106.

complicit in gross human rights abuses'.[137] Most of the reasons put forward by the report may relate not only to corporate human rights violations but also to other types of corporate misconduct that cannot be regarded as a breach of international human rights norms but, however, cause injury to people in the host countries where the TNC operates.[138]In addition, the report maintained that apart from the fact that tort liability may have a profound effect on victims of human rights abuses through the provision of appropriate remedies, it can also 'significantly influence patterns of behaviour in a society, raising expectations as to what is acceptable conduct and preventing a repeat of a particular conduct by both the actor held liable and by other actors who operate in similar spheres or find themselves in similar situations'.[139]

One of the essential features of tort liability claims across the globe is that they can be instigated privately by victims of alleged corporate human rights abuses. This is particularly important where the host state involved may, for numerous reasons, be incapable or unwilling to protect their people against such abuses and violations.[140] Another feature that makes tort-based civil liability increasingly important for victims seeking to hold a parent company liable for the injury caused by its foreign subsidiary is that tort law tends to allow claims not only against the primary perpetrator of human rights violations but also against other controllers whose behaviour has in some way contributed to the injury suffered by another.[141] Thus, the pursuit of tort-based liability claims may provide victims with the only legal avenue that is open to host state victims in these cases.[142] This is because alternative legal avenues,

[137] ICJ, 'Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes: Vol 3 Civil Remedies' (ICJ, 2008) 4.
[138] Enneking, (2012) *op.cit.* p. 129.
[139] ICJ, 'Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes: Vol 3 Civil Remedies' (ICJ 2008) 4; See also for example, *Filártiga v. Peña-Irala* [2d Cir 1980] 630 F.2d.
[140] Peter Cane, 'Using Tort Law to Enforce Environmental Regulations?' (2001-02) 41 *Washburn Law Journal* 427, 451; Michael Anderson, 'Transnational Corporations and Environmental Damage' (2001-02) 41 *Washburn Law Journal* 399, 409.
[141] ICJ, Report (2008) *op.cit.* p. 5; Reinschmidt, (2013) *op.cit.* p. 111.
[142] ICJ, Report (2008) *Ibid,.*

for instance within the sphere of public international law or domestic criminal law, may not provide access to remedies against private actors.

Nevertheless, the availability of tort remedies is largely dependent on different factors which in the end will determine the feasibility for victims of corporate human rights abuses who are from developing host states to pursue their claims in TNC home state courts through tort liability claim.[143] Although tort claim may not use the terminology of human rights law, ie may not regard harm as 'torture', arbitrary detention' or 'forced prostitution', naturally tort law in all jurisdictions across the world aims to protect 'interests' such as life, property, liberty, dignity, physical and mental integrity'. [144] However, in the bulk of tort liability claims the term 'human right' is not even used in the cause of the action. As Stephens argued, 'the label "tort" is a pale understatement when applied to the horrors inflicted upon victims and survivors of human rights abuses'.[145]

Turning back to the objective of determining whether tort law acts as an adequate instrument to adjudicate extraterritorial activities of TNCs that amount to human rights violations, it is important to note that it plays a significant role in the absence of other means. The difficulties of corporate structure, access to courts and applicable law continue to pose real hurdles in regulating the activities of TNCs through foreign tort liability claim.[146] The significant increase in the number of foreign tort liability claims may continue because victims, lawyers and human rights activists realise this to be the only legal instrument within their reach. The words of Hoffman are helpful to elucidate the role of tort law in holding parent companies liable for human rights violations committed by their subsidiaries abroad:

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[143] *Ibid*,.

[144] George P Fletcher, *Tort Liability for Human Rights Abuses* (Hart Publishing) 115; see also for example, *Filártiga v. Peña-Irala* [2d Cir 1980] 630 F.2d; *Kadic v Karadzic* [2d Cir 1995] 70 F.3d 232 and *Doe I v Unocal* [9th Cir, 2001] 248 F.3 915; *Sosa v. Alvarez-Machain* [2004]542 USA 692.

[145] Beth Stephens, 'Conceptualizing Violence under International law: Do Tort Remedies Fit the Crime' (1997) 60 *Albany Law Review* 579, 603.

[146] Anderson, (2001-2) *op.cit.* p. 424; François du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011) 127 *Law Quarterly Review* 589, 600; Cane, (1997) *op.cit.* chs 2 and 3 on rights-protecting torts.

> I do not think you change the world by litigating but I do think that litigation can inspire legislation that can change the world … International legislation will, at the end of the day, be a better means of curbing corporate behaviour than law suits.[147]

However, successful human rights case, leading to the recognition that human rights violations have been committed will be more empowering for claimant than dry personal injury claims. A human rights claim will also offer a more inclusive corporate accountability standard that the global legal community will require in the present-day, than the award of damages based on tort law. The idea of using human rights norms in holding TNCs liable is also attractive relatively for three reasons: it privileges the plaintiff in cases against powerful TNCs, it presents the potential of universal international norms on business and human rights and it bestows a greater standard that can undermine the problems posed by procedural issues.[148] In the end, human rights litigation may presents more effective solution at durably embedding business and human rights than the notion of tort liability, even if they address the fact.

Tort law, in its present state, can complement but not replace domestic regulation as a means to control the activities of TNCs that violate human rights.[149] Seeking remedies through tort law has the obvious drawback of the extent to which access to justice would be available to litigants who are often located far from sites of power. National and international legal regulatory regimes should be well-equipped to absorb the practical and legal constraints of corporate accountability. Implementing Ruggie's Guiding Principles and Framework at the domestic level will be a first step in the right direction, but there is still a long way to go.[150] The following section evaluates the various tort law theories in which a parent company could be held liable for the extraterritorial conduct of its subsidiary.

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[147] Quoted in, Doreen McBarnet et al, *The New Corporate Accountability Corporate Social Responsibility and the Law* (CUP 2007) 175, fn 70.
[148] David Feldman, 'Proportionality and the Human Rights Act 1998', in Evelyn Ellis (edn), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999)117; UNHRC, Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights (2014), A/HRC/ 26/L.22/Rev.1.
[149] Reinschmidt, (2013) *op.cit.* p. 111.
[150] UN Guiding Principles.

5.4.3. Theories of Parent Company Liability

Under traditional tort law principles, there are various ways in which a parent company can be held liable for violations and damages perpetrated by its subsidiary. These can be categorised under the headings of direct parent liability, vicarious liability, joint liability and enterprise group liability. These alternatives were also spelt out in the case of *James Hardie & Co Pty Ltd* v *Hall* by Sheller J.A. in the following way:

> The characterisation of a group of companies, linked by shareholding, as a single enterprise where one is an actor, whose acts or omissions should be attributed to another or others in the group, involves either 'lifting the corporate veil', treating the actor as an agent or imposing upon another or others within the group a duty by reason of the degree or manner of control or influence over the actor. The distinction between these ideas is easily blurred.[151]

5.4.3.1. Direct Parent Liability

Under common law, a parent company may be directly liable for the harmful activities of its subsidiary due to its failure to exercise proper control over it.[152] The 2011 Guiding Principles on Business and Human Rights in Principle 13 expounded on the duties of companies to respect human rights, including by preventing injurious activities of their affiliates. The aforesaid direct liability claims are usually established on allegations of negligence by the parent companies concerned although parent companies may, in some instances, be accused of recklessness or intentional violation of the human rights in the host state. However, it will be easier to establish a negligence claim, other than reckless or intentional conduct on the part of the parent company, because the former will not evoke the same measure of moral culpability as the latter.[153]

Direct parent liability claims usually arise when the parent company is directly engaged in the operations of its subsidiary or exercises *de facto* control as it owes a legal duty of care to avoid causing harm to others. By failing to exercise reasonable care in controlling the

[151] [1998] 43 NSWLR 554, 579-80.
[152] Nygh, (2002) *op.cit.* p. 64.
[153] Joseph, (2004) *op.cit.* p. 67.

activities of its subsidiary, the companies have acted in breach of the duty of care that they owed to those affected by the activities of its subsidiaries. Consequently, such breaches have caused reasonably foreseeable injuries to the victims.[154] The negligence is usually based on their level of engagement, power and/or control over the activities of their subsidiary. An example of this is manifest in the case of *Chandler v Cape plc*[155] which is unique to England and Wales, the UK Appeal Court upheld a High Court decision that a parent corporation owed a direct duty of care to the staff of one of its affiliates to ensure a health and safety standard at work, a duty that was breached. This case has extensively expanded the potential liabilities of parent companies for their subsidiaries. In the case, the claimant, Mr Chandler, was an employee of Cape plc's subsidiary for several years from 1959 to 1962. During the course of his employment Mr Chandler was exposed to asbestos fibres, and was diagnosed with asbestosis in 2007. At that time, the affiliate company had already been dissolved. Mr Chandler brought a claim against Cape plc's former parent company, claiming that the company owed and had breached a duty of care to him. The Court of Appeal lay out the following four-part test of 'relevant control' in the parent-subsidiary relationship for determining parental health and safety as part of the duty of care for individuals employed by a group company:

> (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[156]

However, the court cited *Connelly v Rio Tinto Zinc (RTZ) Corporation plc*[157] as a reference when it held 'that there is nothing in either judgment or in the general law to support the submission … that the duty of care can … only exist if the parent company has absolute

[154] Enneking, (2012) *op.cit.* p. 179.
[155] [2012] EWCA Civ 525.
[156] *Chandler v Cape* [2012] EWCA Civ 525.
[157] *Rio Tinto* [1999] CLC 533.

control of the subsidiary'. By the court's reasoning, the parameters of parental 'influence and involvement' in the operation of its subsidiary seem to be the two key elements in the concept of parental control which, in turn, signify an assumption of responsibility that is required for the proximity demanded by a duty-of-care analysis.[158] The *Connelly* case involved a direct liability claim brought against the English parent company of a TNC by a former employee of its Namibian subsidiary who had contracted cancer as a result of his work in the subsidiary's asbestos mines.[159] The Court held that a parent company may, in certain situations, owe a duty of care to the employee of its subsidiary to safeguard him from injury suffered in the course of his employment. Thus, in *Connelly*, the direct liability of the parent company was established on the basis of the *actions* it had taken in defining the policies of its subsidiary. Although the cases above are a relevant example to consider when assessing how and when a parent should be held liable for acts of its affiliates, they pertained to employment law where the injured party had a direct relationship with the subsidiary, and thus vicariously with the company.

Accordingly, one key question that needs to be tackled is the feasibility to hold the parent company owing a duty of care liable for damages caused to third parties who have no relationship with the company but are affected by the harmful activities of their subsidiaries. In this respect, the Dutch Shell cases are noteworthy as they are based on such absolute duties. The parent company Royal Dutch Shell (RDS) had a duty to use its control and influence over its Nigerian subsidiary to prevent it from committing human rights abuses in the Niger Delta region.[160] Furthermore, given Shell's argument that the oil spills were caused by sabotage of the pipelines, a further question is whether and under what conditions it might be possible to hold RDS liable for not preventing the actions of saboteurs, especially since historically sabotage has been a major (contributory) cause of human rights violations in the

[158] *Chandler v Cape* [2012] EWCA Civ 525 para 66.
[159] *Connelly v RTZ Corporation plc* [1997] UKHL 30.
[160] *AR Akpan & Anor v Royal Dutch plc & Anor* District Court of Hague [2013] C/09/337050/HAZA 09-1580.

Niger Delta.[161]Also in the case of *Choc v. Hudbay Minerals*[162] Canadian Supereme Court found that a Canadian parent company owing to its duty of care could be directly responsible for various human rights violations including murder and rape to a Guatemalan indigenous people committed by security personel hired by its subsidiary.[163]

In 2012, France's highest court found the French oil giant, Total, criminally responsible for the negligence of its affiliates. As such, the parent company willingly accepts responsibility for failing to carry out maintenance services when it hired an ageing 25-year-old tanker.[164] The case arises from the 1999 shipwreck of the oil tanker Erika that broke off the Brittany coast and caused an oil disaster that spilled about 30,000 litters of oil on France's Atlantic coast and killed thousands of marine lives.[165] Although the Erika issue is a criminal case and not a civil one, the ruling is, nonetheless instrumental in determining the direct liability of a parent company for the act of its subsidiary. Moving in the direction of this notable verdict, a bill has been introduced in France's Parliament. The bill aims to place direct liability on the parent company for the wrongful behaviour of its subsidiary, suppliers, and contractors abroad if the plaintiff can prove that the parent company failed to exercise due diligence to prevent an injurious act. In March 2015, the committee's motion was adopted by the Lower Chamber but was rejected in the Upper Chamber.[166]

A company who appears to be the manufacturer or marketer of its products may also owe a direct duty of care toward a consumer. In that situation, direct coporate liability may arise.The duty of care owed to the consumer lies in ensuring that its product is manufactured

[161] For a focus on Dutch tort law, subsections 5.3.1 and 6.4.2.
[162] *Choc v. Hudbay Minerals* [2013] ONSC 1414.
[163] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries Violations of International Human Rights Law' (2015)72 *Washington and Lee Law Review* 1769, 1835-1836.
[164]Robert Myles, Erika Oil Disaster - France's Top Court Upholds Total Conviction, *Digital Journal* (27, September 2012) < http://www.digitaljournal.com/article/333666 > accessed 11 January 2017; BBC News, France Upholds Total Verdict over Erika Oil Spill (25, September 2012).
[165] Nadia Bernaz, *Business and Human Rights: History, Law and Policy- Bridging the Accountability Gap* (Routeledge 2016)280.
[166] Skinner, (2015) *op. cit.*, p. 1827.

with due care, and to ensure that the consumer is fully informed about any possible risks in consumption.[167] A case that demonstrates this point arises in *Pelman v. McDonald's Corporation*,[168] where two young girls sued McDonald's, in a New York federal district court for obesity-related health issues. The plaintiffs alleged that they were deceived by the fast food chain's misleading advertisement into believing that the product could be a healthy part of their diet if eaten every day, but it failed to adequately label the nutritional content of its food product and the health-related effects. The action alleges that McDonald's breached Section 349 and 350 of the New York General Business laws, which prohibits deceptive practices in the advertisement, sale and promotion of products.[169] Although the court declined to hear the claim for lack of enough information to support their negligence or deception claim, the case is important for the purpose of examining the duty and responsibility of a company towards consumers. In 2013, a case was also instituted by some French human rights groups against Samsung France for misleading consumers by claiming to be an 'ethical' company.[170]

Thus, it is clear that, at least on the basis of the tort law principle, a parent company may under certain situations owe a duty of care to victims of human rights violations committed by its foreign subsidiaries if the parent has 'relevant control of the subsidiary's business'.The *Chandler* decisions undoubtedly confirmed that the fact that a parent company and its foreign subsidiary are two separate legal entities cannot prevent such a duty of care that results for the parent company under certain conditions, even though, it does not necessarily appear from the simple fact that the employer is a subsidiary of the parent company and segment of its corporate group. The court also stated that the case was not concerned with lifting the veil

[167] Nygh, (2002) *op.cit.* p. 675.
[168] *Pelman v. McDonald's Corp*. [N.Y. Sup. 2003] 237 F.Supp.2d 512.
[169] John Alan Cohan, 'Obesity, Public Policy, and Tort Claims Against Fast-Food Companies' (2003) 12 *Widener Law Journal* 103, 120; Melissa Grills Robinson et al, 'Combating Obesity in the Courts: Will Lawsuits Against McDonald's Work' (2005) 24(2) *Journal of Public Policy & Marketing* 295,300.
[170] For more information on this case see Simon Mundy, **'**Samsung Rejects Child Labour Allegations' *Financial Times* (London, 27 February 2017); Bernaz, (2016) *op. cit.*, p.290.

of incorporation but instead was a well-known example of what is described as direct liability of parent company on the ground of the tort law.[171]

5.4.3.2. Secondary (Indirect) Liability

In certain situations, a parent company may be held culpable for the conduct of its foreign subsidiaries on the grounds that it has 'aided and abetted' or been 'an accessory to' unlawful activities.[172] In other words, it holds indirect (secondary) liability. The idea that a parent company can be responsible for aiding and abetting wrongful activities of their foreign subsidiaries is a type of liability that is well recognised in criminal law but in some jurisdictions it may also be used to prove tortious liability.[173] This is the basis of an allegation made by the plaintiff in the ATCA-based case of *Doe v Unocal*[174] although, as the matter was eventually settled out of court, the United States Ninth Circuit Court of Appeals stated that there were genuine issues of material fact upon the evidence provided to determine whether Unocal aided and abetted forced labour in Burma.[175] The claimants in that case had alleged that Unocal had provided material assistance to the Burma military in the form of maps and other logistical support. In doing so, the claimants alleged that Unocal had 'aided and abetted' human rights abuses committed by the Burmese military.

Under this indirect secondary liability, it is unnecessary to ascertain whether the defendant parent company owed a duty of care to the plaintiff or even that its activities were the primary cause of the tort. Instead, 'liability attaches to a material contribution, consciously

[171] Enneking, (2012) *op.cit.* p. 179.
[172] Zerk, (2006) *op.cit.* p. 225.
[173] Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Social Responsibility Initiative Working Paper No 59, 2010) 169.
[174] *Doe v Unocal* [9th Cir 2002] 395 F.3d 932; Among the vast cases of against companies alleging aiding and abetting human rights violation see also, *Doe VIII v ExxonMobil Corp* [DC Cir, 2011] 654 F.3d 11; *Wiwa v. Royal Dutch Petroleum/Shell* [2004] 392 F.3d 812; Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' (2005) 13 *Human Rights Brief* 14, 15.
[175] *Doe v Unocal* [9th Cir 2002] 395 F.3d 932, 953; Armin Rosencranz, David Louk, '*Doe v. Unocal:* Holding Corporations Liable for Human Rights Abuses on Their Watch' (2005) 8 *Chapman Law Review* 135, 142.

made, to the commission of a tort by another – or, as the USA courts have put it, a knowing and substantial contribution'.[176] Under common law, at least four possible bases of indirect secondary liability were recognised. These were claimed to exist where parent companies 'assisted or supplied' their foreign subsidiaries with the means to commit human rights violations (ie technology and resources), through persuading or actively influencing their foreign subsidiaries to commit those violations and/or by allowing their wrongful activities afterward or by conspiring with them in the commission of those unlawful behaviours.[177] For an indirect liability claim to be possible, the plaintiffs have to establish that the parent company has contributed substantially to the violations perpetrated by its foreign subsidiary and that it knew or should have known the fact that its activities would influence the commission of the subsidiary's illegal behaviours.[178]

Allegations of indirect parent liability are central to many current human rights related cases against corporations and findings evolving at the procedural stage are beginning to throw some light on what secondary liability might mean, at least in the ATCA framework. In the *Unocal* litigation, for example, 'aiding and abetting' was defined by the Ninth Circuit Court of Appeals for the purposes of corporate accountability under ATCA as 'knowing practical assistance or encouragement which has had a substantial effect on the commission of an offence'.[179] However, in the ATCA-based foreign liability case of *Presbyterian Church of Sudan v Talisman Energy Inc*,[180] the Court of Appeals for the Second Circuit made reference to the principles enunciated in *Sosa* v *Alvarez-Machain*[181] that the proper standard for aiding and abetting should be derived from international law, not domestic law. The international law standard requires the plaintiffs to prove that the defendant parent company has provided

[176] Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Social Responsibility Initiative Working Paper No 59, 2010) 169.
[177] Enneking, (2012) *op.cit.* p. 180; see also Zerk, (2010) *op.cit.* p.169.
[178] Enneking, *Ibid.*, p. 181.
[179] [9th Cir 2002] 705 F.3d 932, 951.
[180] *Presbyterian Church of Sudan v Talisman Energy* [2009] Docket No 07-0016-cv.
[181] [2004] 542 US 692.

substantial assistance to the tortious acts perpetrated by the other for the purpose of facilitating the offences.[182] The court then moved on to apply a more rigorous test than that used in American domestic courts and indeed is more stringent than that used in the *Unocal* case. In view of the *Talisman* decision, a business would only be responsible for complicity in a human rights violation where it has offered substantial assistance with the intention of advancing the violation.

5.4.3.3. Vicarious or Agency Liability

The principle of vicarious or agency liability is established on the notion that the link between parent and affiliate is akin to that of principal and agent or master and servant or between an employer and its employee.[183] According to the principle, the parent company would be held liable for the abusive practices of its foreign subsidiary on the basis of the existence of particular juridical relationships of authority and control between those parents and their foreign subsidiaries.[184] According to Zerk, the English courts tend to be more conservative than their American counterparts in the following terms:

> [T]he English courts remain generally unconvinced by the policy justifications in favour of more flexible use of vicarious liability concepts, preferring to limit their use to narrowly defined 'agency' situations … judicial pronouncements under ATCA so far suggest a rather more flexible approach to the question of 'agency' than that used by the English courts.[185]

It is only in limited situations that the subsidiary will be regarded as acting as the 'agent' of the parent. Essentially, it has to be established that the parent company has applied a high level of control over its subsidiary and the relationship has to be so close that the subsidiary

[182] *Presbyterian Church of Sudan v Talisman Energy* [2009] Docket No 07-0016-cv.
[183] Seck, (1999) *op.cit.* p. 147; see also Zerk, (2010) *op.cit.* p. 169-170.
[184] *Sinaltrainal v Coca Cola* [S.D. Fl., 2003]256 F. Supp. 2d 1345; *In Re South African Apartheid Litigation* [S.D.N.Y. 2009] 633 F.Supp.2d 117. On 27 July 2015, the Second Circuit dismissed the defendants, Ford and IBM, for failure to overcome the presumption of extraterritoriality set forth in *Kiobel. Balintulo, et al. v. Ford, IBM, et al*., [2d Cir. July 27, 2015] *Nos.* 14-4104; In *Re South African Apartheid Litigation* [S.D.N.Y. 2014] 56 F. Supp. 3d 331, 338.
[185] Zerk, (2006) *op.cit.* p. 224-5.

could be considered to be carrying on the activities of the parent company.[186] For instance, in the 2004 ruling on *Bowoto v Chevron*,[187] Judge Ilston held that the agency relationship, which would result in liability under ATCA, was 'a close relationship or domination between the parent and subsidiary'. This relationship would be applicable in 'finding that the injury allegedly inflicted by the subsidiary … was within the subsidiary's authority as agent'.[188] This landmark case was brought under the ATCA against Chevron Nigerian Ltd (CNL) for committing serious human rights violations in Nigeria. Chevron was charged with the deaths and injuries of unarmed protesters and innocent citizens of the Niger Delta region of Nigeria arising from its complicity with the Nigerian military, allegedly acting in concert with CNL as its hired security. Though the court was not prepared to pierce the corporate veil and was not convinced that CNL was the 'alter ego' of Chevron, the court found that there was enough evidence to conclude that CNL was the agent of its USA parent company and the parent company could still be liable for the wrongdoing of its foreign subsidiary on the basis of the agency relationship.[189]

Ultimately, the control relationships that may bring about a form of vicarious liability whether through the court or by legislation vary with each legal system and are subject to equitable strict conditions.[190] Thus, in most cases it will only be possible in special circumstances to hold a parent company accountable for the human rights violations of its foreign subsidiaries. However, the mere fact that the parent company directly or indirectly wholly owned its subsidiary does not in itself make it responsible for the misconduct of that subsidiary.[191] After all, this alleged vicarious liability theory and its effects have been

[186] Seck, (1999) *op.cit.* p. 148.
[187] [ND Cal 2004] 312 F. Supp. 2d 1229.
[188] *Ibid.*, p. 1239.
[189] *Ibid.*, p. 1239.
[190] Enneking, (2012) *op.cit.* p. 181; Zerk, (2006) *op.cit.* p. 223-5.
[191] Enneking, *Ibid,.*

confirmed at trial stage on its merits. So far, courts in the USA appear to be more liberal on corporate accountability based on the agency relationship than English courts.

5.4.3.4. Principle of Enterprise Liability

The principle of enterprise liability is based on the idea that the economic and operational relationship that exists between the parent and the subsidiary companies is highly intertwined and 'enterprise law must better implement and prevent frustration of the underlying purposes and objectives of the law in the area in question than utilization of traditional entity law would'.[192] The concept of enterprise liability has been instrumental in some regulatory frameworks, particularly bankruptcy law, and it often receives little attention within the sphere of English tort law due to the direct challenge it poses to the principle of separate legal personality.[193] Enterprise liability is a theory that the Guiding Principles seem to endorse.[194]

In enterprise liability, the corporate group is considered to be a singular economic unit which replaces the classical corporate law principle of separate legal personality in which the corporate veil can only be lifted in a very limited number of exceptions. What this amounts to, in practice, is that each corporate entity within this economic unit may be held liable for actions or omissions of its foreign subsidiaries based on the economic and commercial integration between them. In the context of transnational enterprise, one can argue that it can give rise to a strict liability on the part of the parent company for human rights abuses perpetrated by its subsidiary on the basis that it should guarantee the protection of those abuses.[195]

[192] Gwynne Skinner, 'Parent Company Accountability Ensuring Justice for Human Rights Violations' (The International Corporate Accountability Roundtable, 2015); Nygh, (2002) *op.cit.* p. 67.
[193] Zerk, (2010) *op.cit.* p. 171.
[194] UN Guiding Principles 14. This states that the obligations of both States and businesses apply 'to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure'.
[195] Enneking, (2012) *op.cit.* p. 184-5.

Enterprise liability is usually applied to avoid the frustration of the fundamental objectives of the law in the area in question than the application of a traditional corporate law principle would.[196] The leading case in which enterprise liability was established is the *Amoco Cadiz Oil Spill*.[197] The case concerns an oil spill from the grounding of the Amoco Cadiz tanker off the French coast which inflicted much injury to a number of French citizens and the French government. The Amoco Cadiz was a subsidiary of a Liberian company, the Amoco Transport Company. This company was eventually controlled by a series of subsidiaries of the Standard Oil Company. Amoco International Oil Company (AIOC), registered in Delaware, was another higher company in the series of subsidiaries other than Amoco Transport. The court gave a general summation about how the corporate group operate which indicated that the structure was extremely intertwined and that control flowed from higher affiliates such as AIOC in the group rather than emanating from Transport itself. The court further held that both AIOC and Transport were severally accountable for the injuries sustained by the claimants due to their respective acts or omissions. [198]

In the UK, there has been less legal attention on the notion of 'enterprise liability'. In *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council*,[199] Lord Denning said that TNC as a group might be regarded as one unit where justice so required for the purposes of the law. Nonetheless, the issues in the Royal Dutch Shell (RDS) cases before a court in the Netherlands have been construed by some in large part, a claim based on the idea of enterprise liability.[200] This view appears to be based on an incorrect interpretation of these

[196] Blumberg, (1993) *op.cit.* p. 92.
[197] *Re Oil Spill by the Amoco Cadiz off the Coast France* [1984] 2 Lloyds Rep 304, 338.
[198] *Ibid*,.
[199] *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council* [1976] 1 WLR 852, 860; *Woolfson v Strathclyde Regional Council* [1976] SLT 159; *Multinational Gas and Petrochemical co v Multinational Gas and Petrochemical Services Ltd and Ors* [1983] 2 All ER 563; *Polly Peck International Plc (in Administration)* [1996] 2 All ER (Ch D).
[200] Zerk, (2010) *op.cit.* p. 171.

claims.[201] It appears that the allegations levied against the parent company RDS was that it set conditions which the whole corporate group should adhere to and to which its foreign affiliates run their business activities has been construed as establishing a claim to the principle of enterprise liability.[202]

However, instead of placing liability on the parent company based on principles of enterprise liability, the plaintiffs in these cases sought to hold RDS directly accountable for its own illegal conduct in failing to adequately manage the exploration activities of its subsidiary. Given the plaintiff's allegation regarding RDS's corporate structure and the claim that this structure allowed it to exercise influence and control over SPDC activities in Nigeria, it was therefore argued that RDS had a duty of care vis-a-vis the Nigerian populace who had been affected by these harmful behaviours.[203] The misunderstanding of this concept will likely be blamed on the basis that the allegations sought to hold the parent company responsible not for its actions but rather for its omissions, and as such sought to place on it a duty to act. This is something that has already been stated and it is not generally recognised in most English legal systems.[204] Nonetheless, the theory of corporate enterprise liability remains an 'emerging doctrine, not yet fully articulated or universally accepted'.[205]

Another legal principle that coincides with the notion of enterprise liability is the doctrine of 'alter ego'. The idea is that in some instances the influence and the actions of a parent company and its subsidiary are so intertwined that the affiliate is no more than the 'alter ego' of the parent. As such, it is lawful to regard the parent and subsidiary as one and the same and

[201] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 310-11; Joseph, (2004) *op.cit.* p. 141.
[202] Oguru Efanga, 'Vereniging Milieudefensie v Shell Petroleum Development Company of Nigeria Ltd (Court of The Hague).' Available in English on the Milieudefensie website <milieudefensie.nl/globalisering/publicaties/infobladen/Scan%20dagvaarding%20Oruma%20Engels.pdf> accessed 20 June 2016.
[203] *AR Akpan & Anor v Royal Dutch plc & Anor* District Court of Hague [2013] C/09/337050/HAZA 09-1580.
[204] *Ibid,.*
[205] Sara L Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining' (2008) 11 *Yale Human Rights and Development Law Journal* 177, 188.

to ignore the corporate veil.[206] Hence, the parent company disregards the formalities of separate legal existence of the subsidiary company. Decisions are only directly taken by the board of the parent company and no separate books of accounts are kept or maintained by the corporate group. In this situation, the subsidiary is nothing more than an empty shell and is regarded as the alter ego of the parent company.[207] For example, in *John Doe v Unocal Corp*[208] and *Wiwa v Royal Dutch Petroleum*,[209] the respective federal courts pointed out that the Unocal Myanmar subsidiary and Shell Nigeria were both the alter ego of the defendant parent companies. Of course, these were preliminary pronouncements and the issue has not been determined at trial.[210]

In the *Unocal* case, the court, instead of ruling it out entirely, recommended certain factors that might be relevant: (a) the level at which subsidiaries controlled their assets and regular operations; (b) the level to which there was co-mingling of funds and other assets; (c) the reasons for the creation of the subsidiary (eg whether this was to avoid existing liabilities); and (d) the level to which subsidiaries were sufficiently capitalised.[211] The disparity between the principle of 'alter ego' and the notions of agency and vicarious liability described above is that agency and vicarious liability principles view the liable person as 'acting through' another separate judicial entity while the 'alter ego' principle would place liability on the grounds that the parent company and the subsidiary are effectively one and the same. Finally, enterprise liability theory that is being utilised in the USA may provide a solution, particularly in the case of mass torts, but its scope and limitations are underexplored.

In considering the potential role of tort law in regulating the activities of TNCs abroad, it is important to consider the liability of businesses especially TNCs for human rights violation

[206] Zerk, (2010) *op.cit.* p. 172.
[207] Nygh, (2002) *op.cit.* p. 66.
[208] [9th Cir 2002] 248 F.3 915.
[209] [2002] 96 Civ 8386.
[210] Joseph, (2004) *op.cit.* p.130 cited in fn 9.
[211] *Doe v Unocal* ruling on the Defendant's Motion for Judgment, 14 September 2004, 2-3.

arising from the operations of its subcontractors overseas. Corporate practices to subcontract production to developing nations due to the availability of resources and cheap labour have made many TNCs involved in human rights abuses through their supply chain.[212] By doing so, Wal-Mart, Apple, and Nestlé, for example, were accused of failing to take precautionary measure to prevent various human rights violations, including low wages, child labour, murder, overtime, and forced and slave labour practices arising from the operations of their subcontractors abroad.[213] The case *Doe v. Wal-Mart Stores Inc*[214] is a claim of this nature instituted against Wal-Mart in the United States Court by employees of Wal-Mart subcontractors based in countries such as China, Bangladesh, Indonesia, Swaziland, and Nicaragua. The plaintiff asserted that the industry had a code of conduct requiring its subcontractors to operate by both international human rights and Wal-Mart standards, but it had failed to take measures to control and implement its code in its supply chain.

Moving in the direction of this important case, there have been several legislative enactments requiring TNCs to carry out human rights due to diligence on their supply chain.[215] This includes § 1502 of the *Dodd Act,* which requires American businesses that source conflict minerals from the Democratic Republic of Congo to report to the SEC effort of due diligence concerning their supply chain and custody of those conflict minerals.[216] Another example is the call by the European Parliament on the Commission to establish an instrument whereby victims of child labour can seek for remedy against EU corporations in the domestic courts of the State Parties and "to ensure supply-chain compliance and especially to come forward with

[212] Niels Bybee, 'The Scope of Contractor Subcontractor Liability in the Modern-Era of Multinational Companies' (2015) 11(2) *Brigham Young University International Law & Management Review* 186, 191; Madeleine Conway, 'A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains' (2015) 40(2) *Queen's Law Journal* 741, 774.
[213] *Doe v. Nestlé, S.A.*, [C.D. Cal. 2010] 748 F. Supp. 2d 1057
[214] *Wal-Mart* [9th Cir. 2009] 572 F.3d 677; see also, *Sola v Wal-Mart Stores East Inc* [App. Ct. 2014] 100 A.3d 864, 152 Conn App. 732.
[215] *Wal-Mart* [9th Cir. 2009] 572 F.3d 677 para 681.
[216] American Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), Pub L No 111–203, § 1502, 124 Stat 1376.

mechanisms that make the principal contractor liable in the EU in cases of violation of UN conventions on child labour in the supply chain".[217] This measure would create a kind of strict liability regardless of whether the parent company is aware of the human rights abuses and irrespective of whether it could have taken precautionary measures to prevent it.[218] This rule pertains to manufacturer's strict liability for potentially defective products according to which the parent company would be is liable for safety defects caused by its foreign supply components.[219]

There are further types of cases that are not based on assessing liability and redress for victims of corporate human rights' violations but rather concern business and human rights.[220] One example of such proceedings is the case of *Nike Inc. v Kasky,*[221] contested before the US Supreme Court. The plaintiff, a consumer rights activist, instituted an action against Nike under California's Unfair Competition and False Advertising Laws.[222] The issue before the court was to consider whether Nike's public statements on the existence of good labour standards and practices in its overseas suppliers' factories, which they knew were not true, amounted to a breach of California's unfair business practices and advertisement laws or whether the speech was commercial or non-commercial.[223] The Court refused to hear the matter, as it was improvidently granted, and eventually the parties settled out of court.[224]

[217] European Parliament Resolution of 16 January 2008: Towards an EU Strategy on the Rights of the Child (2008/0012) No 122; Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2(3) *Journal of European Tort Law* 221, 253.
[218] *Rylands v Fletcher* [1868] UKHL 1; for more details on Strict Liability see also, Fletcher, (2008) *op. cit.*, p. 41- 44.
[219] Directive 85/374/EEC of 25 July 1985 on Liability for Defective Products (1985), OJ L 210, p. 29–33; Dam, (2011) *op. cit.*, p. 253.
[220] Bernaz, (2016) *op. cit.*, p. 289.
[221] *Nike v. Kasky* [2003] 539 US 654, 655.
[222] Example of cases with similar argument are: *Re Tobacco II Cases* [Cal. 2009] 207 P.3d 20, 31-38; *Rubin v. Coors Brewing Co.*, [1995] 514 US 476*; Lorillard v. Reilly* [2001] 533 US 525.
[223] Bernaz, (2016) *op. cit.*, p. 216.
[224] Roger P. Alford, 'The Future of Human Rights Litigation after Kiobel' (2014) 89(4) *Notre Dame Law Review* 1749, 1761; Jennifer L. Pomeran, 'Are we Ready for the Next *Nike v. Kasky*' (2014) 83 *University of Cincinnati Law Review* 203, 219.

Tort law is a system of correlative rights and obligations aimed at the compensation of injury. The extent to which tort law can provide a remedy is, thus, restricted to the catalogue of interests to which it attaches the right to remedy and the kinds of behaviours to which it attaches obligations of reparation.[225]Therefore, the obligation of the company to remedy the injury caused only arises when wrongful action and responsibility can be established. Tort law is primarily a fault-based liability and does not offer a remedy if the plaintiff cannot link the injury to any wrongful activity.[226]The issue of parent company liability for the acts and omissions of its subsidiaries is not yet settled. Although the courts have been careful and have refused to deviate from the consecrated principles of the *Salomon* case, they use different approaches to overcoming the corporate veil to establish liability on the parent company of the group. The courts have established fraud and sham companies as the main exceptions to the principle of separate corporate legal personality because they merely recognise a breach of a common law or statutory duty. None of the exceptions offer an effective means of rendering a parent company liable for the torts committed by their subsidiaries. However, in the interests of justice, courts have been able to use their powers and have acknowledged the possibility of lifting the corporate veil in tort claims. The enthusiasm to find new exceptions to the principle of corporate legal personality shows that courts have moved beyond peeking behind the veil of incorporation to staring at it through a myriad of approaches to provide and enhance access to adequate remedy and justice for victims of abusive corporate practices. For the sake of legal argument, courts need to be more consistent when exercising these exceptions.

5.5. The Status Quo and Recent Developments in Some Home State Courts of Transnational Corporations

[225] Cane, (2001-02) *op.cit.* p 435.
[226] *Ibid*,.

The previous section assessed the theories of tort law in which a parent company could be held liable for violations and damages perpetrated by its subsidiary. This section evaluates the existing state of affairs and recent developments in the courts of the USA, the UK and the Netherlands.

5.5.1. The Existing State of Affairs and Recent Developments in American Courts

It can be argued that the trend of holding parent companies of transnational groups accountable before home state courts for human rights violations committed by their subsidiaries abroad, especially those operating in developing host countries, started in the USA during the 1990s. The USA offers possibly the most suitable venue for suing TNCs for human rights abuses perpetrated abroad with the Alien Tort Claims Act (ATCA).[227] Enacted in 1789, the ATCA conferred federal courts with original 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'.[228] This language in Section 1350 confers jurisdiction to federal courts to hear any civil case: (1) introduced by an alien: (2) for a tort: (3) committed in serious violation of the 'law of nations', or a Treaty of the United States, in force in the country; and (4): irrespective of where the act was committed and the nationality of the perpetrator.[229] The United States is the only country to allow an alien to sue for conduct that occurred wholly

[227] Lucien J Dhooge, 'Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act' (2006) 28(3) *Loyola of Los Angeles International and Comparative Law Review* 394, 398. The Alien Tort Claims Act (ATCA), also known as the Alien Tort Statute (ATS). This statute, which has notably been referred to as '*a kind legal Lohengrin*, since, *no one seems to know whence it came*' (or, more particularly, what exactly the 1789 drafters had in mind when they enacted it); Bahareh Mostajelean, 'Foreign Alternatives to the Alien Tort Claims Act: The Success (Or Is it Failure?) Of Bringing Civil Suits against Multinational Corporations That Commit Human Rights Violations' (2008) 40 *The George Washington International Law Review* 497, 497- 498.

[228] Codified in (2006) 28 USC § 1350. For the original version of the ATS, see Judiciary Act of 1789 § 9(b), 1 Stat. 77.

[229] Matt A Vega, 'Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery under the Alien Tort Statute' (2009-10) 31 *Michigan Journal of International Law* 386, 391.

outside of the United States which impacted foreign citizens alone, and had no effect whatsoever within the United States.[230]

Suing the parent company of a transnational group for violations of international human rights law in United States federal courts under the ATCA has become possible thanks to three breakthrough cases. These are: *Filartiga v Peña-Irala* [231] *Kadic v Karadzic* and *Doe I v Unocal*.[232] The Court of Appeals' ruling in *Filartiga* is important for at least two reasons. First, the Court described the type of violations which are recognised as a valid right of action under the ACTA. The court established that a determination of a violation of the law of nations depends on the existing international consensus among the nations of the world today.[233] The Court found that the law of nations is to be determined by looking at the 'works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law'.[234] Secondly, the conclusion avowed that an alien may sue in the United States for violations of the law of nations that occurred outside the territory of the United States.[235]

In the *Kadic* case, the court held that an individual could be directly liable for violating certain laws of nations irrespective of whether or not the action was undertaken under the auspices of a state.[236] Lastly, *Doe I v Unocal* laid the foundation that a plaintiff may bring an action against a United States-based TNC under the ATCA before a federal court for violations of international human rights norms committed by its foreign subsidiaries.[237] The

[230] Mirela V Hristova, 'The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility' (2012-13) 47 *University of San Francisco Law Review* 89, 94-5.
[231] *Filártiga* [2d Cir 1980] 630 F.2d.
[232] [9th Cir, 2001] 248 F.3 915.
[233] *Filártiga* [2d Cir 1980] 630 F.2d 881; Audrey Koecher, 'Corporate Accountability for Environmental Human Rights Abuse in Developing Nations: Making the Case for Punitive Damages Under the Alien Tort Claims Act' (2007) 17(1) *Journal of Transnational Law Policy* 152, 155.
[234] *Filártiga* [2d Cir 1980] 630 F.2d 880.
[235] *Filártiga Ibid.*, para 887; Yihe Yang, 'Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from Kiobel' (2012) 40(2) *Western University Law Review* 195, 197.
[236] *Kadic v Karadzic* [2d Cir 1995] 70 F.3d 232.
[237] [9th Cir. 2001] 248 F.3 915.

decisions in the *Unocal* case clear the way for more ATCA-based civil liability claims before American courts against TNCs registered in the USA for human rights violations committed abroad.[238] However, this door has now closed, as will be discussed below.

Following *Unocal*, ATCA-based civil claims have been brought before American federal courts by victims of human rights abuses from a developing host country against a score of American TNCs operating abroad.[239] These cases concerned several alleged abuses by the defendant TNCs, ranging from war crimes, genocide and crimes against humanity in the Bosnian-Serb Republic of Srpska;[240] involuntary clinical experimentation on children in Nigeria;[241] to torture, extrajudicial killing and forced disappearances in the Philippines;[242] severe environmental degradation of rainforests and rivers in Ecuador;[243] and complicity in human rights abuses perpetrated in host countries such as Nigeria,[244] (apartheid-era) South Africa,[245] Sudan[246] and Colombia.[247] In the *Unocal* case, the court found that forced labor was a modern form of slavery and so corporations such as Unocal could be held liable under the ATCA for aiding and abetting the military in establishing a system of forced labor, murder and rape.[248] Before the jury trial began, the parties agreed to settle and Unocal agreed

[238] Doreen McBarnet and Patrick Schmidt, 'Corporate Accountability Through Creative Enforcement: Human Rights, the Alien Tort Claims Act and the Limits of Legal Impunity in Doreen McBarnet et al (eds), *The New Corporate Accountability* (CUP 2007) 167.

[239] See, for example, *Flomo v Firestone Natural Rubber Company* [7th Cir 2011] 643 F.3d 1013, 1015; *Abdullahi v Pfizer, Inc.,* [2d Cir 2009] 562 F.3d 163; *Doe v Exxon Mobil Corp.*, [DDC 2002] No. 01-1357 (LFO); *Flores v Southern Peru Copper Corp* [S.D.N.Y. 2002] 253 F. Supp. 2d 510, 522; *Doe v Nestle* [9th Cir 2014] 766 F.3d 1013; *Bano v Union Carbide* [2d Cir 2001] 273 F.3d 120; *Iwanowa v Ford Motors Company* [DNY 1999] 67 F. Supp. 2d 424; *Bigio v Coca-Cola Co* [2d Cir 2000] 239 F.3d 440, 446; *Bowoto v. Chevron Texaco Corp* [ND Cal 2004] 312 F. Supp. 2d 1229, 1240; *Aldana v Del Monte Fresh Produce, N.A., Inc* [11th Cir. 2005] 4 16 F.3d 1242, 1245; *John Roe I v Bridgestone* [SD Ind 2007] 492 F. Supp. 2d 988 1020; *Re Chiquita Brands Intern., Inc* [SD Fla 2011] 792 F. Supp. 2d 1301; *Re Citigroup Inc Shareholder Derivative Litigation* [Del Ch 2009] 964 A 2d 106; *Corrie v Caterpillar* [9th Cir, 2007] 503 F. 3d 974.

[240] *Kadic v Karadzic* [2nd Cir, 1995] 70 F.3d 232.

[241] *Abdullahi v. Pfizer, Inc* [2d Cir, 2009] 562 F.3d 163.

[242] *Re Estate of Ferdinand Marcos Human Rights Litigation* [9th Cir, 1994] 25 F.3d 1467.

[243] *Aguinda v Texaco, Inc* (SDNY 1996) 945 F. Supp. 625, 627; *Jota v Texaco, Inc* [2d Cir, 1998] 157 F.3d 153, 158-61.

[244] *Wiwa v Royal Dutch Petroleum/Shell* [2000] 226 F.3d 88; *Kiobel v Royal Dutch Petroleum, Co* [2013] 133 SCt 1659.

[245] *Re South African Apartheid Litigation* [SDNY 2004] 346 F. Supp. 2d 538, 542.

[246] *Presbyterian Church of Sudan v Talisman Energy, Inc* [2nd Cir 2009] 582 F. 3d 244.

[247] *Sinaltrainal v Coca-Cola Co* [11th Cir, 200]) 578 F.3d 1252.

[248] Unocal [9th Cir. 2001] 395 F.3d 946.

to compensate the appellants for an undisclosed amount. The case was dismissed with the requirement that it could not be brought again.

In 2011, in *Doe VIII v ExxonMobil Corp*,[249] the DC Circuit Court of Appeals pointed out that ExxonMobil could be liable for aiding and abetting violations of international law[250] and this could be applied extraterritorially.[251] The plaintiffs' alleged human rights abuses such as genocide, torture, crimes against humanity, sexual violence and kidnapping were committed in violation of international law by the Indonesian military in connection with ExxonMobil's natural gas extraction and operation facilities in the Aceh province.[252] The plaintiffs maintained that ExxonMobil knew or should have known about the Indonesian military's international human rights abuses against the Indonesians.[253] In the *Talisman Energy, Inc* case, the court held that to determine liability under ATCA the plaintiffs must show that the defendant actually aided and abetted a violation of international law. The court went further to say that for the defendant to be held liable it needed to have provided the culprit with practical assistance that had a significant consequence on the commission of the misconduct with the purpose of aiding the commission of that crime.[254] The case concerned an instance of alleged complicity by a Canadian energy company, Talisman, with the Sudanese government's human rights violations (ranging from extrajudicial killings, forced displacement, rape etc.) in order to expedite oil extraction in southern Sudan.[255] This decision has been condemned and although it may not find a following in all the other circuits, it has elevated a very high obstacle for future ATCA-based foreign tort liability claims, in an effort

[249] *ExxonMobil* [DC Cir, 2011] 654 F.3d 11, 26.
[250] *Ibid.*, at 20.
[251] *Ibid.*, at 15.
[252] *Ibid.*, at 16.
[253] *Ibid.*, at 15-16.
[254] *Presbyterian Church of Sudan v Talisman Energy* [2nd Cir, NY 2009] 582 F 3d 244 258.
[255] *Ibid*,. For more details about the case see the website of the Business & Human Rights Resource Centre <http://business humanrights.org/en/talisman-lawsuit-re-sudan#c9318> accessed 20 January 2015.

to hold corporations accountable for being complicit in violations of international human rights committed by the authorities of the host country.[256]

Most of these cases have turned out to be complex high-profile and drawn-out claims that always raise complicated and often controversial social, political and legal issues, drawing lots of attention from politicians, the media and the general public both within and outside the United States. One of the most controversial claims brought under the ATCA claim has undoubtedly been the 2014 *Doe v Nestle* claim[257] in which the circuit court held that international law, not domestic tort law, would provide the legal standard for the aiding and abetting approach.[258] The case involves a suit brought against Nestle by former child slaves trafficked from Mali and forced to work in the Ivory Coast.[259] The plaintiffs alleged that the defendant aided and abetted child slavery by providing assistance to Ivorian farmers.[260] The court asserted that 'prohibition against slavery is universal and may be asserted against the corporate defendants in this case'.[261] In the opinion of the court, the *myopic* focus on profit over human welfare made Nestle act with the purpose of getting the cheapest cocoa product, even if it meant facilitating child slavery.[262] The court found that Nestle could be held liable under the ATCA for aiding and abetting child slavery by cocoa farmers in the Ivory Coast. In this regard, the court allowed the plaintiffs to amend their complaint to show the connection their claims had to the United States in order to fit with the 'touch and concern' test stated by the United States Supreme Court in *Kiobel v Shell*.[263]

Shell BP is a joint venture between two existing a TNCs, (Royal Dutch Petroleum/Shell and British Petroleum) that has been at the centre of attention due to its involvement in several

[256] Enneking, (2012) 122.
[257] [9th Cir 2014] 766 F.3d 1013.
[258] *Ibid.*, at 1023.
[259] *Ibid.*, at 1016.
[260] *Ibid.*, 1016.
[261] *Ibid.*, at 1022.
[262] *Ibid.*, at 1026.
[263] John Bellinger, '*Doe v Nestle:* Will SCOTUS Grant Cert to Clarify Unresolved Issues in Kiobel?' (*Business & Human Rights Resource Centre* 30 December 2015) <https://www.business-humanrights.org/en/search-results?langcode=en&keywords=Doe+v.+Nestle+&pagenum=0> accessed 25 October 2016.

high-profile liability claims under the ATCA. It became the subject of litigation under the ATCA before federal courts in early 1996. One of the claims was *Wiwa v Royal Dutch Petroleum/Shell*.[264] This claim pertained to Shell's alleged complicity in human rights abuses through its Nigerian subsidiary against the Ogoni people of the Niger Delta Region in Nigeria perpetrated by the Nigerian security forces. Plaintiffs brought claims alleging the commission of crimes against humanity, summary executions, torture and cruel, inhuman or degrading treatment.[265] The court assessed whether private actors like Shell could be held accountable for these abuses, and determined that they could be. Thirteen years after the filing of this case, in June 2009, an out-of-court settlement was reached on the eve of the trial, for $15.5 million to compensate the plaintiffs and to establish a trust for the benefit of the Ogoni people.[266]

More recent and possibly ongoing developments in the area of corporate ATCA claims seem to offer little hope for future ATCA-based foreign civil liability claims. In the related case of *Esther Kiobel v Royal Dutch Petroleum Co*[267] which got to the Supreme Court through an atypical route after having been dismissed by a lower court, the USA Supreme Court affirmed and significantly limited the extraterritorial application of the ATCA. The case involved a class action suit brought by a Nigerian plaintiff against Royal Dutch Petroleum, an Anglo-Dutch corporation, for allegedly aiding and abetting a number of human rights violations by the Nigerian government in the Ogoni region of Nigeria.[268] In April 2013, the Supreme Court in the *Kiobel* decision narrowed the reach of the ATCA for abuses occurring outside of the United States. The case was dismissed by the court which held that there was a presumption against the extraterritorial application of the law. The argument was that the drafters of the ATCA, in 1789, did not clearly state that its reach should extend beyond the

[264] *Wiwa v Royal Dutch Petroleum/Shell* [2000] 226 F.3d 88.
[265] *Ibid.*, at 92.
[266] The settlement agreement can be found at <http://www.ccrjustice.org/sites/default/files/assets/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf> accessed 11 June 2015.
[267] *Kiobel* [2013] 133 S.Ct. 1659.
[268] *Ibid.*, at 1662-3.

United States borders; it is believed that the statute only applies to norm abuses committed within the United States (or on the high seas) but not in the territory of another sovereign state. The Court held that the issues must 'touch and concern' the territory of the United States with 'sufficient force' to overwhelm this presumption against extraterritoriality.[269] The consequence of this ruling has been a near restriction on plaintiffs pursuing justice through this important venue. During the period of the *Kiobel* ruling, about 19 ATCA-based corporate claims were waiting to be heard in the federal courts. Only one new ATCA claim has been brought since then against a corporate entity.[270]

Amusingly, the same circuit court that gave new life to this notable statute has tried to bring about the end of life for the statute. In the appeals in *Talisman*[271] and *Kiobel v. Royal Dutch Petroleum*[272] – both concerning alleged complicity of corporates in human rights violations committed in Sudan and Nigeria respectively – the Second Circuit, in two sequential knock-backs, all but perpetually shut the ATCA door which the US Supreme Court had left 'ajar subject to vigilant door keeping', at least in its circuit.[273]

Developments following the *Kiobel* decision make it highly improbable that the ATCA would remain a suitable avenue for those aspiring to hold TNCs responsible for human rights violations perpetrated by foreign companies abroad without a sufficient territorial nexus with the United States.[274] Since the *Kiobel* decision, courts in the USA have dismissed numerous ATCA claims that were pending at the time, using this restrictive approach on extraterritoriality although the full framework of extraterritorial jurisdiction in USA courts after *Kiobel* are still developing. Cases dismissed include those against ExxonMobil in

[269] *Ibid.*, at 1659.
[270] *Ibid.*, at 1659; See also the website of Business & Human Rights Resource Centre <http://business-humanrights.org/en/closing-the-courtroom-door-where-can-victims-of-human-rights-abuse-by-business-find-justice> accessed 15 January 2015.
[271] *Presbyterian Church of Sudan v Talisman Energy, Inc* [2nd Cir 2009] 582 F. 3d 244.
[272] *Kiobel* [2013] 133 S Ct 1659.
[273] Odette Murray et al, 'Exaggerated Rumours of the Death of an Alien Tort? Corporation, Human Rights and the Remarkable Case of Kiobel' (2011) 12 *Melbourne Journal of International Law* 1, 2-3.
[274] Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014) 10(1) *Utrecht Law Review* 44, 50.

relation to its alleged complicity in human rights abuses committed by the Indonesian military in Aceh;[275] Ford and IBM for their alleged role in abuses perpetrated by the South African Apartheid regime;[276] Nestlé and others over forced child labour at cocoa suppliers in Ivory Coast;[277] and Rio Tinto's alleged involvement in human rights violations committed during an armed conflict in Bougainville, Papua New Guinea.[278]

The existing ATCA framework ought to be amended and reviewed. This is because the legal accessibility of ATCA to reach business entities for alleged infringement of international human rights committed in a foreign country is still not resolved.[279] In the past few years, several United States federal courts have delivered a judgment that narrowed the scope of the ATCA to hold United States-based TNCs liable for human rights violations they committed overseas.[280] However, it is inspiring to see the potential for home state courts of TNCs to litigate human rights violations committed by their affiliate in another state.

5.5.2. The Existing State of Affairs and Recent Developments in the United Kingdom Courts

The trend towards the development of foreign civil liability claims has not remained confined to the United States; similar cases have been brought in other developed countries, such as the UK. Developments in the UK appear to be more promising for the future of foreign civil liability claims. Recent high-profile examples include the *Trafigura* case, and the case of the

[275] *Doe VIII v. Exxon Mobil Corp* [D.C. Cir. 2011] 654 F.3d 11, 15 vacated in part on other grounds by, [D.C. Cir. 2013] 527 F. App'x 7.
[276] *Sakwe Balintulo and others v Daimler AG, Ford Motor Company and International Business Machines Corporation* [2nd Cir CA 2013] 727 F.3d 174.
[277] *Doe 1 v Nestle USA Inc* [9th Cir 2014] 766 F. 3d 1013.
[278] *Sarei v. Rio Tinto, PLC* [9th Cir. 2011] 671 F.3d 736, vacated by, [2013]133 S.Ct. 1995; See also the website of the Business & Human Rights Resource Centre <http://business-humanrights.org/en/us-appeals-court-upholds-dismissal-of-lawsuit-against-rio-tinto-over-complicity-in-alleged-human-rights-abuses-in-bougainville-papua-new-guinea> accessed 15 January 2015.
[279] Donald Earl Childress, 'The Alien Tort Statute, Federalism, Federalism, and the Next Wave of Transnational Litigation' (2012) 100 *The Georgetown Law Journal* 710, 714.
[280] *Kiobel* [2013] 133 S Ct 1659; *Doe v Exxon Mobil Corp* [DC Cir, 2013] 654 F.3d 11, 15 vacated in part on other grounds by, [D.C. Cir. 2013] 527 F. App'x 7.

Nigerian Bodo community. The *Trafigura* case concerned a lawsuit filed on behalf of a group of Ivorian victims before the High Court in London in 2006 against Trafigura over the alleged dumping of toxic waste in the Ivory Coast. In this case, a vessel sailing under a Panamanian flag and leased by the UK-based shipping corporation Trafigura dumped more than 580 tonnes of toxic waste in Abidjan, the Ivory Coast, after approval to deposit the poisonous waste had been declined in other countries. The toxic waste was loaded onto 12 tanker trucks managed by *Societe Tommy*, an Ivorian corporation, which had been hired by Trafigura to dispose of the waste. The indigenous company deposited the poisonous waste across the city. The exposure to toxic gas emanating from that waste resulted in the deaths of 10 people and physically injured about 100,000 others.[281] After years of up and down court processes, the case was successfully settled out of court in September 2009. Trafigura reportedly agreed to pay each of the 30,000 plaintiffs about £1,500.[282]

Recently, Shell accepted liability in an out-of-court settlement after extensive court proceedings between the Bodo community in Nigeria and RDS for injuries suffered when tens of thousands of barrels of oil spilled from a broken pipeline into the creeks and forests of their area in 2008. This destroyed water sources and caused environmental degradation. In January 2015, RDS admitted to having paid approximately $83.1 million in a settlement agreement with the Bodo community.[283] *Arise news* reported that the out-of-court settlement was the biggest to date for oil spills in Nigeria and was a breakthrough for the oil-rich Niger Delta region that had been afflicted by consistent abuses of human rights and environmental

[281] Business & Human Rights Resource Centre <http://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire> accessed 19 January 2015.
[282] *Ibid*,.
[283] *Ibid*,.

degradation. [284] However, it was decidedly small compared to the billions BP paid in compensation to inhabitants of the Gulf of Mexico after the 2010 Macondo rig disaster.[285]

5.5.3. The Existing State of Affairs and Recent Developments in the Netherlands Courts

In January 2013, The Hague District Court in the Netherlands gave a final decision in a case involving a foreign civil liability claim initiated in 2008 by four Nigerian farmers, together with the Dutch NGO *Milieudefensie* against RDS and its Nigerian affiliate SPDC. The case concerned oil leakage from a Shell pipeline that had, according to the plaintiffs, resulted in damage to the local environment and affected the incomes of fishermen and farmers.[286] The case was the first foreign civil liability claim to be brought before a Dutch court. The victims alleged that Shell Nigeria failed to exercise reasonable care to stop the oil spills from occurring, in checking their effect and in properly cleaning up the polluted environment. They also claimed that the parent company had not used its power and control over the company's policies on human and environmental protection to ensure that the oil exploration activities of its Nigerian affiliates were conducted with due care for human rights and the environment. In addition, the claimants sought a declaratory decision from the court as they alleged that the defendant corporations had operated negligently towards them and were jointly and independently liable for the resultant injury. They also sought injunctions enjoining the defendants to perform due pipeline maintenance, to totally clean the environment, especially fishponds devastated by the oil leakages in question and to come up with strategies that would allow for a more appropriate way to address oil spills in the

[284] Julia Payne and Simon Falush, 'Shell to Pay out $83mln to Settle Nigeria Oil Spill' *Arise News*, (New York, 7 January 2015).
[285] Michael Muskal, 'BP Agrees to Pay $18.7-Billion Settlement in Gulf of Mexico Oil Spill' *Los Angele Times* (Los Angeles, 2 July 2015).
[286] The Hague District Court [2013] LJN BY9845 (re oil spill near Goi); The Hague District Court, (30 January 2013) LJNBY9850 (re oil spill near Oruma); The Hague District Court [2013] LJN BY9854 (re oil spill near Ikot Ada Udo).

future.[287] In January 2013, the Hague District Court issued a judgment that the oil spills happened due to sabotage and not due to lack of maintenance as the litigants had claimed. The court also held that RDS could be held partially responsible for human rights violations in the Niger Delta region of Nigeria, asserting that the company should have prevented sabotage at one of its facilities. The Court ordered SPDC to pay unspecified damages to one farmer but dismissed four other claims filed against the Dutch parent company.[288]

This case is remarkable for several reasons. One of these is that it forms part of the global movement towards foreign civil liability claims that has arisen over the past two decades in developed countries. Increasingly, foreign civil liability claims are being brought against parent companies before courts in the TNC's home state in relation to human rights abuses perpetrated mostly in developing host states as a result of the corporate group's local activities there.[289] This indicates to lawyers, legal experts and, in particular, home state courts dealing with this type of claim that the trend towards these foreign civil liability claims is strong. Besides this, the ruling establishes that both in principle and in practice parent and affiliated companies of TNCs may be held responsible before home state courts.

In a strictly legal sense, The Hague District Court's ruling in the Shell case did not necessarily set a precedent because the judgment was rendered on the basis of Nigerian tort law. Furthermore, the parent company RDS was not held liable, instead the court declaring that a parent corporation under Nigerian tort law was not under any legal obligation to stop its subsidiaries from inflicting injury on third parties except in exceptional situations, which did not exist in this case in the opinion of the court.[290] However, in view of the recent

[287] Liesbeth FH Enneking, 'Multinationals and Transparency in Foreign Direct Liability Cases: The Prospect for Obtaining Evidence under the Dutch Civil Procedural Regime on Production of Exhibits' (2013) 2(3) *The Dovenschmidt Quarterly* 134, 136.

[288] Business & Human Rights Resource Centre <http://business-humanrights.org/en/dutch-court-says-shell-partly-responsible-for-nigeria-spills> accessed 20 January 2015.

[289] Enneking, (2013) *op.cit.* p. 136.

[290] The Hague District Court (30 January 2013) LJN BY9845 (re oil spill near Goi) paras 4.43-4.58; The Hague District Court [2013] LJNBY9850 (re oil spill near Oruma); The Hague District Court [2013] LJN BY9854 (re oil spill near Ikot Ada Udo) paras 4.45-4.60.

developments that are taking place in the international context in which it is set, it will possibly have a broader impact. These developments include the increasing demand for adequate mechanisms through which a parent company can be held responsible for actions and omissions of its subsidiary abroad.[291]

Recent trends in the USA, the UK and the Netherlands are transforming the legal framework in which these claims are established as some avenues are being shut to such allegations while others are being opened. For the last two decades, TNC home state courts have progressively been faced with foreign tort liability cases against their TNCs for human rights violations perpetrated in developing host states.[292] Most of these foreign civil liability claims have so far been brought before United States courts but the development has also spread to other Western states, such as Australia, the UK, Canada, France and the Netherlands, though in far smaller numbers.

However, only very few of the foreign civil liability claims that have been filed thus far have been decisively resolved by a court. A substantial number of these claims are pending, mainly in pre-trial hearing, such as the *ExxonMobil* lawsuit, regarding Aceh, and the *Chiquita* lawsuits, regarding Colombia. Furthermore, a substantial number of foreign tort liability cases such as *Goodyear*, *Aguinda* and *Rio Tinto*[293] were dismissed at pre-trial due to jurisdictional obstacles, non-justiciability of the cases because of their political nature and other procedural and practical factors peculiar to them.[294] Also, many cases, such as those against Unocal, Cape plc and Trafigura, and the cases brought by the Nigerian Bodo community, have all been resolved out of court but usually only when the corporate

[291] Enneking, (2013) *op.cit.* p. 136.
[292] Enneking, (2014) *op.cit.* p. 44.
[293] *Goodyear Dunlop Tire Operations, S.A. v Brown* [2011] 131 S.Ct. 2846; *Aguinda v Texaco* [2d Cir 2002] 303 F. 3d 473; Letter from William H Taft IV, Legal Adviser to the US Department of State, to J. Robert D. McCallum (31 October 2001) in *Sarei v Rio Tinto* [CD Cal 2001] No. 00-11695 (MMM) (AIJx); *Bell Atlantic Corp. v. Twombly* [2007]550 US 544, 556–57; *Siderman de Blake v Republic of Argentina* [9th Cir 1992] 965 F. 2d 699, 707.
[294] Jordan Clark, 'Kiobel's Unintended Consequences: The Emergence of Transnational Litigation in State Court' (2014) 41(2) *Ecology Law Quarterly* 243, 257.

defendant has tried to apply for dismissal at pre-trial stage and failed. So far, only a few of these claims have successfully reached trial. The *Dutch Shell* case is one such case that proceeded up to the final determination of the primary cause of action.

5.6. Other Obstacles Affecting Access to Justice in the Home State Courts of Transnational Corporations

As the preceding sections demonstrate, the present state of affairs and recent developments in foreign liability claims against a parent company for the act of a foreign subsidiary in some TNC home state courts arguably and in practice require TNCs to be held responsible for human rights violations they have committed. As stated above, the corporate veil is one of the formidable obstacles to international human rights claims against parent companies for the acts of their subsidiaries abroad. This section will assess some of the procedural and practical factors influencing the feasibility of proceedings in home state courts of TNCs.

5.6.1. The Principle of *Forum Non Conveniens*

Forum non conveniens is a principle of common law that allows a court to exercise its discretion to decline jurisdiction that is clearly vested in it.[295] This is either because the forum selected by the plaintiff may be a suitable one but in the interests of justice there is a 'clearly more suitable forum' in which the case may be more appropriately heard or because the forum selected by the plaintiff is 'clearly inappropriate'.[296] Concerning the liability of TNCs, legal action can be instituted in both host state and home state. A plea for a stay of proceedings in the home state court on the grounds of *forum non conveniens* is usually made by corporate defendants, thus requiring that the plaintiff's case be contested in some other

[295] Rolf H Weber and Baisch Rainer, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2015) *European Business Law Review Accepted Paper* 2015/13. <https://ssrn.co m/abstract= 26 25536> accessed 7 November 2016.
[296] Nygh, (2002) *op.cit.* p. 59.

jurisdiction.[297] For instance in *Goliath Portland Cement Co Ltd* v *Bengtell*, Gleeson CJ held that: 'Certainly, it is appropriate to claim that another forum is "more suitable" where it is argued that most important part of the activities happened in the territory of another country.' The court further stated that: 'The place where a large corporation has its headquarters is a reasonable place in which to commence an action against it.'[298]

The United States and other common law jurisdictions apply the principle of *forum non conveniens*. It has become part of federal procedural law and has been recognised virtually by all states in the United States. Under the principle, a court in the United States with personal and subject matter jurisdiction may, at its own volition, refuse to hear the case where another forum is more suitable and accessible.[299] *Forum non conveniens* is one of the most frequently raised arguments by corporate defendants in favour of a trial elsewhere. It is used to move the proceedings from United States courts into countries where often weaker and less efficient legal regimes are easier to circumvent advantageously.[300] Due to its efficient judicial system to adjudicate mass tort cases together with victim-fair liability laws, victims of human rights violations by TNCs consistently sue in the USA courts for damages. However, for the majority of the victims of human rights abuses from developing host states, the principle poses 'an almost impenetrable obstacle to a sought-after day in an American court'.[301] In fact, the principle serves as a valuable tool to the success and survival of TNCs and 'is a vital defence against perceived multitudes of foreigners seeking to take advantage of liberal, product liability laws designed for the protection of American residents'.[302]

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[297] *Capital Currency Exchange, NV v Natl Westminster Bank PLC* [2d Cir, 1998] 155 F.3d 603, 605, cert denied, [1999] 526 US 1067; *Carlos Abad et al v Bayer Corp et al* [2009] No. 08-1504, 08-2146 9 Appeal from US DC for the Southern District of Indiana) 1 May 2009; Jeremy C Bates, 'Home is Where the Hurt Is: Forum Non Conveniens and Antitrust' (2015) 2000(1) *University of Chicago Legal Forum* 281, 281-3.
[298] [1994] 33 NSWLR 414, 419 (NSWCA Australia).
[299] Peter Blumberg, 'Asserting Human Rights against Multinational Corporations under the United States Law: Conceptual and Procedural Problems' (2002) 50 American Journal of Comparative Law 493, 501.
[300] Clark, (2014) *op.cit.* p. 259.
[301] Shruthi Ramakrishnan, 'Lesson in Transnational Corporate Liability from Bhopal' (2013) *Working Paper*.
[302] *Ibid*,.

The dismissal of the Bhopal claims by the New York District Court conceivably provides the most striking example of such behaviour.[303] In this case, thousands of Indians instituted an action after 'the most devastating industrial disaster in history'. The disaster happened on 2 December 1984 when over 200,000 people died and several thousand were wounded after a gas leakage from a chemical plant owned by an American corporation, Union Carbide, occurred in Bhopal, India.[304] Various class actions concerning claims for damages against the American parent company were filed in the United States District Court of New York but were eventually joined. The government of India made itself the sole plaintiff representing the victims.[305] According to the Chief Justice of the Supreme Court of India: 'These cases must be pursued in the USA … It is the only hope these unfortunate people have.'[306] During that time, the Indian courts were overloaded with a large backlog of cases which could possibly drag on for many years. The idea that the Indian legal and judicial system would be able to deal with the Bhopal lawsuit was 'ludicrous' in the eyes of legal observers.[307] The United States Federal District Court in New York dismissed the claims citing *forum non-conveniens*. The Court found that the Indian courts were the appropriate forum for resolving the case notably because witnesses and evidence were situated on Indian soil.[308]

After the case was dismissed, the Indian authorities secured a deal in 1989 that provided for a 'full and final compensation' of $470 million, comprising all future claims.[309] The woefully inadequate reparations were widely condemned given the extent of the human rights

[303] *In re Union Carbide Corporations Gas Plant Disaster at Bhopal India* [1986] 634 F. Supp. 842.
[304] *Ibid.*, at 844.
[305] Blumberg, (2002) *op.cit.* p. 514.
[306] Upendra Baxi & Thomas Paul, *Mass Disaster and Multinational Liability: The Bhopal Case* (Bombay N M Tripathi Private 1986).
[307] See *Re Union Carbide Corporation v Union of India* [1991] 4 SCC 584, 625-653; see also FE Smith, 'Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening US Court to Victims of Corporate Human Rights Abuses' (2010) 44 *Columbia Journal of Law and Social Problems* 145, 167.
[308] *Re Union Carbide Corporations Gas Plant Disaster at Bhopal India* [1986] 634 F. Supp. 842, 844.
[309] Smith, (2010) *op.cit.* p. 167.

violations perpetrated.[310] The actions and omissions leading to the Bhopal tragedy violated some human rights preserved in the ICCPR and ICESCR, including the rights to life,[311] health,[312] clean water,[313] the environment,[314] and the right to remedy.[315]

In contrast to the situation in the United States, litigation over foreign tort liability claims involving TNCs in the UK has proved to be more promising in holding parent companies accountable for the wrongful acts of their foreign subsidiaries. Although the principle of *forum non conveniens* has flourished in the UK too, English courts have more often than not given substantial weight to the lack of fair and equitable justice in alternative venues and have refused to allow the plea of *forum non conveniens* by TNCs.[316] In the UK, the doctrine of *forum non conveniens* was elucidated and brought to light *in Spiliada Maritime Corporation v Cansulex Ltd*.[317] According to the court, *forum non conveniens* would be appropriate if the defendant could establish that there was another natural forum which was clearly and distinctly more suitable for the hearing of the case. Usually, this is the forum in which the damage takes place; where the evidence can be accessed; and where victims and witnesses are based.[318] The claimant can only stop the dismissal of the claim if he or she can prove that justice cannot be accessed at the alternative venue.[319] Nevertheless, the *Connelly*[320] *Lubbe*[321] and *Thor Chemicals*[322] proceedings in the UK were delayed for a long time due to

[310] Oscar Omar Salazar-Duran, 'A Human Rights Approach to Corporate Accountability and Environmental Litigation' (2009) 43 *University of San Francisco Law Review* 733, 758.
[311] International Covenant on Civil and Political Rights (1966) 999 UNTS 171, art 6.
[312] International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 4, art 12.
[313] UNCESCR, General Comment No 15: 'The Right to Water' (2003), UN Doc E/C.12/2002/11.
[314] International Covenant on Economic, Social and Cultural Rights (1966), art 12.
[315] International Covenant on Civil and Political Rights (1966), art 2; A series of tort liability claims in the USA including *Dow Chemical Co v Castro Alfaro* [1990] 786 SW 2d 674; *Aguinda v Texaco* [2d Cir 2002] 303 F. 3d 473; *Aldana v Del Monte Fresh Produce NA, Inc* [11th Cir. 2009] 578 F.3d 1283and *Sarei v Rio Tinto Plc* [CD Cal 2002] 221 F. Supp. 2d 1116, 1184 were all dismissed on *forum non conveniens grounds*.
[316] Ramakrishnan, (2013) *op.cit*.
[317] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460; *Re Harrods (Buenos Aires) Ltd* [1990] 4 All ER 334 (CA); *Amchem Products Inc v British Columbia (Workers Compensation Board)* [1993] 1 SCR 897.
[318] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 478.
[319] Muzaffer Eroglu, *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (Edward Elgar 2008) 105.
[320] *Connelly v RTZ Corporation* [1998] AC 873.
[321] *Lubbe v Cape Plc* [2000] UKHL 41.

the doctrine of *forum non conveniens*. In *Connelly*, the court spelled out the principle that a claimant who would be denied substantial justice in the local courts due to her inability to pay for lawyers and experts to pursue a case, but who would be able to obtain such representation in the courts where she had instigated her claim, should be allowed to proceed with her claim, despite the fact that the local courts were otherwise the more appropriate venue. [323] There was a similar outcome in *Lubbe v Cape Plc* in which about 3,000 South Africans filed an action for damages in UK courts against the UK company Cape Asbestos for personal injuries suffered as a result of exposure to asbestos during their course of employment with the defendant corporation. The House of Lords refused to dismiss the case based on *forum non conveniens*.[324]

The application of the doctrine in *Connelly* after years of legal battles eventually enabled the *Lubbe* plaintiffs to defeat the *forum non conveniens* argument and proceed with their case in the UK.[325] The *Connelly and Lubbe* litigations are important milestones in holding parent companies liable for the wrongful activities of their subsidiaries abroad. It is worth mentioning that these claims were allowed to continue in the UK, due to the inability of the plaintiffs to engage the services of a lawyer in the natural venue and, also the appropriate forum were not experienced enough to handle a class action that the English system had.[326] The absence of legal aid is not sufficient to 'oust' the appropriate forum, but it became imperative when situated in the broader context of the legal and evidential complexity of the case. The House of Lords agreed with Lord Bingham's analysis in the Court of Appeal that the court was confronted with 'stark choice' between an appropriate forum where there never

[322] *Moses Fan Sithole & Others v Thor Chemicals Holdings Ltd & Desmond John Cowley* [1999] EWCA Civ 706.
[323] *Connelly v RTZ Corporation* [1998] AC 873.
[324] *Lubbe v Cape Plc* [2000] UKHL 41.
[325] *Lubbe v Cape Plc* [2000] 1 WLR 1545. See also, Alex Twanda Magaisa, 'Suing Multinational Corporate Group for Tort in Wake of Lubbe Case' (2001) 2 *Law Social Justice & Global Development Journal* 1, 9.
[326] Magaisa *Ibid.*, p. 1-9.

could be a proceeding and one which, made a hearing possible though 'not the most appropriate'.[327]

A recent ruling of the Court of Justice of the European Union (CJEU) in *Owusu v Jackson* & *Others*[328] has further restricted the ability of defendants in the UK courts from raising the plea of *forum non conveniens*. This case concerned Article 2 of the Brussels Convention which provides that courts of EU Member States must exercise jurisdiction over any person domiciled within their territorial borders, irrespective of the domicile of the plaintiff.[329] In the case, the plaintiff Owusu, a British national domiciled in the UK, brought a suit in the UK claiming damages resulting from injuries incurred while holidaying in Jamaica when he hit his head against a submerged sandbank when swimming. The defendants were an individual domiciled in the UK from whom a holiday home had been rented, and several Jamaican companies allegedly responsible for not giving notice of the hazardous conditions that led to Owusu's swimming accident.[330] The defendants sought dismissal on the grounds of *forum non conveniens* arguing that Jamaica was the more appropriate forum. The case was sent to the CJEU for a ruling on whether the Brussels Convention prohibited relief on the *forum non conveniens* motion when the alternative forum was not a Brussels Convention contracting state. The Court held that the Brussels Convention precluded a court of a contracting state from declining the jurisdiction conferred on it by Article 2 of the Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action even if the jurisdiction of no other contracting state was at issue or the proceedings had

[327] *Connelly v RTZ Corporation* [1998] AC 873.

[328] *Andrew Owusu v N.B. Jackson, Trading as 'Villa Holidays Bal-Inn Villas' and* Others [2005] ECJ, Case C-281/02, 2 WLR 942. See also, Eroglu, (2008) *op.cit.* p. 108.

[329] The case was determined regarding the previous text in force on these matters, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), 1262 UNTS 153, (Brussels) Brussels Convention which has been superseded by Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001), OJ L12/1 (Brussels 1).

[330] *Owusu v Jackson* [2005] *Ibid.*, para 10-16.

no connecting factors to any other contracting state.[331] The effect of the judgment of the CJEU was that despite the fact that the UK had no link with the swimming hazard and Jamaica was the appropriate venue for the proceedings, Owusu was allowed to institute the legal action in an English court. Although the obstacles of *forum non-conveniens* with regard to bringing a lawsuit against TNCs in home states for their abusive activities abroad are becoming fewer in the UK, the *Owusu* ruling has finally closed the door entirely on the plea of *forum non conveniens* by an English court.[332] It is therefore important to note that Article 2 of the Brussels Convention is important for victims of European-based TNCs who have suffered injuries overseas because it lets litigants from host states such as Nigeria sue European-based businesses in their home states court irrespective of where the injury takes place or who the claimants are.

In September 2011, a mass claim was filed by South African mining silicosis victims in the UK High Court against Anglo American South Africa Ltd (AASA), which is owned by London-based multinational mining giant, Anglo American plc, and AngloGold Ashanti Limited (AngloGold).[333] The plaintiffs argued that because the 'central administration' and/or 'principal place of business' of AASA now, the parent company was in England, not South Africa that is why they were able to institute the case in London. And under Article 60 of the Brussels I Regulation, courts have jurisdiction over defendants domiciled in their jurisdiction.[334] The domicile of a company includes where it has its 'statutory seat' or central administration or principal place of business. The defendant AASA disputed jurisdiction of the English court based on based on Article 60(1) (b) of the Brussels I Regulation, in which the company was ordered to provide disclosure of certain categories documents concerning to

[331] *Owusu v Jackson* [2005] *Ibid.,* para 46
[332] 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* 939, 960.
[333] *Vava & Ors v Anglo American South Africa Limited; Young v Anglo American South Africa Limited* [2012] EWHC 1969 (QB).
[334] *Ibid,.*

its central administration.[335] In 2013, the Court upheld AASA's argument concerning jurisdiction.[336]Eventually, the claimants appealed against the decision to the UK Court of Appeal, and the appeal was refused.[337]

In other jurisdictions, such as Norway and Canada, courts have consistently followed the *Spiliada Maritime* case to decline jurisdiction.[338] In Canada, courts usually decline jurisdiction not because it considers itself an unsuitable forum for the trial but because it believes that another forum is clearly better suited based on factors that link the proceedings and the parties to either forum.[339] In *Amchem Products, Inc v British Columbia (Workers Compensation Board),* the Supreme Court of Canada has identified the following factors in determining whether to decline jurisdiction.[340] This includes the residence of the parties, the witnesses and the location of the evidence, the applicable law, the cost and effect of transferring the matter to another forum, the effect of a transfer on the conduct of the proceedings and, ultimately, the interests of justice.[341] Moreover, in *Club Resorts Ltd*[342] the Canadian Supreme Court found that in order for a court to dismiss a case on the basis of

[335] *Ibid.*, at 8.
[336] *Vava & Ors v Anglo American South Africa Limited; Young v Anglo American South Africa Limited* [2013] EWHC 2131(QB) [66].
[337] *Young v Anglo American South Africa Limited* [2014] EWCA Civ 1130. It should be noted that *Vava* and other claimants did not challenge the decision of Andrew Smith J.
[338] Joost Blom, 'Concurrent Judicial Jurisdiction and Forum Non Conveniens - What is to be Done' (2009) 47 *Canadian Business Law Journal* 166, 171; *Recherches Internationales Quebec v Cambior Inc* [1998] QJ No 2554 (Superior Court of Quebec, Canada).
[339] Court Jurisdiction and Proceedings Transfer Act, SBC, c28 §11. The statute reads: '(1) after considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding; (2) a court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum, (b) the law to be applied to issues in the proceeding, (c) the desirability of avoiding multiplicity of legal proceedings, (d) the desirability of avoiding conflicting decisions in different courts, (e) the enforcement of an eventual judgment, and (f) the fair and efficient working of the Canadian legal system as a whole.' This statute was intended to codify the common-law test. *See Teck Cominco Metals Ltd. v Lloyd's Underwriters* [2009] 1 SCR 321, para 22 (Can). In addition, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to jurisdiction and to the doctrine of forum non conveniens that reads substantially the same. See Court Jurisdiction and Proceedings Transfer Act, SBC c28; *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572, paras 40-41 (Can).
[340] Chilenye Nwapi, 'Re-Evaluating the Doctrine of *Forum Non Conveniens* in Canada' (2013) 34 *Windsor Review of Legal and Social Issues* 59, 68.
[341] *Amchem Products, Inc v British Columbia (Workers Compensation Board)* [1993] 1 SCR 897.
[342] *Van Breda Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 paras 101-112.

forum non conveniens, the defendant must prove the existence of an alternative forum that is 'clearly more appropriate', and take into account that the alternative forum is better suited to litigate the matter in the interests of all the parties and the ends of justice.[343]

Another Canadian case, *Recherches Internationales Quebec v Cambior Inc*, was also dismissed on the grounds of *forum non conveniens*. In this case, a claim against a Canadian mining corporation was brought by a public interest group after the spill of cyanide-contaminated tailings at a place occupied by its affiliate in Guyana.[344] The case of *Bil'in (Vill. Council) v Green Park Int'l* was also dismissed by the Quebec Superior Court on the grounds of *forum non conveniens*, stating that there was little connection between Quebec and the human rights abuses perpetrated in Palestine and it would be more appropriate to litigate the case in Israel.[345] In the case, the Village Council of Bil'in (Palestine) instituted an action against Green Park International Ltd in the Superior Court of Quebec, Canada for aiding and abetting war crimes on Palestinian land.[346]

Although *forum non conveniens* stands as an obstacle for victims of corporate human rights abuses who are from the developing world to access adequate justice in the home state of TNCs, these countries can play a significant role in ensuring that their inefficient legal regime and regulatory instruments do not hamper justice for victims. For example, the case of Chevron in Ecuador indicates how developing states can exercise jurisdiction favourably and play a role in holding TNCs accountable for their acts within the country.[347] A class action for injuries was instituted in the District of New York by about 30,000 Ecuadorians against Chevron for the serious human rights violations perpetrated by long-term dumping of toxic waste in Ecuador as a result of oil exploration by Texaco (a subsidiary of the parent company

[343] *Ibid.*, paras 109.
[344] [1998] QJ No 2554 (Superior Court of Quebec, Canada).
[345] *Bil'in (Vill. Council) v Green Park Int'l* [2009] QCSC 4151, para 335.
[346] Motion Introducing a Suit, *Bil'in (Village Council) & Ahmed Issa Yassin v Green Park Int'l, Inc* [2008] No. 500-17-044030-081 (Superior Court, Province of Quebec, District of Montreal).
[347] Ramakrishnan, (2013) *op.cit.*

Chevron).[348] Predictably, Texaco moved for the dismissal of the claim on *forum non conveniens* grounds and argued that Ecuador provided a fair and adequate alternative forum and this was ultimately granted. The litigation continued in Ecuador and the Ecuadorian court handed down a judgment ordering Chevron to pay the claimants the sum of US $18 billion as damages.[349] On appeal, the Ecuadorian Court reduced the amount to US $9 billion. Notwithstanding the reduction in damages, the US $9 billion judgment was still a significant success for Ecuadorians against Chevron and an unusual occasion when a *forum non conveniens* dismissal turned in favour of the plaintiffs. Unfortunately, none of the money has been paid yet.[350]

5.6.2. Political Questions

Nonjusticiable doctrines such as the political question, act of state and comity have created another substantial burden in ATCA litigation for corporate human rights violation. Although distinct principles they are correlated because they all have to do with the fact that the conduct that constitutes ATCA litigation are likely to have perpetrated abroad.[351] Under the political questions doctrine allows the American courts to decline jurisdiction when the cause of action raises political issues within the domain of the executive and legislative branches of government.[352] During the (George W) Bush administration, the US Department of State and Department of Justice carried out a comprehensive attack on the ATCA, reprising arguments

[348] *Aguinda v Texaco* [2d Cir 2002] 303 F.3d 476.
[349] Business and Human Rights Resource Center, 'Texaco/Chevron lawsuits (Re Ecuador)' <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> accessed 20 April 2015; Howard Erichson, 'The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy' (2013) 1(2) *Stanford Journal of Complex Litigation* 417, 418.
[350] Simon Romero & Clifford Krauss, 'Chevron Is Ordered to Pay $9 Billion by Ecuador Judge' *The New York Times* (New York, 14 February 2011).
[351] Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge 2016)267.
[352] Oxford Pro Bono Publico, 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse' (A Comparative Submission Prepared for John Ruggie, UNSG Special Representative on Business and Human Rights, 3 November 2008) 322; Jodie A Kirshner, 'Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe: Extraterritoriality, Sovereignty and the Alien Tort Statute' (2012) 30(2) *Berkeley Journal of International Law* 259, 276.

against admissibility of international law into US courts for judicial enforcement abroad and raising new challenges to the extraterritorial basis of the statute itself.[353] The Department of State, in *Sarei v Rio Tinto,* submitted a brief that said 'continued adjudication of the claims … would risk a potentially serious adverse impact … on the conduct of our foreign relations'.[354] The same assertion was submitted in *ExxonMobil* together with an affidavit from the Indonesian ambassador stating that Indonesia 'cannot accept' a suit against an Indonesian government institution and the United States courts should not be deciding 'allegations of abuses of human rights by the Indonesian military'.[355] The Bush administration prompted the Supreme Court review of *Sosa's* decision in which the Court ultimately narrowed the reach of the ATCA significantly.[356] Its letter in support of the petition for certiorari maintained that 'the ATCA cannot properly be construed to permit suits requiring United States courts to pass factual and legal judgment on these foreign acts'.[357] In a more recent case of *Corrie v. Caterpillar,*[358] the Ninth Circuit affirmed the dismissal of a case filed by Center for Constitutional Rights (CCR) against Caterpillar in District Court for the Western District of Washington on grounds of political question doctrine. [359]In the case, Caterpillar was accused of aiding and abetting international human rights violations by selling its bulldozers to Israel knowing they would be used illegally to demolish Palestinian homes in violation of international law.[360] The Ninth Circuit Court held that it lacks jurisdiction to determine the

[353] Kirshner, (2012) *Ibid.,* p. 274.
[354] Letter from William H Taft IV, Legal Adviser of the US Department of State, to J Robert D McCallum (32 October 2001) in *Sarei v Rio Tinto* [CD Cal 2001] No. 00-11695 (MMM) (AIJx).
[355] Quoting letter from William H Taft IV, Legal Advisor to the US Department of State, to the U.S. District of Columbia District Court (29 July 2002)) in *Doe v ExxonMobil Corp* [DDC 2002] No. 01-1357 (LFO).
[356] Brief for the United States in Support of the Petition for a Writ of Certiorari, *Sosa v Alvarez-Machain,* [2004] 542 U.S. 692 (No. 03-339).
[357] *Ibid,.*
[358] *Corrie v. Caterpillar, Inc.* [9th Cir. 2007] 503 F.3d 974, 980-84.
[359] *Corrie v. Caterpillar, Inc*. [W.D. Wash. 2005] 403 F. Supp. 2d 1019
[360] On the vast literature on the case, see Kristina Maalouf, 'The Political Question Doctrine in the Ninth Circuit and Why It Should Not Have Barred the Adjudication of *Corrie v. Caterpillar'* (2014)44(1) *Golden Gate University Law Review* 35, 37.

case because adjudication would question the foreign policy decision of the political branches of the US government to fund all of the Caterpillar bulldozers sold to Israel.[361]

5.6.3. Comity

The doctrine of international comity was defined in the case of *Hilton v Guyot* as 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws'.[362] The doctrine of comity is usually applied where the exercise of jurisdiction would be inappropriate due to the connection of the interests of foreign states in the case.[363] The doctrine is exercised by American courts to decline jurisdiction over matters where there is a conflict of law between the legal systems of the USA and a foreign state.[364] Comity is a discretionary concept and to some extent an act of courtesy rather than a binding legal obligation on the court. In *Sarei v Rio Tinto*, comity also arose in which the court balanced the United States policy interest in exercising jurisdiction with that of Papua New Guinea in desisting from such an exercise.[365] This is one of the bases on which the United States federal Court in New York declined jurisdiction over three *Texaco* cases that concerned Texaco's oil operations which polluted the rainforests and rivers in Ecuador and Peru between 1964 and 1992.[366] In these claims, the trial court used a 'balancing' standard test to ascertain the

[361] *Corrie v. Caterpillar, Inc.* [9th Cir. 2007] 503 F.3d 974, 982.
[362] *Hilton v. Guyot* [1895] 159 U.S. 113, 164.
[363] Joseph, (2004) *op.cit.* p. 46.
[364] Donald Earl Childress III, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010) 44(11) *University of California Davis* 13, 13-14; Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 136-7; Russell J Weintraub, 'The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a Choice-of-Law Approach' (1992) 70 *Texas Law Review* 1799, 1801-4.
[365] *Sarei v Rio Tinto Plc* [CD Cal 2002] 221 F. Supp. 2d 1116, 1184: *Presbyterian Church of Sudan v Talisman Energy* [ADNY 2003] 244 F. Supp. 2d at 343; Lucien J Dhooge, 'The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism' (2003) 35 *Georgetown Journal of International Law* 3, 90.
[366] *Aguinda v Texaco, Inc* [SDNY 1996] 945 F. Supp. 625, 627; *Jota v Texaco, Inc* [2d Cir, 1998] 157 F.3d 153, 158-61; *Sequilhua v Texaco* [SD Tex 1994] 947 F. Supp. 61. The Ecuadorian government unwillingness for the

different conflicting policy interests in the subject matter before resolving that an exercise of jurisdiction would not be proper.[367]

5.6.4. The Act of State Doctrine

An American court will refuse to hear a case under the doctrine of act of state when the act committed involves another foreign sovereign state's conduct within its jurisdiction.[368] In *Banco National de Cuba v Sabbatino*, the United States Supreme Court found that the act of state doctrine precluded American courts from adjudicating on public activities perpetrated by recognised foreign sovereign states within its territorial boundary.[369] In *Siderman de Blake v Republic of Argentina* it was stated that 'the act of state doctrine reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress'.[370] In *Sarei*, the United States District Court in California held that courts find that a claim is barred by the act of state doctrine only if (1) it involves an official act of a foreign sovereign, (2) is performed within its own territory, and (3) seeks relief that would require the court to declare the foreign sovereign's act invalid.[371]

5.6.5. Costs and Resources Influencing the Feasibility of Proceedings in Home State Courts of Transnational Corporations

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trial of the cases to be in the USA was a key factor in the federal court's decision to decline jurisdiction under international comity doctrine.

[367] *Aguinda v Texaco, Inc* [2d Cir, 2002] 303 F.3d 470, 480.

[368] *Bigio v Coca-Cola Co* [2d Cir, 2000] 239 F.3d 440, 451-53; *Presbyterian Church of Sudan v Talisman Energy, Inc* [SDNY 2003] 244 F. Supp. 2d 289, 344-46; *Sarei v Rio Tinto PLC* [CD Cal 2002] 221 F. Supp. 2d 1116, 1183-93; *Doe v. Unocal Corp* [CD Cal 1997] 963 F. Supp 880, 892-95.

[369] *Banco National de Cuba v Sabbatino* [S.Ct. 1964] 376 US 398, 428.

[370] *Siderman de Blake v Republic of Argentina* [9th Cir 1992] 965 F.2d 699, 707; *Iwanowa v Ford Motor Co* [DNJ 1999] F. Supp. 2d 424.

[371] *Sarei v Rio Tinto Plc* [CD Cal 2002] 221 F. Supp. 2d 1116, 1184.

Given the possibility of litigation in the home state courts of TNCs, the consequence of practical barriers in which these cases can be brought cannot be overemphasised.[372] Except for a few exceptions, plaintiffs' lawyers in TNC home states have exhibited a distinct lack of interest in taking on such claims. These claims are inevitably complicated, hard-contested by TNCs, precarious and capital intensive. They are expensive to fund, of indefinite duration and outcome, and have substantial flow insufficiency for the plaintiffs' legal representatives. In addition, the extent of the financial risk means that only legal practitioners who are proficient in this area may feel sufficiently bold to undertake the risk or, to put it differently, the alleged risk for new lawyers to this area is even higher. By contrast, the TNC's lawyers are well-funded on an ongoing basis, irrespective of the outcome. However, if these claims succeed, they may be extremely profitable which intensifies the financial incentives for plaintiffs' lawyers with proficient and adequate resources to undertake such work.

The tort litigation culture, especially the payment of punitive damages in the United States is aided by civil procedural laws uniquely favourable to foreign liability claims.[373] Certainly, they do not merit comparison with European legal frameworks, specifically because most of these issues fall beyond the scope of the EU's regulatory framework and differ amongst Member States. The United States has a unique public interest litigation tradition.[374] In the United States, foreign civil liability litigation has long been used to advocate social change and affect future guidelines, as well as to remedy past wrongful acts and prevent future events from happening.[375] The United States has well-structured and dedicated public-interest non-profit law firms funded through tax-deductible donations that undertake these cases for free.

[372] Enneking, (2012) *op.cit.* p. 136.
[373] Beth Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27(1) *Yale Journal of International Law* 1, 14.
[374] Helen Hershkoff, 'Public Interest Litigation: Selected Issues and Examples, Washington, DC' (2005) The World Bank 1, 3; *Brown v Board of Education* (1954) 347 US 483.
[375] Liesbeth Enneking, 'Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases' (2009) 40 *The George Washington International Law Review* 903, 931.

[376] In addition, the United States has a culture of providing *pro bono* legal services to low-income people rendered by private law offices and civil society organizations.[377] Most importantly, the US is perhaps an attractive forum to institute an action mainly because the losing parties are not required to pay the opponent's costs except if the case is considered extremely vexatious.[378] Other circumstances that have offered a uniquely supportive environment for foreign liability lawsuits in the United States are the possibility for litigants to engage a lawyer on a contingency-fee arrangement; the potential for a grant of punitive damages; and the potential for American courts to award a default judgment against an absent defendant.[379]

However, apart from the UK, where there is limted scope, a similar environment does not exist in the rest of Europe, which is home to a significant proportion of TNCs that operate in developing host countries. For instance, the European Commission recently noted that the rules of civil liability in Europe are no longer focused on promoting good social behaviour but rather toward remedying the damage experienced.[380] Rouhette points out that this litigation culture of the civil law countries in continental Europe which usually regard civil law as a device that cannot adequately prevent and punish abusive conduct, and perceive the protection of the public interest to be within the domain of criminal law.[381] Despite the EU's attempt to synchronise its Member States' civil procedure rules, of which the Brussels I and the Rome II Regulations are a consequence, most of these procedural and practical concerns

[376] Stephens, (2002) *op.cit.* p.14.
[377] Ruggie, (Oxford Pro Bono Publico 2008) *op.cit.* p. 327.
[378] Stephens, (2002) *op.cit.* p. 12-13.
[379] Joseph, (2004) *op.cit.* p. 16-17; *Beckwith v Bean* [1878] 98 US (8 Otto) 266, 277 - the court said that: 'The principle of permitting damages, in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt, and malignant motive and design which prompted him to the wrongful act' *Browning-Ferris Industries of Vermont, Inc v Kelco Disposal*, Inc [1989] 492 US 257, 275.
[380] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (2007), OJ L 199 (Rome II).
[381] Thomas Rouhette, 'The Availability of Punitive Damages in Europe: Growing Trend or Nonexistence Concept?' (2007) 74 *Defence Council Journal* 320, 321-2.

are not within the EU's scope of authority. They are being controlled by the domestic laws and practices of each state party, and they differ from state party to state party.[382]

In the UK, *Connelly, Lubbe* and *Thor Chemicals* were publicly funded by the Legal Services Commission. This implies that the victims' lawyers received regular payments for legal services rendered, although in very low amounts.[383] At present, cases are run based on a no-win-no-fee agreement, a practice allowed by law in South Africa,[384] Australia[385] and the UK.[386] No-win-no-fee arrangement is a conditional fee agreement between litigants and lawyers which means lawyers' fees are only paid if they win but they may charge an 'uplift fee' on their costs if they do win.[387] This injury-sharing agreement has also been recognised in Canada. Another benefit to plaintiffs bringing a claim in the UK has been that the cost uplift (or 'success fee') is to be paid by the unsuccessful defendant instead of being paid out of the victim's reparation.[388]

One example of a European law firm that specialises in foreign civil liability claims is the UK firm Leigh Day. Leigh Day is the leading law firm in the UK that takes on foreign liability cases and the majority of its UK business and human rights cases litigated to the final judgment turn out to be successful.[389] However, this model has been threatened by the recent *Legal Aid Sentencing and Punishment of Offenders Act 2012* (LASPO). One of the implications of the LASPO was to reduce the recovery of fees and costs available to litigants

[382] Enneking, (2009) *op.cit*. p. 932-3.
[383] Meeran, (2011) *op.cit*. p. 18.
[384] South African Contingency Fee Act (1997).
[385] For example, see Legal Profession Act (2004) (Vic) ss 3.4.27 and 3.4.28.
[386] UK Court and Legal Service Act (1990), ss 58 & 58A; Richard Meeran, 'Cape Plc: South African Mineworkers' Quest for Justice' (2003) 9(3) *International Journal of Occupational and Environmental Health* 218, 223.
[387] Paul Fenn er al, 'No win, no fee, cost-shifting and the costs of civil litigation: A natural experiment' (2014) *BAFFI Center Research Paper Series* 152/2014 2-3; Peter Melamed, 'An Alternative to the Contingent Fee - An Assessment of the Incentive Effects of the English Conditional Fee Arrangement (2006) 27(5) *Cardozo Law Review* 2433, 2436.
[388] *Mclntyre Estate v Ontario (Attorney General)* [2001] OJ 713.
[389] Michael Goldhaber, 'Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard' (2013) 3 UC *Irvine Law Review* 127, 131.

of human rights abuses.[390] Parliament alleviated the rule slightly by removing the 'loser pays' regulation for victims' personal injury but not for environmental claimants. Leigh Day's funding model gave it the ability to recoup defendants' full legal fees, success fees and insurance premiums for the proceedings that safeguarded victims from the risk of protecting a successful defendant's costs.[391] This limitation on the cost of a legal action combined with the introduction of Articles 4 and 15 of the Rome II Regulation are likely to produce a significant reduction in damages awards for developing host state applicants. This would actually rule out the recovery of success fees in TNC litigation and consequently make it hardly worth it for law firms such as Leigh Day to take on foreign direct liability claims from the few claimants still keen to go forward, such as those in the *Monterrico* and *Thor* claims. This would also make human rights an unattractive arena for UK law firms to move in to.[392]

5.7. Conclusion

It is submitted that under international law a home state may incur an obligation to regulate extraterritorial activities of its businesses operating abroad or operating under the command, direction or control of the home state.[393] Likewise, under current international human rights law, although there is no clear state obligation to regulate the activities of their TNCs extraterritorially, current practice by treaty bodies makes it clear that there is an emerging requirement on home states to control the activities of their TNCs abroad. However, it is debateable whether this somewhat restricted practice, by some treaty bodies, is enough to infer that states now have extraterritorial obligations to prevent and remedy human rights within the business and human rights sphere.[394]

[390] UK Ministry of Justice Royal Assent for Legal Aid Sentencing and Punishment of Offenders Bill (2012).
[391] Goldhaber, (2013) *op.cit.* p. 133.
[392] *Ibid.*, p. 134.
[393] McCorquodale and Simons, (2007) *op.cit.* p. 605.
[394] Bernaz, (2013) *op.cit*. p. 505.

In recent times, attempts have been made by some home states to enact legislation designed to regulate their TNCs' foreign operations with a view to protecting human rights. Although the Bills represent a genuine effort to resolve an existing issue over the course of a decade (2000-2010) by four home states of TNCs in order to promote corporate accountability for human rights violations, the Bills were never formally debated, and the proposals were all withdrawn from the legislative agenda.[395]

Yet it would seem that home states, through some form of extraterritoriality ought to have a role to play in holding TNCs accountable for human rights violations they commit abroad. In fact, victims of human rights violations by TNCs have increasingly utilised home state courts in seeking remedies and justice. However, litigating human rights abuses against TNCs in home state courts has not been an easy process for the victims. Cases against TNCs have been pursued before home state courts on the basis of the tort of negligence in order to hold parent companies of TNCs liable for damages to be paid to the victims of human rights abuses who are from host countries in the developing world. The mismatch between integrated corporate structures and the lack of an integrated international system of tort law continues to pose a real hurdle in regulating the activities of TNCs through tort liability litigation. In general, it is challenging to gain legal remedies for violations of human rights *per se* directly against corporate entities in home state courts. Although the importance of ATCA cannot be underestimated, it does not provide an efficient and foreseeable avenue to seek remedies and justice for victims of corporate exploitation across the globe.[396] Its practical application is, however, restricted to the United States and is a somewhat blunt sword when used as a tool to impose corporate accountability.

[395] Morimoto, (2005) *op.cit*. p. 159.
[396] Natalya S Pak and Nussbaumer P James, 'Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses (2009*) Hertie School of Governance, Working Paper* 45/2009, 29; Reinschmidt, (2013) *op.cit*. p. 109.

Increasingly, home state courts are facing foreign liability claims against their TNCs for violating human rights in developing host countries. Although increasing rapidly, the number of foreign liability cases brought so far remains limited; only a handful of these cases have resulted in a decision on the merits. Until now, only a few of these cases have actually made it to the hearing; a considerable number of lawsuits, such as *Unocal*, *Cape plc* and *Trafigura*, have been resolved in out-of-court settlements. Furthermore, a good number of foreign civil liability cases have been dismissed at pre-hearing stages before a full hearing due to jurisdictional challenges or other procedural and practical factors peculiar to them.

Accordingly, as potential perpetrators of human rights violations, TNCs have numerous ways to evade legal proceedings in their home states. As such, an international legal instrument may be required to ensure victims of corporate human right abuse have access to effective legal remedies and justice in TNC home states. This chapter therefore recommends the adoption of an international instrument by states which illuminates extraterritorial home state obligations to prevent and remedy human right violations committed by their TNCs abroad.[397] This may be followed by the adoption of a domestic legal system which imposes liability on a parent company for human rights violations committed by its subsidiary abroad.[398] Once it is recognised as a matter of law, most of the problems that have been presented against extraterritorial home state regulation of TNC activities may be overcome more easily. Recent attempts by some countries to develop the National Action Plans (NAP) for the implementation of Ruggie's Guiding Principles and Framework at the domestic level are a first step in the right direction.[399]

[397] See, for example, Business and Human Rights Resource Centre, 'Binding Treaty, UN Human Rights Council Sessions' <http://business-humanrights.org/en/binding-treaty> accessed 4 November 2016.

[398] For instance, the Alien Tort Claims Act (1789) (ATCA) in the USA is a piece of legislation upon which, since the late 1990s, victims of transnational corporate human rights abuses increasingly rely upon to obtain justice for the negative human rights impacts of US companies abroad. To date, however, this has had little success.

[399] For example, The UK developed National Action Plans (NAP) entitled, Good Business: Implementing the UN Guiding Principles on Business and Human Rights 2013. Other countries that have issued the National Action Plans (NAP) include the Netherlands, Italy and Denmark. See generally, United Nation Human Rights

To this end, once the idea of extraterritorial home state regulation becomes familiar, policy makers and NGOs could start campaigning for a more inclusive and binding legal instrument such as a treaty, while calling on states to enact appropriate legislation on their extraterritorial obligations concerning the activities of their TNCs abroad. It is important to note that home state regulation does not diminish the legal duty of host states to protect human rights. In a statement, which specifically addressed home state obligations, the Human Rights Committee declared that TNCs headquartered in their territory should take steps to prevent human rights violations overseas 'without … diminishing the the obligations of the host States under the Covenant'.[400]

CHAPTER 6
HOST STATE REGULATION OF TRANSNATIONAL CORPORATIONS

6.1. Introduction

While states may be able to make legislative and administrative changes to uphold and promote human rights, the role of enforcing international human rights norms and standards

Office of the High Commissioner (OHCHR), 'State National Action Plans' <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> accessed 7 November 2016.

[400] UNCESCR, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights (2011), UN Doc E/C.12/2011/1, para 5.

is entrusted mainly to domestic judicial remedies.[401] This also applies to cases of corporate human rights violations, since, as discussed in previous chapters, there is no meaningful international process to hold transnational corporations (TNCs) directly liable.[402] As concluded in chapter five, victims of corporate human rights abuses have increasingly utilised home state courts in seeking remedies and justice. However, suing TNCs in home state courts for human rights committed abroad has not been an easy route for the victims. While this statement is generally true, this thesis argues that there cannot be successful regulation and adjudication of TNCs at both the international and regional level without a similar development of a minimum legal and institutional structure by the host state at national level.[403] However, the regulation of TNCs by host states – which are more often than not developing countries – does not work for a number of reasons. These will be given below.

The primary objective of this chapter is to analyse whether domestic courts within developing host states have the potential to provide effective remedies and justice for the victims of corporate human rights abuses. To achieve this objective, the first part of the chapter analyses the role of the host state in providing an effective remedy and justice for victims of human rights violations by TNCs operating in their territory and the various obstacles that undermine the effectiveness of host states' regulatory regimes or judicial systems. The second part of the chapter uses Nigeria as a case study with particular attention paid to the landmark Nigerian cases of *Shell*[404] and *Pfizer,*[405] to assess both the extent of human rights violations committed

[401] Jacob Abiodun Dada, 'Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal' (2013) 10 *Journal of Law, Policy and Globalization* 1, 1; Iman Prihandono, 'Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries' (2011) 3(7) *Journal of Law and Conflict Resolution* 89, 90.

[402] David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 933, 934.

[403] Thomas Mclnerney, 'Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2007) 40 *Cornell International Law Journal* 171, 189-90.

[404] *Irou v Shell-BP* (Unreported Suit No. W/89/71 in the Warri High Court; *Chinda v Shell-BP* [1974] 2 RSLR 1; *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited, the Nigerian National Petroleum Corporation and the Attorney General of the Federation* Decision Federal High Court of Nigeria in the Benin Judicial Division Holding at Court in Benin City [2005] Unreported Suit No FHC/B/CS/53/05.

by TNCs in developing host states like Nigeria, and how these entities have been dealt with by the Courts at domestic. This section, therefore, seeks to answer the specific question about the role and potential of domestic courts within developing host countries to provide effective remedies for victims in the context of corporate human rights abuses. It further evaluates the Nigerian legal and institutional framework with a view to determining the existence of legal, practical and procedural barriers, whilst presenting the remedies sought and achieved for corporate human rights abuses in these cases. The last part of the chapter will suggest ways and means of tackling the problems which undermine host state control of TNCs so as to enhance greater access to justice and remedies to victims of corporate human rights violations. As stated above, the main aim of this chapter is to identify whether domestic courts of developing states are willing and able, and whether the states themselves have the political will, to provide a remedy for the victims of corporate human rights abuses.

6.2. Regulating the Activities of Transnational Corporations by Host States

Basic principles of state sovereignty imply that each state has the authority and responsibility to lay down rules and development policies through its national regulation and law enforcement mechanisms.[406] As discussed in chapter two, under international law, the state is the principal duty bearer to guarantee that TNCs do not violate human rights where they operate, and to seek appropriate remedies in cases where any human right abuse has taken place.[407] This combination of factors places a significant onus upon the host state i.e. the state

[405] *Abdullahi 1 v Pfizer, Inc* [SDNY, 2002] US Dist LEXIS 17436 at 1; *Abdullahi II v Pfizer, Inc* [2d Cir NY, 2003] *77* Fed Appx 48, US App LEXIS 20704; *Abdullahi III v Pfizer, Inc* 2005 [SDNY, 2005] US Dist LEXIS 16126, all arose from this incident.

[406] Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 645; See also Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 299; Andrew Clapham, *Human Rights Obligation of Non-State Actors* (OUP 2010) 526.

[407] International Covenant on Civil and Political Rights (1966), 999 UNTS 171 art 2; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) para 18 (Maastricht Guidelines); UN Human Rights Committee, General CommentNo 16: 'Article 17 The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (1988), HRI/GEN/1/Rev.9 (Vol. I); UN Human

that plays host to a TNC, as opposed to the state where it is headquartered (home state). Thus, as a matter of principle, the obvious source of corporate accountability is regulation by the host country in which the violations take place, which as a general rule no other state should interfere with (as discussed in chapter four in the context of jurisdiction).

Owing to the extensive debate regarding victims of corporate human rights violations, international human rights law now requires states to 'identify mechanisms, modalities, procedures and methods of implementation of existing legal obligations' aimed at protecting human rights.[408] This obligation *inter alia* includes providing an effective and independent domestic judicial instrument and a fair trial as well as providing for sanctions and remedies.[409]This obligation has also been reaffirmed by the *UN Guiding Principle* whereby states are required to take appropriate domestic judicial measures to ensure victims of corporate human right abuses get proper access to effective remedies as well to reduce possible legal and practical factors that will impede access to such remedies and justice.[410] For instance, if *Costco*, an American wholesale corporation which runs a large merchandising operation in the UK, were to violate human rights in the process (for example, by discriminating against employees), then it would be the UK's responsibility to enforce the employees' rights.

Rights Committee, General Comment No 10: 'Article 19 Freedom of Expression' (1983); UN Committee on the Elimination if Racial Discrimination, General Recommendation 20 on Article 5: 'Non-Discriminatory Implementation of Rights and Freedoms' (1996) HRI/GEN/1/Rev.9 (Vol. I); CEDAW, General Recommendation 19: 'Violence against Women' (1992) UN Doc A/47/38, para 9; UN Declaration on the Elimination of Violence against Women, (1993), UN Doc A/RES/48/104, art 1; and Universal Declaration of Human Rights (1948), UN Doc A/10, para 8.

[408] Sarah Joseph, 'Liability of Multinational Corporations' in Malcolm Langford (edn), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 613; see, generally, Shaw, (2008) *op.cit.* p. 645; Brownlie, (2008) *op.cit.* p. 299.

[409] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (1990) E/1991/23; CESCR, 'General Comment No. 9: The Domestic Application of the Covenant' (1998), E/C.12/1998/24, para 10.

[410] UNHRC, Report of the UN Special Representative of the Secretary-General on the issue of human rights and Transnational Corporations and Other Business enterprises; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (2011), UN Doc A/HRC/17/31, para 25-6.

Reliance on the host state to enforce human rights norms against TNCs means that protecting people's rights and interests is dependent on the effective functioning of the host country's regulatory framework, the agencies charged with ensuring its functioning, and its judiciary, which would be required to step in, at the behest of litigants, should violations occur.[411] The next section will examine the obstacles that can arise to hamper the success host state regulation of TNCs for human rights violations committed within the host state's territory.

6.2.1. Obstacles to the Success of Host State Regulation

Despite the straightforward principle articulated above, it remains difficult for host states to actually hold TNCs liable for their human rights abuses. These difficulties stem from the unique nature of TNCs in that they are international, mobile and powerful.[412] The following paragraphs will review a number of potential obstacles including the absence of strong legal mechanisms; a lack of capacity to implement human rights norms; a lack of political will or interest; a lack of financial, human and institutional resources; and public corruption which is prevalent in developing host countries. All these obstacles can arise to hamper the success of host-state regulation of TNCs activities violating human rights.

[411] Natalie L Bridgeman and David B Hunter, 'Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism' (2008) 20(2) *Georgetown International Environmental Law Review* 187, 195.

[412] Todd Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order' (2004) 27(2/8) *Boston College International and Comparative Law Review* 429, 433; He stated that: [The] international scene is no longer just about formal, diplomatic relations between countries it has witnessed the emergence of increasingly powerful non-state actors; powerful in the sense that their activities have a significant and direct impact on the lives of millions of people ... The problem is that their power is not matched by a corresponding degree of responsibility and accountability. Some MNEs have a budget that far exceeds that of many developing countries and still, there is no mechanism to hold them accountable for the violations of human rights that their activities generate. In many developing countries where these MNEs operate, the rule of law is ineffective; there are no legal remedies, and no possibilities of redress which goes to say that the MNEs can act with near-total impunity.

6.2.1.1. The Absence of Strong Legal Mechanisms and Institutions

Traditional dependence on the host state duty to protect human rights largely relies on an effective and functioning domestic legal system and institutions that will ensure TNCs are accountable for human rights abuses they have committed either directly or indirectly.[413] In this regard, many of the developing host countries lack the institutional and legal frameworks required to regulate the activities of TNCs that operate in their territories.

Even in countries where an established legal system exists, most of the laws are out-dated and need to be amended to meet the current trends.[414] The punishments (both monetary and general sanctions) imposed for human rights abuses by TNCs in some countries are too small to discourage human rights abuses.[415] As an example, Nigeria has a well-established legal system that purports to regulate the activities of TNCs. However, its regulatory regime has failed to prevent and remedy human rights violations committed by TNCs.[416] The reason for this is simple. The Nigerian government has a 55% stake in the Shell Petroleum Development Company of Nigeria Ltd (SPDC) by virtue of their joint venture arrangement.[417] Therefore, enforcing a human rights standard that requires significant payment of compensation would eventually reduce profits, clearly against the interest of the government and its partners. This is because expenses borne by the company are apportioned accordingly to the government. Because domestic incomes of developing host countries mainly rely upon the activities of TNCs, the governing bodies of these countries, perhaps justifiably in the interest of the more

[413] Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as Potential means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 1, 26.
[414] Tetsuya Morimoto, 'Growing Industrialisation and our Damaged Planet: The Extraterritorial Application of Developed Countries Domestic Laws to Transnational Corporations Abroad (2005) 2(1) *Utrecht Law Review* 134, 145.
[415] For instance, *In re Union Carbide Corporations Gas Plant Disaster at Bhopal India* [1986] 634 F Supp 842 867, the Indian authorities secured a deal in 1989 that provided for a 'full and final compensation' of $470 million, which was widely condemned compared with the extent of the human rights abuses perpetrated.
[416] Joshua P Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal* 261, 278; Kenneth Omeje, 'Petrobusiness and Security in the Niger Delta, Nigeria' (2006) 54 *Current Sociology* 477, 494.
[417] For instance, in some cases where Shell is sued by the victims, Nigerian Government is either joined or applied to be joined as a party, see *Chief (Dr.) Pere Ajuwa and 1 other v The Shell Petroleum Development Company of Nigeria Ltd (SPDCN*) [2011] SC.290/2007.

general development challenges in the country, tend to evade stringent regulation against TNCs.[418]

6.2.1.2. Lack of Willingness and Ability of Host States to Protect Human Rights

The operation of the doctrine of host state responsibility is premised on the assumption that the state has the will and the capacity to implement and enforce human rights standards against private actors.[419] Judging from current trends, either most states have lost their ability to control and regulate private actors like TNCs, or corrupt officials have chosen TNCs over their people. It is the deliberate choice of certain countries not to protect, or indeed to violate, the rights of particular communities. This is evident in some Latin American countries in relation to the rights of indigenous peoples.[420] Similarly, repression in the Niger Delta by the Nigerian government can be attributed to more than a simple lack of capacity to protect people's rights against the 'evil corporates'.[421]

Globalisation has led to an increase in the substantial clout of TNCs and, equally, a notable reduction in the competencies of states to hold them to account. The economic muscle that corporate entities have at their disposal makes it very difficult for developing host states to regulate them.[422] Some developing host states lack the political will or interest to make the laws and policies required to regulate the activities of TNCs operating in their territory.[423] In a bid to attract foreign direct investment, developing host states are willing to barter their 'power' of regulation in exchange for interim economic advantages.[424] This has given rise to the phenomenon of 'race to the bottom' by which countries refrain from establishing strict

[418] Morimoto, (2005) *op.cit.* p. 145.
[419] Bridgeman and Hunter, (2008) *op.cit.* p. 196.
[420] Bogumil Terminski, 'Oil-induced Displacement and Resettlement: Social Problem and Human Rights Issue' (Research Paper, School for International Studies, Simon Fraser University, Vancouver, 2011) 2.
[421] Micaela L Neal, 'The Niger Delta and Human Right Lawsuit: A Search for the Optimal Legal Regime' (2011) 24 *Pac McGeorge Global Business & Development Law Journal* 344, 345-6.
[422] Chirwa, (2004) *op.cit.* p. 27.
[423] Bridgeman and Hunter (2008) *op.cit.* p. 196.
[424] Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell The Cat' (2004) 5 *Melbourne Journal of International Law* 37, 50.

human rights standards in an effort to draw in TNCs seeking locations where they can inexpensively carry out their operations.[425] Most of these states are competing tirelessly for TNC investments in anticipation of the benefits that these investments will create for their economies. TNCs provide ways through which their foreign subsidiaries can improve efficiency and export proficiency, diversify the economy and, as a whole, advance the host country's level of economic growth.[426]

Also, governments in the developing world continually expect positive effects on their people from the success of economic growth objectives, so they are more likely to overlook human rights abuses perpetrated by foreign investors, especially if certain financial targets are satisfied.[427] For example, in the case of oil companies in Nigeria, the Nigerian government derives most of its revenue from the exportation of crude oil yet local residents of the oil-rich region have been economically and politically marginalised, subjected to neglect and their lands have been plagued by environmental degradation and brutal military activity due to the alleged involvement and complicity between the Nigerian government and the TNCs.[428]

Developing host countries possess a deficit of bargaining power in relation to the economically strong TNCs who often have the ability to directly influence a country's social and economic policies.[429] These countries carefully apply their power of regulation to suit the interests of these economic actors[430] because TNCs can always terminate business dealings in the sanctioning state and establish themselves in a more corporate-friendly state.[431] For

[425] Alicia Grant, 'Global Laws for a Global Economy: A Case for Bringing Multinational Corporations Under International Law' (2013) 6(2) *Studies by Undergraduate Researchers at Guelph* 14, 16.
[426] Elisa Giuliani and Chiara Macchi, 'Multinational Corporations' Economic and Human Rights Impact on Developing Countries: A Review and Research Agenda' (2013) 38 *Cambridge Journal of Economics* 479, 480.
[427] *Ibid,.*
[428] Rebecca Oliver Enuoh & Benjamin James Inyang, 'Effective Management of Corporate Social Responsibility (CSR) for Desired Outcome: The Niger Delta Issue in Nigeria' (2014) 5(4) *International Journal of Business Administration* 32, 35.
[429] Debosmita Nandy and Niketa Singh, 'Making Transnational Corporations Accountable for Human Rights Violations' (2009) 2 *NUJS Law Review* 75, 82.
[430] *Ibid,.*
[431] Sarah Joseph, 'Taming the Leviathans: Multinational Enterprise and Human Rights '(1999) 42(2) *Netherlands International Law Review* 171, 177.

example, TNCs that can easily and cheaply relocates to competitor states with cheaper labour that are less likely to assent to union demands for higher labour standards and better working conditions. When TNCs confront a labour union with a credible threat to move, unions are often left to revise its labour demands downward or risk losing the jobs entirely.[432] It is now accepted that such practices and threats are made even in developed states. For instance in 1998 Rolls-Royce threatened to move out of the UK market if it embraced Europe's higher labour standards. This was a key reason for the UK's initial opt-out of the social requirements of the EU Maastricht Treaty.[433] If such a phenomenon has become normal in a developed and economically robust member of the OECD, it puts into perspective any expectation that developing countries would be able to effectively negotiate with TNCs.

One common practice of TNCs operating in the host state are the use of a complex corporate structures to shift income to low-tax jurisdictions such as tax havens.[434] This also means that the return to the domestic economy is more limited than it could be. Thus the host state accepts an *ab initio* restriction in return for the TNC being based on its territory, with this further undermining its ability to negotiate.

Furthermore, public corruption has been prevalent in developing host countries and frequently leads to human rights violations and abuses. For instance, the rights to health and education may be violated when government officials divert public resources meant to improve the quality of education and healthcare for personal gain or bribes. Systemic corruption in a country's major institutions such as the judiciary subverts the rule of law and undermines the framework for safeguarding human rights. Corruption in developing host

[432] Katherine Van Wezel Stone, 'Labor and the Global Economy: Four Approaches to Transnational Labour Regulation' (1995) 16 *Michigan Journal of International Law* 988, 990.
[433] Joseph, (1999) *op.cit.* p. 176; Nandy and Singh, (2009) *op.cit.* p. 82.
[434] Tim Wagener and Christoph Watrin, 'The Relevance of Complex Group Structures for Income Shifting and Investors' Valuation of Tax Avoidance (2013) *University of Munster Working Paper* 2013, 1; See also Grahame R Dowling, 'The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible' (2014) 124 *Journal of Business Ethics* 173, 176.

countries prevents adequate enforcement of human rights standards.[435] Influential, corrupt officials do not allow candid, vigorous probes and prosecutions of their relatives and friends including themselves since they are often deeply implicated in the problem.

Businesses in different sectors give bribes to receive all kinds of favor such as the overlooking of human rights and environmental regulations.[436] As an example, an employee of a TNC operating in Nigeria, including an affiliate of Halliburton, disclosed information to French investigating authorities when he was accused of misappropriation in the long-term *Elf* case. He declared that the company used a $180 million 'slush fund' to bribe Nigerian officials in relation to a natural gas plant in Nigeria.[437] Another recent, notable case of corruption in Nigeria is the missing $20 billion in oil revenue. The Governor of the Central Bank of Nigeria revealed, at a public hearing in the Senate, that records available to the bank showed that the total amount generated from crude oil sales was $67.8 billion while the records of remittance to the Federation Account by the NNPC indicated $47.8 billion so there was a shortfall of $20 billion unaccounted for.[438] President Goodluck Jonathan dismissed the country's bank governor, accusing him of 'financial recklessness and misconduct'.[439] According to *The New York Times*, this dismissal is further evidence of the Nigerian government's weakening resolve to tackle widespread corruption, a problem that has plagued the country since independence.[440] To preserve the culture of immunity on which corruption relies, leaders often encourage the persecution of those who expose official

[435] Morimoto, (2005) *op.cit.* p. 145.
[436] Grant, (2013) *op. cit.* p. 16.
[437] Open Society Justice Initiative, *Legal Remedies for Resource Curse: A Digest of Experiencing in Using Law to Combat Natural Resource Corruption* (Open Society Justice Initiative 2005).
[438] Emma Ujah, 'Missing $20bn: FG to Hire Forensic Auditor- Okonjo Iweala' *Vanguard* (Nigeria, 14 February 2014).
[439] Mathew Lloyds, 'Nigeria Fires Official Who Uncovered Billions in Missing Oil Money' *Aljazeera English* (20 February 2014).
[440] Adam Nossitter, 'Governor of Nigeria's Central Bank is Fired after Warning of Missing Oil Revenue' *The New York Times* (20 February 2014).

misconduct.[441]The lack of effective whistleblowing legislation and weak legal institution create a huge problem to potential whistle-blowers.[442] Whistleblowing could prevent transgression within institutions by increasing the possibility of exposing dishonest, illegitimate and unlawful activities, and punishing its committers.[443]

Similarly, Siemens' systematic bribery in different sectors across many developing countries resulted in the violation of a wide range of internationally recognised human rights, including the rights to health care, equal access to public services, self-determination, political representation and, ultimately, to the rule of law.[444] Siemens is an internationally operating manufacturer of industrial energy, hospital equipment and infrastructure for cities. The parent company is located in Germany with over 1,800 subsidiaries and 400,000 employees in 190 countries. In 2001, it listed American depositary shares on the New York Stock Exchange, thus becoming an 'issuer' for the purposes of the Foreign Corrupt Practices Act (FCPA).[445] In 2008, the American Securities and Exchange Commission (SEC) accused Siemens AG of paying over $1.4 billion in bribes to government officials across the globe in exchange for business. Unfortunately for Siemens, it eventually paid around $1.6 billion in penalties and

[441] Mark L Wolf, 'The Case for an International Anti-Corruption Court' (World Forum on Governance Convened Brookings Institution, July 2014) 5.

[442] Whistleblowing is a protected aspect under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and by international and regional human rights agreements including Article 33 of the UN 2005 Convention Against Corruption, which requires state "protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities."8 Similarly, Article 5, Paragraph 4 of the African Union Convention on Preventing and Combating Corruption requires the "protect (ion of) informants and witnesses in corruption and related offences, including protection of their identities." And Nigeria, as a signatory to both instruments, is bound by commitments to ensure effective protection of Whistle-blowers; see also, Onakoya Olorunfemi Adebisi and Moses Chinonye Love, 'Effect of System Factors on Whistleblowing Attitude of Nigerian Banks Employees: A Conceptual Perspective' (3rd International Conference on African Development Issue 2016)304; Bolanle Ogungbamila, 'Whistleblowing and Anti-Corruption Crusade: Evidence From Nigeria' (2014)10(4) *Canadian Social Science* 145,146.

[443]Generally, on whistleblowing see, David Lewis and Joshua Castellino, 'Establishing a Different Dimension of Citizen Security: The Case for Special Protection for Whistle-blowers' (2013) 4 (4) *Beijing Law Review* 185, 186; David Lewis, 'The Council of Europe Resolution and Recommendation on the Protection of Whistle-blowers'(2010)39(4)*Industrial Law Journal* 432,433; Indira Carr and David Lewis, 'Combating Corruption through Employment Law and Whistleblower Protection' (2010)39(1) *Industrial Law Journal* 1, 7; David Lewis (edn), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research?* (Cheltenham: Edward Elgar, 2010).

[444] Andrew B Spalding, 'Corruption Corporations and the New Human Right' (2014) 91(6) *Washington University Law Review* 1365, 1381.

[445] *Ibid*,.

disgorgement of profits, the largest settlement in FCPA's history.[446] Siemens paid a penalty of approximately $450 million to the US Department of Justice to settle the case and related bribery charges and $350 million in disgorgement to settle SEC charges. Siemens also paid a fine of about $569 million to the Office of the Prosecutor General in Munich to whom the company paid a penalty of about $285 million in October 2007.[447] Of course it is interesting to note that no money from these large-scale settlements were devolved to the public economies of the developing countries where the bribery occurred in the first place, draining the host state economy the first time around.

Siemens' bribery schemes corrupted a number of sectors of society in many countries. With regard to infrastructure, which is the most critical area to a developing state's growth, Siemens and its affiliates dishonestly paid Chinese officials $22 million to gain contracts to construct a railway and $25 million to build high-voltage transmission lines. The list of infringements includes: $17 million in Venezuela to obtain contracts for railway construction; in Israel, they paid about $20 million to win contracts to build up and service power plants; $800,000 for the development of traffic control systems in Russia; in Nigeria, where Siemens' bribery practices were allegedly 'long-standing and systematic', $12 million was paid for the development of telecommunications services; and $5 million was given for a contract to install mobile telephone services in Bangladesh.[448] Thus, Siemens' bribery activities across developing countries variously violated the rights to equality of access to public services, medical care, self-determination and political representation, and ultimately weakened the rule of law.[449] The "best-case" prosecutorial remedy involved the payment of a fine in the home state rather than to make good the damage done in the host state where the

[446] SEC, 'US SEC Charges Siemens AG for Engaging in Worldwide Bribery' (*US, Security and Exchange Commission Press Release*, 15 December 2008) <http://www.sec.gov/news/press/2008/2008-294.htm> accessed 16 February 2015; see also *Sec & Exch Comm'n v Siemens Aktiengesellschaft* [DDC 2008] No 08 Civ 02167 at 3.
[447] SEC, (2008) *Ibid,.*
[448] Spalding, (2014) *op.cit.* p. 1382.
[449] *Ibid.*, p. 1383.

"cost" of the bribes were usually passed on to consumers and/or tax payers in the case of publicly funded infrastructural projects.

In April 2012, the *New York Times* uncovered payments made by Wal-Mart, a US-based TNC, of more than $24 million in bribes to Mexican officials that had been accounted for as 'legal fees' and paid through local business agents known as 'gestores'. The bribes apparently aided Wal-Mart to dishonestly secure zoning and environmental approvals, remove fines, avoid taxes and acquire confidential reports.[450] The bribes permitted Wal-Mart to evade zoning constraints and build a store beside the ancient pyramids of Teotihuacan in spite of months of hunger strikes and protests by an indigenous community.[451]

Although corporations are accused of aiding corruption through the payment of bribes, some argue that corporate actors have been unwilling participants in these illegal activities. This is because businesses always prefer to act responsibly within the sphere of 'good governance', which can partly be characterised by transparency and the rule of law.[452] Giving bribes is expensive and getting involved in corruption scandals may subvert the 'social licence' of corporations to operate. For example, the CEO of AngloGold Ashanti, Bobby Godsell, in defending the accusation that the company, one of the major gold mining corporations in world, gave money to a rebel military group in the Democratic Republic of Congo (DRC), said that payments were made against their will. This was an issue on which Godsell said that the company had 'messed up' and regretted it seriously.[453]

If this perception is accepted, then giving a bribe may be considered onerous to companies as it raises the cost of conducting business. Accordingly, corruption is often accepted in accounting terms as part of the risk for businesses operating in developing host countries.

[450] David Barstow, 'Vast Mexico Bribery Case Hushed up by Wal-Mart after Top Level Struggle' *The New York Times* (New York, 21 April 2012).
[451] David Barstow, 'The Bribery Aisle: How Wal-Mart Got its Way in Mexico' Struggle' *The New York Times* (New York, 17 December 2012).
[452] Andre Standing, 'Corruption and the Extractive Industries in Africa: Can Combating Corruption Cure the Resource Curse?' (2007) 153 *Institute for Security Studies Papers* 1, 6.
[453] Jenni Evans, 'Anglo "Messed Up" in the DRC' *Mail & Guardian*, (*South Africa*, 2 June 2005).

Therefore, fighting corruption is regarded as necessary for improving business conditions in developing countries. Corruption, by necessity, imposes a tax on business activity.[454] Data from a survey reveals that most of the companies operating in Uganda that pay bribes interact more closely with the government than companies that do not pay bribes.[455]

In addition, even if the willingness to regulate the activities of corporate actors is present, developing host countries often lack financial, human and institutional resources, thus making effective regulation difficult.[456] Chirwa is of the view that the resources required to ensure TNCs' compliance with human rights standards are more than the resource potentials of many developing nations.[457]

The lack of independence of the judiciary in some host states is also an impediment to access to effective remedies and justice for the victims of corporate human rights violations.[458] Although the constitutions of many countries stress the independence of their judiciaries, in practice they are not.[459] According to the International Commission of Jurists (ICJ) on the subject of the rule of law and the judicial system under the democratisation process in Kenya, for there to be a real rule of law in Kenya there are many problems in the judicial system that need to be improved upon.[460] Similarly, after the 2007 disputed election results in Kenya, adversely-affected parties refused to refer their complaints to the electoral tribunal, as insisted by the government, because they believed the judiciary was not independent of the incumbent government.[461] The lack of independence of judiciaries will continue to negatively impact access to justice until they become independent and are viewed by the public as being more

[454] Odd-Helge Fjeldstad et al, 'Bribes and Tax Regulations: Business Constrains for Micro Enterprises in Tanzania' (2006) *CMI Working Papers* 2/2006, 8.
[455] *Ibid*,.
[456] Christiana Broecker, 'Better the Devil You Know, Home State Approaches to Transnational Corporate Accountability' (2008) 49 *International Law and Politics* 159, 184.
[457] Chirwa, (2004) *op.cit.* p. 27.
[458] Julian Mukwesu Nganunu, 'Judicial Independence and Economic Development in the Commonwealth' (2014) 40(3) *Commonwealth Law Bulletin* 431, 438.
[459] Economic Commission of Africa (ECA), 'African Governance Report II' (2009) 130.
[460] International Commission of Jurists (ICJ), 'Democratisation and the Rule of Law in Kenya' (ICJ Mission Report, 1997) 57.
[461] Economic Commission of Africa (ECA), 'African Governance Report II' (2009) 130.

independent. Also, some developing states lack the technical proficiency to supervise and regulate the activities of private actors to determine, for instance, whether a corporation's human rights standards or safety measures are up to scratch.

Therefore, due to the relative imbalance of power and the reliance of developing host countries on the presence of TNCs, it is still necessary to rely on the host states' regulation of TNCs. As the example cited above of Siemens shows, developed world home states are in a position to enforce and call to account its corporations, in a manner that is difficult to imagine in the list of countries where a tort occurred due to Siemens use of bribery.Therefore, one must look at the deficiency in the developing host countries judicial process and focus on the extent to which this can be strengthened to enforce human rights standards against TNCs. To further underscore this point, the next section will evaluate the legal and institutional framework and the regulation of TNCs in Nigeria. It will use Nigeria as a case study to assess the extent of human rights violations committed by TNCs in developing host states like Nigeria. And why Nigeria is the ideal country to study this phenomenon through is because it is Africa's most populous state, it is a key emerging economy; it is a country with significant foreign direct investment, it has emerged from military rule towards democracy and it is investing in its domestic institutions. Although issues concerning corporate human rights abuses are not pertinent to Nigeria alone, other emerging economies such Sudan, and Ecuador and South African meet similar problems. However, it is not within the scope of this thesis to evaluate the extent of human rights violations committed by TNCs in countries, and this will become a valuable insight and basis to future research in this area.

6.3. An Overview of Human Rights Violations Committed by Transnational Corporations in Nigeria

TNCs are hardly recent arrivals in Nigeria; most trading carried out during the British colonial administration was done through corporations. In fact it could be argued that the very interest in Nigeria for the colonial power, Britain, was access and the potential of exploitation of its "Oil Rivers".[462] TNCs such as the United Africa Company, the Royal Niger Company and Lever Brothers, to name a few, were heavily involved in colonial Nigeria, even before a robust colonial governance regime was constructed.[463] With the discovery of crude oil in viable commercial quantities in 1956 in the Niger Delta region by Shell-BP (now SPDC), there was an influx of TNCs into the oil exploration industry in Nigeria.[464] Currently, TNCs such as Royal Dutch Shell, Chevron, ExxonMobil, Total FinaElf and BP are leading players in the Nigerian crude oil exploration industry.[465]

Located in Western Africa, Nigeria is endowed with plentiful mineral resources which include bitumen, limestone, gold, coal and iron ore.[466] A resource-rich country, Nigeria has about 37.2 billion barrels of proven reserves of crude oil, 187 trillion cubic feet of proven reserves of natural gas, and a production rate of about 2.3 million barrels of crude oil daily. This makes Nigeria the leading producer of crude oil in Africa and the sixth largest producer of crude oil among the members of the Organisation of Petroleum Exporting Countries

[462] Gwilliam Iwan Jones, *The Trading States of the Oil Rivers: A Study of Political Development in Eastern Nigeria* (OUP, 1968)31; Kenneth Onwuka Dike, *Trade and Politics in the Niger Delta, 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Clarendon Press 1956)1; I. M. Okonjo, *British Administration in Nigeria, 1900-1950: A Nigerian View* (NOK Publishers, 1974); Victor Ojakorotu and Noné Louis Morake, 'The Oil Curse and Incessant Conflicts in Africa: The Question of the Niger Delta of Nigeria' (2010)2(1) *AFFRIKA Journal of Politics, Economics and Society: Human Securitising, Sustainable Peace and Development in the Niger Delta* 37,41; Godfrey Etikerentse, *Nigerian Petroleum Law* (1edn, Macmillan, 1985)1.

[463] Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (University of Toronto Press 2009) 3.

[464] Kato Gogo Kingston, 'Shell Oil Company in Nigeria: Impediment or Catalyst of Socio-Economic Development' (2011) 1(1) *African Journal of Social Sciences* 15, 16; Eaton, (1997) *op.cit.* p. 265.

[465] Michael Baghebo, 'The Impact of Petroleum on Economic Growth in Nigeria' (2013) 2(5) *Global Business and Economics Research Journal* 102, 103; Terminski, (2011) *op.cit.*

[466] Omo Aregbeyen and Bashir Olayinka Kolawole, 'Oil Revenue Public Spending and Economic Growth Relationships in Nigeria' (2015) 8(3) *Journal of Sustainable Development* 113, 114; Adeniyi Jimmy Adedokun, 'Oil Export and Economic Growth: Descriptive Analysis and Empirical Evidence from Nigeria' (2012)9 (1) *Pakistan Journal of Social Sciences* 46, 48.

(OPEC).[467] It is undeniable that crude oil exports play a dominant role in Nigeria's economy, accounting for about 90% of its total government revenues.[468]

The increasing presence of TNCs in the oil exploration industry, which is the backbone of the Nigerian economy, has brought about serious human rights violations in the Niger Delta region of Nigeria. At the crux of these human rights violations is the exploitations meted out to the residents of the Delta. [469] Land is destroyed during exploration drilling activities leading to the displacement of residents and disruption to their lives. As the land damaged is often used for farming, the right to food is also violated.[470] At the production stage, activities with machines and other equipment are characterised by frequent pipeline leakages and oil spills that pollute the water that provides these host communities with drinking water; killing fish and other aquatic life and destroying the lives and livelihoods of subsistence based communities that rely on fishing.[471] During the production phase, gas is flared continuously throughout the region; some flares are constant with no specific end point to this form of pollution.[472] Nigeria flares about 33 per cent of the gross natural gas it produces in contrast with the USA which flares about 0.4 per cent.[473] The key difference can be attributed to stricter environmental regulations in the USA which require state of the art technology, while

[467] Kingston, (2011) *op. cit.* p.16.
[468] Gbadebo Olusegun Odularu, 'Crude Oil and the Nigerian Economic Performance: Oil and Gas Business' (2008) 7.
[469] It was reported in a Shell Internal Position Paper that 56.4 kms of mangrove forest had been destroyed by Shell in Rivers State of Nigeria during seismic operations as at 1995. See JP Van Dessel, *The Environmental Situation in the Niger Delta,* (Internal Position Paper, February 1995) 15. See also *Shell-BP v Usoro* [1960] SCNLR 121; *Seismograph Service v Mark* [1993] 7 NWLR pt 304 203.
[470] Serges Djoyou Kamga and Ogechukwu Ajoku, 'Reflection on How to Address the Violations of Human Rights by Extractive Industries in Africa: A Comparative Analysis of Nigeria and South Africa' (2014) 17(1) *Potchefstroom Electronic Law Journal* 452, 460.
[471] 'Niger Delta: Shell's Manifestly False Claims About Oil Pollution Exposed, Again' (*Amnesty International*, 3 November 2015) <https://www.amnesty.org/en/latest/news/2015/11/shell-false-claims-about-oil-pollution-exposed/> accessed 29 June 2016; Howard Mustoe, 'Shell Being Sued in Two Claims over Oil Spills in Nigeria' *BBC News* (London, 2 March 2016); Ibaba Samuel Ibaba and John C Olumati, 'Sabotage Induced Oil Spillages and Human Rights Violation in Nigeria's Niger Delta' (2009) 11(4*) Journal of Sustainable Development in Africa* 51, 54-5.
[472] Ashley Palomaki, 'Flames Away: Why Corporate Social Responsibility is Necessary to Stop Excess Natural Gas Flaring in Nigeria' (2013) 24(2) *Colorado Natural Resources, Energy & Environmental Law Review* 501.
[473] Koriambanya SA Carew, 'David and Goliath: Giving the Indigenous People of the Niger Delta A Smooth Pebble-Environmental Law, Human Rights and Re-Defining the Value of Life' (2002) 7 *Drake Journal of Agricultural Law* 493, 501; Palomaki, (2013) *op. cit.* p. 501; Morimoto, (2005) *op. cit.* p.141.

the absence of such regulations in Nigeria means that out-dated polluting technology remains used in the manufacturing process. Continuous gas flaring in the Niger Delta has led to the formation of acid rain which pollutes the stream and rivers and rusts the metal roofs on Nigerian houses.[474] Aside from the disproportionate rise in cases of cancer and other organic diseases related to water pollution, people in the Niger Delta report that they suffer respiratory diseases from constant gas flares. In addition, gas flaring emits greenhouse gases into the atmosphere creating a broader more global tort in terms of environmental damage.[475] Thus TNCs activities in the Delta generally result in violations of the violation of individual and group rights such as the rights to health, environment, infrastructural development and socio-economic livelihood; they also negatively impact the right to development and contribute to climate change. Such activities have brought about litigation against oil TNCs in their home states, including the USA,[476] UK[477] and Netherlands.[478]

In addition, the right to life is also violated, with lives lost as a consequence. In fact, due to the violation of socio-economic and environmental rights described above, the residents of the Niger Delta protested in the 1990s against transnational oil exploration companies, with this resulting in the deployment of Nigerian security forces who conducted summary executions, crimes against humanity, torture and cruel, inhuman or degrading treatment, under the pretence of guarding oil facilities from the protesters.[479] This set of human rights abuses happened directly at the behest of the people's own government. The Nigerian government through the NNPC, a statutorily established, state-owned company, has equity

[474] Michael F Farina, 'Flare Gas Reduction: Recent Global Trends and Policy Considerations' (Ge Energy, GEA18592 10/2010) 22.
[475] Ayoola Tajudeen John, 'Gas Flaring and its Implication for Environmental Accounting in Nigeria' (2011) 4(5) *Journal of Sustainable Development* 244, 244; Ajugwo Anslem, 'Negative Effects of Gas Flaring: The Nigerian Experience '(2013) 1(1) *Journal of Environment Pollution and Human Health* 6, 6-7.
[476] *Wiwa v Royal Dutch Petroleum/Shell* [2000] 226 F.3d 88; *Esther Kiobel v Royal Dutch Petroleum, Co* [2013] 133 S Ct 1659.
[477] Shell & the Bodo Community –Settlement vs. Litigation, in *Business & Human Rights Resource Centre* online at: https://business-humanrights.org/en/shell-the-bodo-community-%E2%80%93-settlement-vs-litigation accessed 1 July 2016.
[478] *Alfred Akpan v Royal Dutch Shell Plc* [2013] No.337050/HA ZA 09-1580.
[479] *Wiwa* [2000] 226 F.3d 88.

interest in oil exploration[480] and so can be held directly responsible for human rights violations committed by SPDC and other oil companies in the Niger Delta area.[481] As part of this joint venture partnership, the Nigerian government has assisted oil companies by providing regular 24 hour security personnel to protect oil exploration and suppressing any attempted protests and agitations in the host community.[482]

In the 1990s, the Ogoni community in the Delta founded the *Movement for the Survival of the Ogoni Peoples* (MOSOP). MOSOP seeks redress through what it calls the 'Ogoni Bill of Rights' for human rights exploitations by both the Nigerian government and the TNCs operating in the area.[483] In response to the oil companies' activities, MOSOP engaged in peaceful demonstrations led by Ken Saro-Wiwa with the aim of protecting the economic, social, cultural and environmental rights of the Ogoni residents, among other things. The then Nigerian government reacted violently to the MOSOP agitations, which included murder, shooting, raping, looting, torture and destroying properties of the Ogoni people.[484] The situation worsened following the arrests of Ken Saro-Wiwa and other Ogoni leaders who were then tried before a special military tribunal in a widely-criticised proceeding. Nine of those leaders were found guilty of a series of charges and sentenced to death by hanging.[485] This event resulted in a number of litigations in the USA under the ATCA. Prominent among these cases were *Kiobel v Royal Dutch Shell* and *Saro Wiwa v Royal Dutch Shell*.[486]

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[480] For example, the Exxon Mobil subsidiary is owned by NNPC (60%) and Mobil Oil (40%). SPDC's shareholding structure comprises NNPC (55%), Shell International (30%), Elf Petroleum (10%) and Agip Oil (5%). Chevron Nigeria Limited is owned by NNPC (60%) and Chevron Texaco (40%). Nigeria Agip Oil Company is owned by NNPC (60%), Agip Oil (20%) and Phillips Petroleum (20%). Elf Nigeria Ltd is owned by the NNPC (60%) and TotalElfFina (40%). Texaco Overseas (Nigeria) Petroleum Company is owned by the NNPC (60%), Chevron (20%) and Texaco (20%).

[481] Carew, (2002) *op. cit.* p. 513.

[482] Neal, (2011) *op. cit.* p. 350.

[483] Eaton, (1997) *op. cit.* p. 269; see also the Ogoni Bill of Rights <http://www.waado.org/ nigerdelta/Rights Declaration/Ogoni.html> accessed 30 June 1016.

[484] 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (*Human Rights Watch* 1999).

[485] Paul Lewis, 'Nigeria Rulers Back Hanging Of 9 Members Of Opposition*' New York Times* (November 1995) 9; Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (University of Toronto Press 2009) 3.

[486] *Kiobel* [2013] 133 SCt 1659 and *Wiwa* [2000] 226 F.3d 88.

Although the people of the Niger Delta are neither the cause of the initial human rights violations in the region nor responsible for the seriousness of the Delta's predicaments, they have contributed to the exploitation by destroying safety valves, setting up illegal oil refineries and detonating explosives to extract oil.[487] The effect of these sabotage driven activities are far less than the enormous network of corroding pipelines, rusting pipes and storage tanks, decrepit pumping stations, and worn-out wellheads including vessels for cleaning out tanks owned by TNCs.[488] The contribution of the Delta people is a direct consequence, not a cause, of the serious human rights violations committed by oil TNCs.[489] Sabotage of oil pipelines and installation and illegal oil bunkering are undertaken as a protest against the alienation, neglect, devastation and unhappy living conditions of the Delta dwellers while at the same time the Nigerian state and corrupt leaders enrich themselves.[490]

While human rights violations in general continue in the Niger Delta region of Nigeria as a result of the activities of TNCs, the trovafloxacin (Trovan) trial of a new drug on children during an epidemic of meningococcal meningitis by Pfizer pharmaceutical company in Kano State, Northern Nigeria raised its own issue of serious disregard for human life and due process.[491] In 1996, Pfizer carried out experimental clinical tests of its new antibiotic (Trovan) on 100 children, and a comparator group of another 100 children were given low dose, gold-standard anti-meningitis treatment – the ceftriaxone antibiotic.[492] The US Food and Drug Administration never approved prescribing the drug for American children.[493] Pfizer's actions resulted in the deaths of eleven children while others were left paralyzed, deaf, blind or brain-

[487] John Vidal, 'Nigeria's Agony Dwarfs the Gulf Oil Spill. The U.S. and Europe Ignore It' *The Guardian* (30 May 2010).
[488] *Ibid,.*
[489] Oteh Chukwuemeka Okpoa, 'Vandalization of Oil Pipelines in the Niger Delta Region of Nigeria and Poverty: An Overview' (2012) 3(2) *Studies of Sociology Science* 13, 16; Vidal, (2015) *op. cit*.
[490] Cyril I Obi, 'Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta' (2010) 30 *Canadian Journal of Development Studies* 219, 220; Onyebuchi Ezigbo, 'Nigeria: Unending Saga Between Oil Firms, Vandals and Illegal Bunkerers' *All Africa, Thisday* (Nigeria, 27 July 2010).
[491] Joe Stephen, 'Pfizer Faces Criminal Charges in Nigeria, *Washington Post Staff Writer'* (30 May 2007).
[492] Jacqui Wise, 'Pfizer Accused of Testing New Drug without Ethical Approval' (2001) 322 *British Medical Journal* 194.
[493] Jeanne Lenzer, 'Nigeria Files Criminal Charges Against Pfizer' (2007) British Medical Journal 1181.

damaged.[494] The survivors of the experimental drug trial filed a number of legal actions against Pfizer in American and Nigerian courts.[495] In a report in 2002, the World Bank described the Nigerian military government that governed during the period of these events as 'pervasively corrupt'. The report also quoted company managers in Nigeria which described the *National Agency for Food and Drug Administration and Control* (NAFDAC) of that time as lacking the capacities required to carry out its regulatory function; instead of 'protecting businesses and consumers', they were 'harassing business and seeking bribes'.[496]

The above general factual account of various human right violations committed by TNCs in Nigeria has been adequately examined and discussed through the landmark case *Royal Dutch/Shell* in the Niger Delta region and that of Pfizer pharmaceutical company in Kano State. This serves as the basis for the discussion that follows in the next section. The problems encountered in Nigeria are similar to those experienced in other countries, especially developing countries. Well-known examples similar to upheavals caused by Shell and Pfizer include Unocal in Burma, Chevron-Texaco in Ecuador, and Texaco and Union Carbide in Bhopal.[497] Victims in these cases have faced long judicial struggles with little or no redress while several are still awaiting remedies and compensation.

6.4. Regulating the Activities of Transnational Corporations in Nigeria: Legal and Institutional Framework

This section examines the legal and institutional framework, the regulation of TNCs in Nigeria and the existing barriers in the Nigerian legal system that could prevent access to effective remedies and justice for victims of corporate human rights violations.

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[494] Stephen, (2007) *Ibid*,.
[495] *Abdullahi 1* [SDNY, 2002] US Dist LEXIS 17436 at 1; *Abdullahi II* [2d Cir NY, 2003] 77 Fed. Appx 48, 2003 US App LEXIS 20704; *Abdullahi III* [SDNY, 2005] US Dist LEXIS 16126.
[496] World Bank, 'Results of the Nigeria Firm Survey' (World Bank, November 2002).
[497] Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' (2005) 13 *Human Rights Brief* 14, 14.

6.4.1. The Protection of Human Rights under the Nigerian Constitution

The 1999 Constitution of the Federal Republic of Nigeria (as amended) is the supreme law of the land and has binding force on the authorities and persons all over the Federal Republic of Nigeria.[498] It has been declared by the Supreme Court as the organic law or *grundnorm* of the land, which not only forms the foundation of a government but also confers rights and responsibilities on its people.[499] The Nigerian Constitutions have not only protected human rights but also established institutions, the state with its various institutions such the judiciary, Public Complain Commission[500] and National Human Rights Commission[501] to ensure their implementation and enforcement.[502]

The preamble to the 1999 Constitution clearly sets the tone with the aim of promoting 'good government and welfare of all persons on the principles of freedom, equality and justice'.[503]

Apart from the preamble, the economic, social and cultural rights found under the Fundamental Objectives and Directive Principles of State Policy (DPSP) in chapter II of the

[498] See art 1(1), 1999 Constitution of the Federal Republic of Nigeria, Cap C23 LFN 2004. For case law affirming this, see *Independent National Electoral Commission (INEC) v Musa* [2003] 10 WRN 1; *Attorney-General of Abia State v Attorney-General of the Federation* [2002] 17 WRN 1, (2002) 6 NWLR pt 763 264; and *Attorney-General of Ondo State v Attorney-General of the Federation* [2002] 27 WLR pt 772 222.

[499] See *Peoples Democratic Party v Independent National Electoral Commission* (INEC) [2001] 1 WRN 1. Akeem Bello, Environmental Rights in Nigeria: Issues, Problems and Prospect (2006) 4 *Ibinedion University Law Journal* 60, 70.

[500] The Public Complain Commission was established by Decree No. 31 of 16th October, 1975, amended by Decree No. 21 of 31st May 1979, which was enshrined in the 1979 constitution of Nigeria and now Public Complaints Commission (PCC) Act, Cap P37 Law of Federal Republic of Nigeria 2004. The establishments of the commission also form part of the 1999 Constitution of the Federal Republic of Nigeria under section 315, (5) (b). The Commission is charge with the responsibility to promote social justice for the victims of human rights abuses and seek appropriate remedies on their behalf.

[501] National Human Rights Commission Decree No 22 of 1995, ss 1 (1) (2) & 6(3), Act CAP. N46 LFN 2004, sec 5(a). The main objective of NHRC is to ensure effective implementation all the laws and regulations concerning the promotion and protection of human rights guaranteed by the Nigerian Constitution, African Charter, United Nations Charter, the Universal Declaration of Human Rights and any other human rights instruments to which Nigeria is a signatory.

[502] Jean –Bernard Marie, 'National Systems for the Protection of Human Rights in Human Rights International Protection, Monitoring, Enforcement', in Januz Symonides (edn) Human rights; *International Protection, Monitoring, Enforcement* (Aldershot Hants: Ashgate, UNESCO Publishing, 2003) 258.

[503] Jacob Abiodun Dada, 'Human Rights under the Nigerian Constitution: Issues and Problems' (2012) 2(12) *International Journal of Humanities and Social Science* 33, 36; Olubayo Oluduro, Environmental Rights: A Case Study of the 1999 Constitution of the Federal Republic of Nigeria (2010) 4(2) *Malawi Law Journal* 255, 257.

Constitution are directed towards the protection of the economic, social and cultural rights enunciated in the Universal Declaration of Human Rights 1948 and related instruments.[504] The chapter II provides in section 17(2)(b) that, in order to preserve the social order, the sanctity of the citizens should be recognised and human dignity should be protected and improved. The Constitution also provides that violations of human rights in any form whatsoever shall be prevented and emphasizes that the government is required to ensure without discrimination, adequate means of livelihood, equal labour opportunities, cultural life, adequate health and safety standards, abolition of child labour and elimination of all forms of forced or compulsory labour.[505]

Similarly, section 20 makes it an objective of the government to safeguard and improve the air, land, water, forests and wildlife of Nigeria. Although the provision in this chapter placed a mandatory duty on the state to direct its policies towards the realisation of the objectives, these provisions are not enforceable by Nigerian citizens against the government by virtue of section 6(6)(c) of the Constitution which provides that:

> The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.[506]

Arguably the non-justiciability on rights provided under DPSP in Chapter II of the Constitution is coherent with the frequent unwillingness of the Nigerian state to protect human rights. At the same time, the Constitution makes it a duty and responsibility of all government agencies and officials exercising legislative, executive or judicial functions to obey respect and apply the provisions of the DPSP.[507]

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[504] Dada, (2013) *Ibid.*, p. 4.
[505] 1999 Constitution of the Federal Republic of Nigeria, CAP C23 LFN 2004, sec 17(2) (d) & 3.
[506] Kaniye SA Ebeku, 'Constitutional Right to Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v Shell* Revisited' (2007) 16(3) *Review of European Community & International Environmental Law* 312, 316.
[507] 1999 Constitution of the Federal Republic of Nigeria, sec 13.

The above provisions were prudently construed in the case of *Archbishop Okogie (Trustees of Roman Catholic Schools) and other v The Attorney-General of Lagos State*[508] in which the Court of Appeal held that the rights stated under the DPSP in chapter II of the Constitution have to concur with and be administered as supplementary to the Fundamental Rights under chapter IV of the Constitution. If there is no violation of any rights stated under chapter IV, there can be no objection to the state acting in conformity with the rights stated in chapter II, certainly on the subject of the legislative and executive powers bestowed on the state.[509] This decision was also affirmed in *Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria* [510] concerning the constitutionality of the Act under which the Independent Corrupt Practices and Other Related Offences Commission (ICPC) was created. The court held that the Act was established under the Directive Principles borrowed from Indian jurisprudence as follows:

> [Every] effort is made from the Indian perspective to ensure that the DPSP are not a dead letter. What is necessary is to see that they are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the DPSP in Chapter II of our Constitution.[511]

The above two cases confirm that the rights stipulated in chapter II of the Constitution can be made justiciable through legislative means. Pressure from below could be mounted on the National Assembly to enact laws to promote and impose the observance of rights contained in chapter II of the Constitution, pursuant to section 13 of the DPSP and item 60(a) of the exclusive Legislative List. The judiciary would then have no excuse not to impose the provisions of such legislation made by the Nigerian parliament. Besides, the issue of the

[508] [1981] 1 NCLR 218.
[509] *Ibid.*, para 232.
[510] [2002] 27 WLR pt 772 222.
[511] *Attorney-General of Ondo State v Attorney-General of the Federation* [2002] 27 WLR (pt 772) 222. This stipulation was judicially interpreted in *Adewole v Jakande* [1981] 1 NCLR 152.

constitutionality of the Directive Principles cannot arise because the Constitution does not grant exhaustive details on actions to be taken to make the rights justiciable.[512]

Further, in *Badejo v Federal Ministry of Education and Ors*[513] a claimant, after scoring 293 marks was not offered the chance to be interviewed for admission into a federal government college, on the basis that her marks were lower than the 295 cut-off required for pupils from her state of origin. However, some other applicants that scored below 293 from the so-called educationally backward states were called for interview. The applicant filed an action in the High Court claiming that she was discriminated against. The Court dismissed the case on the basis that she lacked *locus standi*, but it was reconsidered by the Appeal Court. The Court of Appeal found that although the applicant had *locus standi*, her right to education was not breached because the right was created in the DPSP. The ruling of the Court of Appeal was upheld by the Supreme Court but it held that it would not get involved in a pointless academic exercise.[514] This resulted in Aboride arguing that the Supreme Court had refused to use this opportunity to proclaim the right of people to education in the chapter II provision and tie the right to education to the right to life (under chapter IV fundamental rights provision).[515]

In addition, the basic civil and political rights stipulated in international human rights instruments are recognised and protected under chapter IV of the Constitution.[516] These rights include the right to life;[517] the right to dignity; freedom from slavery torture, cruelty and inhuman and degrading treatment;[518] the right to personal liberty; freedom from arbitrary

[512] *INEC v Musa* [2003] 3 NWLR pt 806 72, 152.
[513] *Badejo v Federal Ministry of Education* [1990] LRC (Const) 735 (Nigeria Court of Appeal, Lagos).
[514] *Badejo v Federal Ministry of Education* [1996] 8 NWLR pt 464 15.
[515] Femi Aborisade, 'Imperatives of Justiciability Socio-economic Rights in Nigeria an Analysis of Chapter II of the 1999 Constitution and Judicial Attitudes' (Unpublished paper presented at the Workshop on Social Protection and the Decent Work Agenda in the Food, Beverage and Tobacco Industry: Issues Arising, IJebu-Ode, Nigeria, 19-20 April 2013).
[516] International Covenant on Civil and Political Rights (ICCPR) (1966).
[517] 1999 Constitution of the Federal Republic of Nigeria, sec 33.
[518] *Ibid.*, sec 34.

arrest and detentions;[519] right to a fair hearing;[520] freedom of association and peaceful assembly;[521] and the right to freedom from discrimination.[522] These rights are justiciable and can be enforced by Nigerian courts against the state and private actors, including corporate entities.

Early jurisprudence has shown that the enforcement of fundamental rights stated under chapter IV of the Constitution was initially misconstrued by the Nigerian judiciary. This emerged in the Court of Appeal in the case of *Federal Minister of Internal Affairs v Alhaji Shugaba Darman*[523] where Karibi-Whyte JCA found that:

> It is undoubtedly relevant to bear in mind that the provision was designed to protect the individual against the oppressive exercise of government authority and majority power. Hence the rights conferred can be enforced and avail essentially, if not entirely against governments acting through their agents.[524]

This decision was affirmed in *Ategie v Mck Nigeria Limited* [525] where the court held that it would not permit an application to be made under the fundamental rights against a corporation even if human rights violations were alleged to have been perpetrated in the action.[526] This was confirmed by the Court of Appeal in *Uzoukwu v Ezeonu II*[527] where the court found that a person's right to dignity as expressed in the prohibition of torture and inhuman and degrading treatment is a right that can be imposed not only against the government and its agents, but also against private persons. This view was also followed in the case of *Denton-West, Walson Jack and 2 others* where the Court stated that every person, whether natural or corporate body, would be held to account for the infringement of human

[519] *Ibid.*, sec 35.
[520] *Ibid.*, sec 36.
[521] *Ibid.*, sec 40.
[522] *Ibid.*, sec 42; Other rights provided in this include right to private and family life (Section 37); right to freedom of thought, conscience and religion (Section 38); right to freedom of movement (Section 41); right to acquire and own immovable property anywhere in Nigeria (Section 43); compulsory acquisition of property (Section 44).
[523] [1982] 3 NCLR 915.
[524] *Ibid,*.
[525] Suit No M/454/92.
[526] See also *Aderinto v Omojola* [1998] 1 FHCLR 101; and *Ale v Obasanjo* [1996 6 NWLR pt 459 384.
[527] [1991] 6 NWLR pt 200 708.

rights provisions protected by the Constitution. So many cases have followed the new trend.[528]

It is important to note that the rights provided under the DPSP in chapter II of the Nigerian Constitution do not originally form part of the fundamental rights under chapter IV of the Constitution; they are fundamental objectives and principles that the Nigerian state aspires to and needs to achieve. This reinforces the idea that they remain an obligation which the state should strive to achieve.[529] Indeed, socio-economic rights under the 1999 Constitution are non-justiciable and unenforceable; the same constitution impliedly stipulates that an international treaty ratified by the National Assembly should be applied domestically as law in Nigeria.[530] In line with many other common law jurisdictions, the effect of section 12 of the Constitution is that if Nigeria ratifies international and/or regional human rights instruments,[531] such treaties will not become binding and enforceable until the same has been domesticated through an Act of the National Assembly.[532] For instance, in *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others v*

[528] [2013]10 SCM 73; see also *Peterside v IMB* [1993] 2 NWLR (pt 278) 712.
[529] Olawale Ajai, 'The Balancing of Interest in Environmental Law in Nigeria' in Michael Faure and Willemien du Plessis (eds), *The Balancing of Interest in Environmental Law in Africa* (PULP 2011) 388.
[530] Section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria provides that (i) No treaty between the Federation and any other country shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly; and (ii) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
[531] Nigeria have subscribed to the major international human rights instruments, such as the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights (ICCPR) (1966) ratified by Nigeria on 29 July 1993; the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) ratified on 29 July 1993; International Covenant on the Elimination of All Forms of Racial Discrimination (1966) (ratified on 16 October 1967); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) (ratified on 13 June 1985); Optional Protocol to CEDAW (1999) (ratified on 22 November 2004); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (ratified on 28 June 2001); Convention on the Rights of the Child (1990) (ratified on 19 April 1991); and Rome Statute of the International Criminal Court (2002) (acceded to on 27 September 2001). Regional instruments include the African Charter on Human and Peoples' Rights (1981) (ratified on 22 June 1983); Optional Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights (1998) (ratified on 20 May 2004); African Charter on the Rights and Welfare of the Child (1990) (ratified 23 July 2001); and Protocol to the African Charter on the Rights of Women in Africa (2003) (ratified 16 December 2004).
[532] Jacob Abiodun Dada, 'Impediments to Human Rights Protection in Nigeria' (2012) 18 *Annual Survey of International & Comparative Law* 67, 71.

Medical and Health Workers Union of Nigeria,[533] the Supreme Court in construing the obligation of Nigeria under the ILO Convention asserted that section 12(1) was a condition precedent to applying international treaties ratified by Nigeria. The Court explicitly stated that as long as the National Assembly has not passed the ILO Convention into law, it is not legally binding and enforceable in Nigeria. Even though this aforesaid ruling breaches a fundamental principle of international law, a state cannot be responsible for deficits in its own law or the provisions of that law concerning an action against it for an alleged violation of its obligations under international law.[534] Thus far, only the African Charter on Human and Peoples' Rights has been domesticated and has become Nigerian law.[535] The Court in *Abacha v Fawehinmi*[536] confirmed that the African Charter which is now part of Nigerian law is binding and enforceable like all other laws that fall within the judicial powers of the courts.

The approach of the Nigerian judiciary concerning the DPSP was first influenced by the initial position of its Indian counterpart with regard to the justiciability of DPSP under Part IV of the Indian Constitution. During the 1950s, the Indian courts recognised the non-justiciability of DPSP in Part IV of the Indian Constitution, which by virtue of Article 37 the Directive principles 'shall not be enforceable by any court'.[537] Currently, Indian courts have effectively and creatively interpreted socio-economic rights stated under the DPSP as an element of the right to life, which is justiciable and enforceable in the Constitution.[538]

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[533] [2008] 37 NRN 1.

[534] Stanley Ibe, 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities' (2009) 10 *African Human Rights Law Journal* 197, 209.

[535] Eva Brems and Charles Olufemi Adekoya, 'Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria' (2010) 54(2) *Journal of African Law* 254, 260.

[536] *General Sani Abacha v Gain Fawehinmi* [2000] 6 NWLR 228.

[537] Dam Shubhankar & Tewary Vivek, 'Polluting Environment, Polluting Constitution: Is a Polluted Constitution Worse than a Polluted Environment' (2005) 17(3) *Journal of Environmental Law* 383, 386. See also Michael R Anderson, 'Individual Rights to Environmental Protection in India' in Alan E Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection 210* (Clarendon Press 1996) 214.

[538] *Mohini Jain v State of Karnataka* [1992] AIR SC 1858; *Peoples Union for Civil Liberties (PUCL) v Union of India & Ors* [2003] 12 SC 283; *Olga Tellis v Bombay Municipal Corporation* [1985] 3 SCC 545, *Minerva Mills v Union of India* (1980) AIR (SC) 1789.

The Nigerian judiciary could have imitated the judicial position of its Indian counterparts by going beyond the limits imposed by the non-justiciability requirements of chapter II. For instance, in the case of *Shanti Star Builders v Narayan K Totame*[539] the Indian court stated that 'the right to life … would take within its sweep the right to food … and a reasonable accommodation to live in'. Further in *Francis Coralie v Union Territory of India*[540] the court was able to read and interpret the right to education as an element of the right to life, which is enforceable in the Constitution.[541] Such an approach in Nigeria would have been helpful to protect the rights to food, environment, land and livelihood frequently infringed upon by TNCs in Nigeria. Although some scholars have noted that Indian courts have not always been consistent in finding a nexus between these DPSP and fundamental rights, it has been observed that 'the Indian judiciary has, generally speaking, commendably transformed the bifurcated regime of human rights system under the India Constitution into a symbiotic, supplementary and mutually reinforcing framework'.[542] In this regard, one cannot but agree with Odinkalu who posited that the approach of the Nigerian judiciary on the issue of the justiciability of the DPSP is based on politics rather than law.[543] The Nigerian judiciary is

[539] *Shanti Star Builders v Narayan K Totame* [1990] 1 SCC 520.
[540] *Francis Coralie v Union Territory of India* [1981] 1 SCC 608, 618-619.
[541] Sangeeta Ahuja, *People, Law, and Justice: A Casebook of Public-interest Litigation*, vol 1 (Orient Longman, 1997); Sangeeta Ahuja, *People, Law, and Justice: A Casebook of Public-interest Litigation*, vol II (Orient Longman, 1997); Shashi Kant Verma, K. Kusum, *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (OUP 2000); Lavanya Rajamani, Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability(2007)19(3) *Journal of Environmental Law* 293, 294; Surya Deva, 'Public interest litigation in India: A Critical Review'(2009)28 *Civil Justice Quarterly* 19, 21-2; Ashish Kumar Dixit, 'Judicial Activism and Public Interest Litigation In India' (2012)6(3) *Quest-The Journal of UGC-ASC Nainital* 489; Manoj Mate, *Public interest litigation and the transformation of the Supreme Court of India Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013).
[542] Dakas CJ Dakas, 'A Panoramic Survey of the Jurisprudence of Indian and Nigerian Courts on the Justiciability of Fundamental Objectives and Directive Principles of State Policy' in Epiphany Azinge and Bolaji Owasanoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (Nigerian Institute of Advanced Legal Studies 2010) 304.
[543] Chidi Anselm Odinkalu**,** 'Lawyering for a Cause: The Femi Falana Story and the Imperative of Justiciability of Socio Economic Rights in Nigeria' (Text of Public Lecture in Honour of Femi Falana, SAN, delivered at the Polytechnic, Ibadan, 10 December 2012) 12. He pointed out that: 'Any suggestion of conflict between Sections 6(6)(c) and 13 does not arise because of the contingent modifier in the former provision, which, in the structure of the Nigerian Constitution, necessarily means that the latter [i.e. section 13] applies by virtue of the modifying contingency evinced in the former … Without a basis, therefore, in the text of the Constitution, the idea that socio-economic rights are not justiciable is easily exposed as founded merely on ideological factors extrinsic to our Constitution'.

vulnerable to political influences and hence it cannot be depended upon completely for the enforcement of socio-economic rights, a specific point that is particularly relevant to the hypothesis advanced in this thesis concerning the appropriateness of host state courts.

On the whole, there is no doubt that the Nigerian Constitution has to some limited extent been definite about the protection of human rights. The issue of whether or not the Nigerian state has ensured the protection of human rights is another thing entirely. Socio-economic rights are the most frequently violated by TNCs in Nigeria and have not been constitutionally addressed as fundamental rights. The Constitution of Nigeria does not encompass a bill of rights as enshrined in the constitutions of other African countries.[544] Besides the socio-economic rights stipulated in chapter II of the Constitution, the Constitution makes no mention of business and human rights. Rather than putting its faith in the Nigerian judiciary to actualise the realisation of these rights, this study recommends that civil society organisations, including labour union and civil rights activists, should embark on public awareness campaigns and also put pressure on the government to force it to transfer socio-economic rights under the DPSP in chapter II into a binding part of the constitution (ie fundamental rights under chapter IV) and should guarantee the International Bill of Rights. This bill of rights should be tailored to compel every person, including companies, to respect human rights. In any case, it is inconceivable that TNCs will breach the constitution of their host states.

Besides the constitutional framework, domestic company law is another major area of law through which a state regulates the activities of companies, both at home and abroad. This is because company law sets the parameters of the company's corporate existence, stipulates the limits within which the company operates and also specifies the situations in which a

[544] Article 8(2) of the South African Constitution, 1996 provides that: 'The Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'; Article 20(1) of the Kenyan Constitution, 2010 provides that: 'The Bill of Rights applies to all law and binds all state organs and all persons. Article 260 defines person to include a company, association … whether incorporated or unincorporated'.

company may wind up under the law.[545] This study will therefore evaluate in the next sections the limit to which Nigerian company law has impacted on TNCs and the effects of Nigerian company law in the regulation of TNCs.

6.4.2. Nigerian Corporate Law and the Regulation of Transnational Corporations

The legal instrument which aims to regulate TNCs directly in Nigeria is the Companies and Allied Matters Act (CAMA) 1990 which replaced the Company's Act of 1968.[546] The first Nigerian company law was promulgated by virtue of the Companies Ordinance 1912, [547] and the laws applicable to companies in Nigeria at this time were the 'common law of England, the doctrines of equity, and the statutes of general application which were in force in England on 1st January 1900'.[548] The effect of this approach was that common law principles, such as the concept of separate legal personality of entities as articulated in the landmark case of *Salomon v Salomon*,[549] were incorporated into Nigerian company law and have remained part of the law ever since.[550]

However, in principle in very limited situations the parent company of a TNC under Nigerian law can be held liable for the actions and omissions of its affiliate. [551] However, there is an obvious difficulty in enforcing any decision.[552] As in common law, the doctrine of separate legal personality is essential and strictly adhered to by the Nigerian judiciary.

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[545] Nicholas HD Foster and Jane Ball, 'Imperialism and accountability in corporate law: the limitations of Incorporation as a Regulatory Mechanism' in Sorcha Macleod (ed*) Global Governance and the Quest for Justice: Corporate Governance* (Hart 2006) 94.

[546] Companies and Allied Matters Act (1990), Cap C20 LFN 2004.

[547] J Ola Orojo, *Company Law in Nigeria* (3rd edn, Mbeyi & Associates 1992) 1. The CAMA was largely based on the 1976, 1980 and 1981 British Companies Act, and made very welcome, important and considerable modifications.

[548] The Interpretation Act (1964) Cap 123 LFN, sec 32; Ameze Guobadia, 'Protecting Minority and Public Interests in Nigerian Company Law: The Corporate Affairs Commission as a Corporations Ombudsman' in Fiona McMillan (edn), *International Company Law Annual*, vol 1 (Hart 2000) 81.

[549] *Salomon v Salomon & Co Ltd* [1897] AC 22.

[550] Philip I Blumberg, *The Law of Corporate Groups: Problems of Parent and Subsidiary Corporations under Statutory Laws of General Application* (Little Brown and Company 1989) 611; Sec 37, Companies and Allied Matters Decree No.1 1990 Act Cap. C20 LFN 2004. The concept of legal personality of companies has been discussed extensively in chapter 5.

[551] *MO Kanu & Sons v FBN Plc* [1998] 11 NWLR (pt 572) 116, 121.

[552] Olufemi Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52(1) *Journal of African Law* 89, 98.

Notwithstanding the strict adherence, the court in some situations may disregard the legal personality and lift the corporate veil to reach the parent company, for example, when the Corporate Affairs Commission (established under section 1 of the CAMA) is investigating the affairs of a company under section 316[553] or where a company is operating as an agent of the parent company or is created as a sham to defraud others.[554] This was affirmed in the Court of Appeal in *Adeyemi v Lan & Baker (Nig) Ltd*[555] where the Court held that:

> … there is nothing sacrosanct about the veil of incorporation … The decision in Salomon v. Salomon must not blind one to the essential facts of dependency and neither must it compel a court to engage in an exercise of finding of facts which is contrary to the true intentions or positions voluntarily created by the parties as distinct from an artificial or fictitious.[556]

In order to regulate the operations of TNCs locally in Nigeria, the CAMA by virtue of section 54, requires foreign companies that wish to carry on business in Nigeria to reincorporate as a local company:

> Subject to sections 56 to 59 of this Decree every foreign company which before or after the commencement of this Decree was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Decree.[557]

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[553] Section 316 of CAMA provides that: If an inspector appointed under section 314 or 315 of this Act to investigate the affairs of a company thinks it necessary for the purposes of his investigation to investigate also the affairs of another body corporate which is or at any relevant time has been the company's subsidiary or holding company or a subsidiary of its holding company or a holding company of its subsidiary, he shall report on the affairs of the other body corporate so far as he thinks that the results of his investigation of its affairs are relevant to the investigation of the affairs of the company first mentioned above.

[554] Olufemi Amoa, *Corporate Social Responsibility, Human Rights and the Law, Multinational Corporations in Developing Countries* (Routledge Research 2011) 122. See also, Companies and Allied Matters Act (1990), sec 506(1) and 290.

[555] [2000] 7 NWLR pt 663 33.

[556] See also *FDB Financial Services Ltd v Adesola* [2000] 8 NWLR pt 668 170; *International Offshore Construction Ltd v SLN Ltd* [2003] 16 NWLR pt 845 157; *Union Beverages Ltd v Pepsi Cola International Ltd and others* [1994] 2 SCNJ 157.

[557] Vincent O. Nmehielle and Enyinna S. Nwauche 'External-Internal Standards in Corporate Governance in Nigeria (The Africa Corporate Governance Conference, International Institute for Corporate Governance and Accountability, Washington, 2004)4; Francis N. Ekwere, 'Some Aspects of the Nigerian Company and Allied Matters Decree, 1990 as They Affect Investors' (1993)37(1) *Journal of African Law* 52-59.

The effect of the above stipulation is not only to forbid unregistered foreign businesses from operating in Nigeria but also to restrict the corporation from exerting any of the powers of a registered enterprise in Nigeria.[558] This does not affect 'the rights and liabilities of a foreign company to sue or be sued in its name or in the name of its agent'.[559] This is based on the idea that a foreign company, which is not registered as a separate legal entity in Nigeria, is still regarded as a juristic person capable of suing and being sued in its business name in Nigerian courts.[560] This was confirmed by the Supreme Court in the case of *Bank of Baroda v Iyalabani Co Ltd*[561] where it was found that 'it is a principle of common law and this is recognised in Nigerian laws that a foreign company may sue or be sued in our courts. It is not unusual that this occurs in our courts'.[562]

However, the concern is that the parent companies of TNCs can easily evade liability for the acts of their subsidiaries operating in Nigeria because these affiliates are registered and legally regarded as a Nigerian enterprise. This contention was argued in a claim filed in the USA court against Mobil and its parent company by residents of the Niger Delta region.[563] Another effect of this rule is that it may hinder the ability of Nigerian victims of corporate human rights abuses seeking redress from TNCs to approach the home state of the parent companies. In terms of the efficacy of this provision, Ogowewo has argued that it only has symbolic value and creates an excessive constraint on foreign companies.[564]

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[558] Orojo J Olakunle, *Company Law and Practice in Nigeria* (5th edn, LexisNexis Butterworths 2008) 49. For Nigerian cases confirming the principle of separate legal personality, this includes Marina *Nominees Ltd v Federal Board of Inland Revenue* [1986] 2 NWLR pt 20 61; *Olufosoye v Fakorede* [1992] NWLR pt 272 747; *Malafia v Veritas Insurance* [1986] 4 NWLR pt 38 802; *Kurubo v Zach Motison (Nig) Ltd* [1992] 5 NWLR (pt 239) 102; *Habib Nig Bank Ltd v Ochete* [2001] FWLR pt 54 384.

[559] *EIIA v CIE Ltd* [2006] 4 NWLR pt 969 114, 125 paras E-F; *Olaogun Enterprise Ltd v SJ and M* [1992] 4 NWLR (pt 235) 361; *NBCI Ltd v Europa Traders Ltd* [1990] 6 NWLR pt 154 36.

[560] Companies and Allied Matters Decree Act (1990), *Ibid.*, sec 60.

[561] [2002] 13 NWLR pt 948 551.

[562] *Ibid.*, para 558.

[563] *Mobil Producing (Nigeria) United v Monokpo* [2003] 18 NWLR pt 852 346, 401. This distinction was also applied by the Court of Appeal in according an oil community a stay of execution of a ruling against Shell for gas flaring in *Shell Petroleum Development Company (SPDC) of Nigeria v Dr Pere Ajuwa and Honourable Ingo Mac-Etteli Court of Appeal, Abuja division* [2007] No CA/A/209/06.

[564] Tunde I Ogowewo, 'The Shift to the Classical Theory of Foreign Investment: Opening up the Nigerian Market' (1995) 44(4) *The International and Comparative Law Quarterly* 915, 916.

Furthermore, section 65(1) of the CAMA provides that a company shall be criminally liable for the wrongful behaviour of its employee or agent to the same extent as if it were a natural person. However, the act underscores the inviolability of corporate criminal liability in Nigeria by signifying that a company shall still be criminally liable for wrongful acts perpetrated by its employees or agents in the course of an activity or a business not authorised by its Memorandum of Association but in which the company engages.[565] This effectively forecloses the use of the *ultra vires* rule as a defence in any criminal case against a company.[566] It seems clear that the memorandum of a company does not limit the scope or possibility of corporate criminal liability.

Therefore, ascertaining the business activity of a company within the provision of section 65(1)(a) includes considering not only the objects clause within the memorandum of the company but also its real business activities and ventures.[567] Okoli rightly points out that the involvement of the 'directing mind and will' located in the members must be present in order to attribute criminal liability to a company. This view was confirmed by the Supreme Court in the case of *Ibadan City Council v Odunkale*[568] where the Court held that the guilt of a director, being the mind and will of a company, may be accredited to the company itself in order to establish corporate liability. Also in *Adeniji v State*[569] it is clearly stated that:

> There is no doubt therefore that the company could be made liable criminally for the actions of natural persons in control or with necessary authority and who are regarded as the alter ego of the company and such natural persons could be treated as the company itself. Corporations being a legal fiction can only act and think through their officials and servants. For the purpose of imposing criminal liability upon corporations other than vicarious responsibility, the conduct and accompanying mental state of senior officers, acting in the course of their employment, can be imputed to a corporation.

[565] Companies and Allied Matters Act (1990), *Ibid.,* sec 65(1) (b) and 66.
[566] 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* 23, 46.
[567] Chijioke Okoli, 'Criminal Liability of Corporations in Nigeria: A Current Perspective' (1994) 38 Journal of African Law 35, 38.
[568] *Ibadan City Council v Odunkale* [1979] 3 UILR 490.
[569] *Adeniji v State* [1992] 4 NWLR pt 234 248, 261; See also *Mandilas and Karaberis Limited and Another v Inspector-General of Police* [1958] 3 FSC 20.

Having said that, the CAMA makes no reference to corporate human rights violations directly although section 299 stipulates that 'where an irregularity has been committed in the course of a company's affairs … only the company can sue to remedy that wrong and only the company can ratify the irregular conduct. Even though the phrase 'company's affairs' is subject to various interpretations, it appears from the stipulation that where a corporation encroaches on human rights, it is only the corporation that can bring a claim for redress. In addition, the section is included in the part that deals with safeguarding of minority rights against unlawful and unfair behaviour.[570] Therefore, it is hard to envisage how a corporation registered in Nigeria can be advanced in ensuring that it conducts its business in a socially responsible way if it were the wrongdoer and the adjudicator simultaneously. This provision deals with shareholders rights. This also brings about the failure of CAMA to consider other stakeholders in the business. In this regard, it is suggested that the CAMA should be revised and broadened to include the rights of other stakeholders, such as local communities of the place where they operate.

This study has thus far revealed that in spite of the possibility of domestic company law being one of the major instruments for regulating the activities of TNCs that impact human rights; Nigerian company law has not been a successful regulatory instrument in the face of the exploitation caused by TNCs. In view of the importance of the protection and enjoyment of human rights within the Nigerian context, there is no major attempt to explore the possibility of using company law in this regard. Certainly, this may be due to the fact that Nigerian law-makers and the regulatory agencies are not aware of the feasible possibility under Nigeria corporate law.[571] Further, the CAMA has not undergone any serious review since it was enacted two decades. Nigeria, as the giant of Africa, must take the lead in dealing with the

[570] Companies and Allied Matters Act (1990), *Ibid.*, Part X.
[571] Oyeniyi Abe, 'The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria' (2016) 7(1) *Journal of Sustainable Development Law & Policy* 137, 152.

issue of business and human rights. Therefore, this study recommends that the CAMA should be amended to ensure every company in Nigeria adheres to the *Guiding Principles on Business and Human Rights* during the time of incorporation. The *Guiding Principles* must be written and presented to all business enterprises as part of the registration documents.[572] However, some recent developments in the area of tort law offer a potential way forward. The next section discusses these developments.

6.4.3. The Role of Tort Law in Regulating the Activities of Transnational Corporations in Nigeria

TNCs may also be held liable for damages under the Nigerian law of tort for wrongful activities perpetrated in the course of their operations. The Nigerian law of tort was established based on the rules of English common law.[573] In spite of this, the damages provided by these rules in cases of human rights exploitations are available for victims of alleged corporate human rights violations in Nigeria. As in English common law, tort law in Nigeria offers two possible remedies for the victims: (i) monetary recompense for the injury suffered; (ii) or injunctions offered at the discretion of the court based on the doctrine of equity established by the trial court.[574] Injunctions have occasionally been sought by victims of corporate human rights violations in Nigeria but were rarely offered. For instance, in *Allar Irou v. Shell-BP*[575] the court declined to grant an injunction sought by the victim whose land, fishpond and creek had been polluted by Shell-BP because the order would have led to asking Shell-BP (the defendant) to stop oil exploration activities in the area. The court ruled that in certain circumstances the interests of third parties must be protected, for instance, where the injunction would lead to stoppage of business activities or 'throwing out a large number of

[572] For instance, Nigeria's environmental laws creates provisions for recognition of human rights, see Section 7 of the Harmful Waste (Special Criminal Provisions) Act (1988), CAP H1 LFN, 2004; section 6 of the Oil in Navigable Waters Act (1968), CAP 06 LFN, 2004; section 3(1) and 4 of the Associated Gas Re-Injection Act, CAP A25 LFN, 2004; and section 62 of Environmental Impact Assessment Act (1979), CAP A25 LFN, 2004.
[573] The Interpretation Act (1964), CAP 123 LFN, 2004, sec 32. These principles of tort law, alongside other rules of English common law that were applicable in England *on 1* January 1900, constitute Nigerian law.
[574] Jedrzej George Frynas, 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43 *Journals of African Law* 121, 121.
[575] Unreported Suit No. W/89/71 in the Warri High Court.

work people'.[576] The court also stated that granting an injunction would affect the operations of the oil companies which is the main source of the country's income. Similarly, in *Chinda v Shell-BP*[577] the court refused to grant an injunction sought by victims of gas flaring for Shell-BP (the defendants) to refrain from operating a similar flare stack within five miles of the victims' community.[578] The decision of the courts in the above two cases was beneficial to oil TNCs as the law permits them to carry on with their oil and gas exploration activities in Nigeria despite the harmful effect of oil operations on the Niger Delta community. According to Shell's legal manager in Nigeria in 1998; 'The law is on our side because in the case of a dispute, we don't have to stop operations', and no sole injunction has been granted against Shell in Nigeria.[579] A major exception in this regard in the development is *Gbemre v Shell*[580] which will be discussed later in the chapter.

Most of the claims that have been brought against TNCs in Nigerian courts have been pursued under the tort of negligence. In such cases the burden is on the claimant to prove that the perpetrator owes him a legal duty of care and that duty has been violated, thus resulting in the alleged harm.[581] In proving negligence, the victims must show that the TNC has violated a pre-existing duty of care towards them and also that the corporation has acted carelessly. However, proving negligence has been particularly difficult in the majority of the cases that have been brought against oil TNCs in Nigeria because the claimant must in fact prove in technical terms how an oil corporation has negligently breached a pre-existing legal duty of care towards them.[582] The case of *Seismograph Service v Mark*[583] is an example of a case in

[576] J. K. C. Nduka et al. 'Acid Rain Phenomenon in Niger Delta Region of Nigeria: Economic, Biodiversity, and Public Health Concern' (2008) 8 *The Scientific World Journal* 811, 816; Oluduro, (2010) *op. cit.* p. 267.
[577] *Chinda v Shell-BP* [1974] 2 RSLR 1.
[578] [1974] 2 RSLR 1, 14.
[579] Personal interview with JA Odeleye, SPDC's Legal Manager and Company Secretary (Lagos, February 1998) cited in Frynas, (1999) *op. cit.* p.123.
[580] *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* [2005] Unreported Suit No FHC/B/CS/53/05.
[581] Taiwo Osipitan, 'Problems of Proof in Environmental Litigation in Nigeria' in JA Omotola (ed), *Environmental Law in Nigeria Including Compensation* (Faculty of Law, University of Lagos 1990) 115-117.
[582] Frynas, (1999) *op. cit.* p. 123.

Nigeria that was dismissed because the claimant had failed to show that the damage to his fishing nets by a (Seismograph) boat violated a duty of care owed to him by the defendant. The court was of the view that the plaintiff ought to have shown that the defendant operated its boat negligently; the simple fact that the boat had torn through the plaintiffs' fishing nets, taking away floaters and other fishing items was insufficient. Another obstacle concerning proof of negligence arises in cases of numerous polluters within an industrial area, which makes it difficult to identify the company responsible for the injury sustained.[584]

The use of the tort principle of *res ipsa loquitur*, which literally means 'the facts speak for themselves',[585] enabled a few negligence cases to succeed in Nigeria without the plaintiff proving that the defendants had breached a duty of care. In the case of *Mon v Shell-BP*,[586] the court awarded compensation to the claimants for injury suffered from an oil spill on alleging a violation but without providing evidence based on the principle of *res ipsa loquitur*.[587]If environmental disaster such as oil spills by TNCs occur, a court is likely to establish that the defendant oil TNC was negligent except if the company can prove that the catastrophe may have happened without negligence on its part or as a result of uncontrollable events such as sabotage.

In Nigeria, cases of abuse of human rights have also been brought against TNCs on the basis of the tort of nuisance, which allows the claimant to sue for interference with the enjoyment of human rights, in particular the right to land. The claim for private nuisance may succeed if the claimant can show that the harm done to his/her property and way of life was due to the

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[583] [1993] 7 NWLR 203.

[584] *Access to Justice: Human Rights Abuses Involving Corporations Federal Republic of Nigeria* (A Project of the International Commission of Jurists Geneva 2012) 26.

[585] See *Onwuka v Omogui* [1992] 3 NWLR pt 230 393; and *Royal Ade (Nig) Ltd v NOCM Co Plc* [2004] 21 WRN 1. The principle will come into operation: (a) On the proof of the happening of an unexplained occurrence; (b) When the occurrence is one which could not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; (c) The circumstances point to the negligence in question being that of the defendant rather than of any other person.

[586] [1970-1972] 1 RSLR 71.

[587] The court in its decision stated that: Negligence on the part of defendants has been pleaded, and there is no evidence of it. None in fact is needed, for they must naturally be held responsible for the results arising from an escape of oil which they should have kept under control.

direct operations of the company.[588] However, cases of nuisance against TNCs in Nigeria have been pursued with little success because the judiciary is reluctant to award compensation to people or communities as a group, a reflection of the bias towards individual rather than collective rights that emanates from English law, and that remains underdeveloped under international human rights law. This is demonstrable to two cases with similarities in tort but different outcomes. In *Seismograph Service v Akporuovo,*[589] the claimant instituted an action against Seismograph that its seismic operation had triggered vibrations which wrecked his three structures. The trial court awarded damages to the claimant. The oil company appealed against the judgment of the Supreme Court, which set aside the lower court decision on the ground that the evidence established by the claimant at the trial was not enough to establish the liability, if any, of the appellant company.[590]

A similar action of public nuisance was seen in *Amos v Shell-BP*.[591] This was brought by residents of Ogbia community against Shell-BP and its subcontractor the Niger Construction Company for building a dam across a creek which resulted in the flooding and subsequent drying up of the creek downstream. The court dismissed the case on the ground that the creek was public property and the claimant had not adequately shown any 'personal' injury.[592] The implication of this case is that it is acceptable that farms are flooded and destroyed, water transportation is disrupted, goods cannot be conveyed to the market and the life of the local people is violated. In *Amos,* rather than the plaintiffs, the Attorney-General of the Federation (the representative of the government and the public), ought to have instituted an action against Shell but the main issue is that the Nigerian government is frequently unwilling to act on behalf of victims of human rights violations by oil TNCs.

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[588] *Abiola v Ijeoma* [1970] 2 ALL NLR 768; *Tebite v Nigerian Marine and Trading Company Ltd* [1971] UILR 432.
[589] *Seismograph Service v Akporuovo* [1974] All NLR 95.
[590] *Seismograph, Ibid* ; Frynas, (1999) *op. cit.* p.125.
[591] *Amos v Shell-BP* [1974] 4 ECSLR 436. *Lawani v Nigerian Portland Cement Co Ltd* [1977] SC 345.
[592] *Amos, Ibid.;* Taiwo Osipitan, 'A Conspectus of Environmental Law in Nigeria' (1997) *1 The Nigerian Journal of Public Law* 85, 91.

Beside the torts of negligence and nuisance, cases have also been brought under the strict liability rule found in *Rylands v Fletcher*,[593] which is still applicable under Nigerian law as in many commonwealth nations. The rule in *Rylands v Fletcher* is that 'anyone who brings on his land and collects and keeps there anything likely to cause damage if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape'.[594] In other words, the defendant is liable for the injury caused as a result of its activities, even though it was not at fault and the act was not done negligently. Nigerian courts have consistently held that once crude oil is channelled or accumulated into pipes the rule applies but if it is in its natural state in the ground then it does not apply.

This was affirmed in *Umudje v Shell-BP*[595] where the court awarded damages to the claimant based on the rule. In that case, the claimants instituted an action against Shell-BP for injury resulting from a Shell-BP oil waste dump and a road constructed across a waterway. The alleged oil escaped from Shell's oil waste dump onto their farms, ponds, streams and rivers destroying their crops, fish and other marine life. Moreover, during construction of the road the company refused to build enough culverts under it and at a particular point in the road fish previously moved across the land during the rainy season into the plaintiff's artificial fish ponds. This was no longer possible after the road was built. Although the Supreme Court accepted those facts, the company was not found guilty under the rule because material must actually escape from a defendant's land – blockage of the creek did not lead to flooding but only starvation of marine life and the river. However, Shell-BP was held liable for damages under the tort of negligence as its refusal to build enough culverts under the road was what led to the blockage of the creek, which caused damage. In *Shell BP v Anaro & Ors*,[596] the

[593] [1866] LR1 Ex 265.
[594] *Ibid.*, para 279-280.
[595] *Umudje v Shell-BP Petroleum Company of Nigeria Ltd* [1975] 9-11 SC 155.
[596] *Shell Petroleum Company of Nigeria Ltd v Anaro & Ors* [2000] 10 NWLR 248.

claimant brought an action against Shell for injury inflicted as a result of an oil spill from Shell's pipeline. The victims alleged that their fishing business suffered due to the devastation of fishponds and rivers, and the destruction of economic trees and household materials. The Court held that the gathering of crude oil in a waste pit was a non-natural use of land and so the rule in *Rylands v Fletcher* applied.

However, a perpetrator will not be liable under the rule if he can prove that the violation was committed with the permission of the victim, by 'an act of God' or by a recognised legal authority or independent act of third persons.[597] Hence, TNCs in Nigeria have managed to hide behind the independent third party exception to escape liability for violations they have committed in the course of their operations. For instance, in *Shell v Otoko*[598] residents of the Niger Delta region of Nigeria filed an action against Shell for injury resulting from an oil spill. Shell argued that the oil spill was caused by an act of unknown saboteurs who removed a screw from a damaged Shell facility. The court ruled in favour of Shell and the company was held not liable.

To sum up, the above discussion submits that tort law has restrictions for victims of corporate human rights violations who sue TNCs in Nigeria. The torts of negligence, nuisance and strict liability provide a legal remedy for claimants instituting an action against TNCs but the claimants' ability to sue is limited within the scope of each tort law rule. It is also apparent that one of the problems claimants of tort liability claims are being faced with in Nigeria is that of credible evidence. As a matter of law, in Nigeria, the admissibility criteria for scientific evidence places a plaintiff, who as a victim bears the onus of proof, at a serious disadvantage to the TNCs.[599] This is explicitly stated in Section 135 of the Nigerian Evidence Act that "Whoever desires any Court to give judgment as to any legal right or liability

[597] Amao, (2011) *op. cit.* p. 132.
[598] *Shell v Otoko* [1990] 6 NWLR (pt 159) 693.
[599] *Access to Justice: Human Rights Abuses Involving Corporations Federal Republic of Nigeria* (2012) *op. cit.* p. 53.

dependent on the existence of facts which he asserts must prove that those facts exist".[600] The burden is on the claimant to prove his or her case on the preponderance of evidence.[601]On the issue of the providing scientific evidence, defendant TNCs have the resources to employ the services of proficient experts in the particular field in a matter so as to rebut the evidence established by the plaintiff to support his/her case. This was apparent in *Ogiale v. Shell*, where Shell also engaged the services of the experts who gave evidence to strengthen the defence of the company and weaken the expert opinion provided by the claimants.[602]Accordingly, the court ruled in favour of the defendant company based on the fact that the plaintiffs failed to prove their case.[603] Thesis thus proposes that the rules of evidence in Nigeria need to be amended and liberalised regarding tort liability claims for human rights violations committed by TNCs in the course of their operations. In such tort liability cases, the burden of proof should be lessened in comparison to that required in a standard civil liability claim. This is necessary as victims of corporate human rights violations still fall back on tort rules to seek adequate judicial remedies and justice and may persistently do so because the Nigerian legal framework on using the provisions of statutes to litigate human rights violations by TNCs such as Shell BP is still immature. Legal changes in cases such as *Shell v Tebo VIP II* [604] and *Shell v Isaiah*[605] appear to have already yielded concrete substantial benefits to the plaintiffs. In both cases, the Court of Appeal reliance on minimal standards of rules of evidence assisted the plaintiffs in winning a compensation award for damage from an oil spill by Shell BP in the Niger Delta region. The next section will evaluate the legislative attempt to protect people against human rights violations by TNCs in Nigeria.

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[600] Evidence Act (2011), CAP E14 LFN, 2004.
[601] *Ibid,.*
[602] *Ogiale v. Shell* [1997] 1 NWLR pt 480 148.
[603] *Ibid,.*
[604] *Shell v Tebo VIP II* [1996] 4 NWLR 657.
[605] *Shell v Isaiah* [1997] 6 NWLR 236.

6.4.4. Other Laws and Regulations Enacted to Protect People against Human Rights Violations by Transnational Corporations in Nigeria

Besides the constitutional framework and tort law principle, Nigeria has enacted various laws and policies to protect its citizens against human rights violations by TNCs, in particular over the most volatile areas of environment and labour. The laws and legislations adopted include the *Petroleum Drilling and Production Regulation (Petroleum Act) 1969* and the subsidiary legislation made under the Act.[606] The *Petroleum Act* was the first to deal with problems related to oil and gas production including the protection of people and the environment from violations that result from such activities. There are three basic regulations under the Petroleum Act. They are: (i) the *Petroleum Drilling and Production Regulations* (PDPR) which requires licensees/lessee oil companies to carry out their operations in a good and 'workmanlike manner' and in conformity with 'good oilfield practice' in order to stop pollution of inland waters and to minimise injury to people and the planet;[607] (ii) *Petroleum Refining Regulation* (PRR) which places an obligation on the manager of a refinery to take necessary steps to prevent pollution of the environment and where such pollution takes place then appropriate measures should be taken to control it;[608] and (iii) *Mineral Oil Safety Regulations and Crude Oil Transportation and Shipment Regulations* which prescribe preventive measures to be taken in the exploration, carrying, transferring and storage of petroleum products to prevent environmental pollution.[609]

[606] Environmental Law Research Institute, 'Synopsis of Laws and Regulations on the Environment in Nigeria' <http://www.elri-ng.org/newsandrelease2.html> accessed 23 June 2016; Oshionebo, (2009) *op. cit.* p. 51.
[607] Petroleum Drilling and Production Regulation (1969), Legal Notice 69 of 1969, Reg 25, sec 17(1) (b) and 25.
[608] Petroleum Refining Regulation (1974), Legal Notice 45 of 1974, sec 43(3).
[609] Mineral Oil Safety Regulations and Crude Oil Transportation and Shipment Regulations (1997), Reg 6.

By contrast, although the *Associated Gas Re-Injection Act* generally prohibits gas flaring,[610] the Act did grant the Minister the discretion to lawfully allow oil corporations to flare gas if he believes that the utilisation or re-injection of the gas is not appropriate or viable in a specific oilfield.[611] Where the Minister gives his consent, such a permit may state the terms and conditions provided under section 1 of the *Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 1984* as well as a monetary fine for the gas flared by oil TNCs.[612] However, it seems the Minister's consent has been twisted to the advantage of oil exploration industries. Despite the main objective of the *Associated Gas Re-Injection Act* to stop the flaring of gas by urging oil companies to implement gas re-injection measures and its existence for more than two decades, gas flaring has persisted in Nigeria.

In addition, some of the laws and policies in Nigeria also obstruct the protection of human rights. For example, *Nigerian National Petroleum Corporation Act of 1977* impedes effective legal action against its businesses. This is because, according to its provision, before a lawsuit can be instituted against a company the intending litigant either by himself or through his counsel has to give the company one month's prior notice of his/her intention to take legal action. Further, a legal action cannot be brought against members of the board and workers of the corporation for their actions and omissions before a period of 12 months after the commission has expired.[613] The Coalition for Change (C4C), a civil society organisation, rightly argued that this legislation enforces 'a strict statutory limitation of action' that

[610] Ch A25, Laws of the Federation of Nigeria, 2004. Oluwatosin Busayo Igbayiloye et al, 'Legal Response to Human Rights Challenges of Multinational Corporations in Nigeria' (2015) 6 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 106, 116; Justice in Nigeria Now, 'Gas Flaring in Nigeria: an Overview' (April 2010) <http://justiceinnigerianow.org/jinn/wp-content/uploads/2010/04/JINN-2010-Gas-Flaring-an-overview.pdf > accessed 29 July 2016.

[611] Associated Gas Re-Injection Act (1979) *Ibid,*.

[612] *Ibid.*, sec 2 & 3(1); Eferiekose Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2010) 2(1) *Washington and Lee Journal of Energy, Climate and the Environment* 97, 104.

[613] The Nigeria National Petroleum Corporation (NNPC) Act (1977), CAP N123 LFN, 2004 sec 12; Igbayiloye et al, (2015) *op. cit.* p. 116.

unjustifiably protects the board of directors or members of staff from litigation that may be instituted against them.[614]

Currently, the Nigerian National Assembly is debating another Bill, the *Petroleum Industry Bill* (PIB), which is to address all the problems related to gas flaring.[615] If enacted, the bill will bring to an end human and environmental injuries caused by flaring gas and reduce economic wastage.[616] At a basic level, ending gas flaring will not only protect the people and the environment in the Niger Delta but also establish a commercially feasible domestic oil company that will increase government revenues.[617] The PIB appears to be a plausible and broadly supported piece of legislation that will regulate the whole of the Nigerian oil and gas industry.[618] However, it will not adequately address issues of gas flaring so as to protect human and environmental rights in the Niger Delta region. This is because of the loopholes (i.e. the legitimate flaring of gas under some instruments) stated in the statute,[619] coupled with corruption within the government, [620] inadequate enforcement mechanisms[621] and lack of incentives needed to develop oil and gas infrastructure.[622] Thus, making laws that will once again resolve the problems of gas flaring in Nigeria to some extent is unnecessary because these have already been addressed for the past 37 years. In light of the above, this

[614] Cited in Kamga and Ajoku, (2014) *op. cit.* p. 474.
[615] The Nigerian Petroleum Industry Bill (PIB).
[616] Kenneth T Royar, 'Money Talks: Why Nigeria's Petroleum Industry Bill will Fail to End Gas Flaring' (Paper Submitted to the Faculty of the Naval War College in Partial Satisfaction of the Requirements of the Department of Joint Military Operations, 2012) 1.
[617] Marc-Antoine Pérouse de Montclos, 'The Politics and Crisis of the Petroleum Industry Bill in Nigeria' (2014) 52(3) *The Journal of Modern African Studies* 403, 409.
[618] Heather Murdock, 'Nigeria Lawmakers to Debate Oil Industry Overhaul' *Voice of America News* (Washington DC, 11 September 2012); Oyeniyi O Abe, 'Utilisation of Natural Resources in Nigeria: Human Right Considerations' (2015) 70(3) *India Quarterly* 257, 265-6; Ismail Mudashir, 'Nigeria: Former Ruling Party Senators Halt Debate on Petroleum Industry Bill' *Daily Trust* (Nigeria, 27 April 2016).
[619] See Associated Gas Re-Injection Act (1979), *Ibid.*, sec 2 & 3(1).
[620] Sam Kennedy, 'The Business of Bribes: Nigeria: The Hidden Cost of Corruption' *Frontline/World* (Boston, 24 April 2009); US Department of Justice, 'Former Executive of Willbros Subsidiary Pleads Guilty to Conspiring to Bribe Foreign Officials in Nigeria and Equador' (12 November 2009).
[621] John Ayoola Tajudeen, 'Gas Flaring and its Implication for Environmental Accounting in Nigeria' (2011) 4(5) *Journal of Sustainable Development* 244, 246; Curtis Gulaga and Brett Light, 'Flare Measurement Best Practices to Comply with National & Provincial Regulations' (CB Engineering Ltd).
[622] USA Energy Information Administration, 'Country Analysis Briefs: Nigeria' 13; Oluduro Olubisi Friday, 'Climate Change - A Global and National Perspective: The Case of Nigeria' (2012) 5(3) *Journal of Politics and Law* 33, 34.

study recommends that the Nigerian government construct a more effective enforcement mechanism to ensure compliance with prudently enacted laws, especially within the sphere of business and human rights.

Other relevant legislation aimed at regulating the activities of TNCs in Nigeria that are worth mentioning are the *Environmental Impact Assessment Act* (EIA),[623] the *Harmful Waste (Special Criminal Provisions) Act (HWSCP Act)*,[624] and the *National Oil Spill Detection and Response Agency Act 2006 (NOSDRA Act)*.[625] The EIA was established to assess the possible adverse effects that public and private projects are likely to have on the environment.[626] However, before embarking on any project whether public or private, a written application has to be submitted to the agency for environmental assessment to determine approval.[627] The HWSCP Act[628] prohibits the transporting, carrying or dumping of hazardous waste in the air, land or waters of Nigeria without the permission of a legitimate authority.[629] The Act imposes the punishment of life imprisonment against anybody found guilty of contravening the provisions of the Act as well as forfeiture of the land or anything else used to further the offence.[630] The culprits are also liable to individuals who have suffered damages as a result of their wrongful activities. Where the act is perpetrated by a company with the consent, connivance or negligence of any officer of the corporation, the Act holds the said officer liable as well.[631] The NOSDRA established the *National Oil Spill Detection and Response Agency* with the overall responsibility to detect and respond to all oil spillages in Nigeria.[632] This also holds oil spillers liable for refusing to report such spillages and failing to clean up

[623] Environmental Impact Assessment Act, (1992) *Ibid,*.
[624] Harmful Waste (Special Criminal Provisions) Act (1988), CAP H1 LFN, 2004.
[625] National Oil Spill Detection and Response Agency Act (2006) No 15.
[626] Environmental Impact Assessment Act (1992), sect 2(1).
[627] *Ibid.*, sec 2(4).
[628] Harmful Waste (Special Criminal Provisions) Act, (1988) *Ibid,*.
[629] *Ibid.*, sec 6.
[630] *Ibid,*. sec 6.
[631] *Ibid,*. sec 7.
[632] National Oil Spill Detection and Response Agency Act (2006) *Ibid,*.

affected land.[633] In addition, the *Nigerian Criminal Code* punishes anyone who 'corrupts the waters' or 'vitiates the atmosphere' with imprisonment.[634]

The *Federal Environmental Protection Agency Act* (FEPA) was repealed and substituted by the *National Environmental Standards and Regulations Enforcement Agency* (NESREA) Act in 2007.[635] The NESREA is tasked with managing and enforcing environmental rules, guidelines and standards to deter private actors including corporate entities from polluting and damaging the environment.[636] The NESREA is also required to enforce compliance with provisions of all international environmental laws, protocols, conventions, treaties and agreements to which Nigeria is a party.[637] However, the mandate of NESREA does not include the administration of environmental rules and regulations in the Nigerian oil and gas industries.[638]

Despite the wide-ranging array of laws and policies as reflected here, the regulatory regime in Nigeria has failed to effectively control the human rights violations committed by the oil TNCs.[639] The regulations are generally disregarded and hardly ever imposed. This is because, as stated above, by virtue of the joint venture arrangement between the Nigerian state and oil companies, the government is hardly likely to impose strict human rights regulations on these entities as this would create huge expenditure and reduce income or proceeds of the business associates.[640] This disposition not only to reduce proceeds but is also why the initial pipelines laid by these companies at the commencement of oil exploration in Nigeria have not been

[633] *Ibid.*, sec 6(2).
[634] Nigerian Criminal Code Act (1906), CAP C38 LFN, 2004ch 23, §245.
[635] The National Environmental Standards and Regulations Enforcement Agency Act (2007), No 25, sec 7.
[636] Hakeem Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 *Beijing Law Review* 306, 309.
[637] Damfebo K Derri and Sylvanus Elijah Abila, 'A Critical Examination of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007' in Festus Emiri & Gowon Deinduomo (eds), *Law and Petroleum Industry in Nigeria: Current Challenges (Essays in Honour of Justice Kate Abiri)* (Malthouse Press 2009) 1.
[638] Aniefiok E Ite et al, 'Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law' (2016) 4(1) *American Journal of Environmental Protection* 21, 26.
[639] *Ibid*,.
[640] Eaton, (1997) *op. cit.* p. 282.

replaced with modern ones. Because these pipelines are rusty and worn-out, they frequently spill oil.[641] Even if the human rights legislations pointed out above are imposed, the damages awarded are considered grossly inadequate to economically powerful oil TNCs. Idemudia points out that compensation for injuries suffered as a result of corporate human rights violations is awarded at insufficient amounts so that oil TNCs can persistently violate human rights and pay damages, as opposed to adhering to rules and regulations.[642] Hence, some of the laws that stipulate punishment, especially imprisonment, are not commensurate with the offence perpetrated, and need to be repealed. Eaton rightly describes Nigerian laws and policies as 'rarely imposed and the regulations are usually simply ignored'.[643] Moreover, none of these legislations prescribe any particular guidelines for the TNCs to meet in order to protect people from the negative effect of corporate activities. The next section will assess the existing situation and responses of the Nigerian national courts to human rights violation by TNCs.

6.4.5. Responses of Nigerian National Courts to Human Rights Violations by Transnational Corporations

Like any modern state, Nigeria has its own court procedures and justice system capable of litigating issues of human rights violations by TNCs.[644] In an attempt to utilise the domestic legal regime, several cases of corporate human rights violations by TNCs operating in

[641] Kenneth Omeje, 'Oil Conflict in Nigeria: Contending Issues and Perspectives of the Local Niger Delta People' (2005)10(3) *New Political Economy* 321, 327. The allegation of an unnamed Niger Delta anti-oil activist interviewed by Omeje vividly describes this: Most of these companies' oil pipelines were laid in the 1960s and 1970s, and our fathers who are in their old age now will tell you (because they participated as labourers in laying them) that they have never seen these pipelines replaced. The pipelines are made of metals, which have a maximum lifespan of about 15 years. Yet they have been on our land for 20, 30, 40 years. It is quite natural they will rust. More so, because some of our terrains are swampy, the pipelines could even have a shorter lifespan. The companies do not replace them before expiration, which causes the spillage. I do not say there could not be cases of sabotage. They are quite rare—and the common feature in these cases is that it involves 'refined products', not raw materials (crude oil).
[642] Uwafiokun Idemudia, 'Rethinking the Role of Corporate Social Responsibility in the Nigerian Oil Conflict: The Limit of CSR' (2009) 21 *Journal of International Development* 833, 839.
[643] Eaton, (1997) *op. cit.* p. 282.
[644] Neal, (2011) *op. cit.* p. 345-6.

Nigeria have been brought before Nigerian courts. These cases concerned several alleged human rights abuses by the defendant TNCs operating in Nigeria, ranging from violations to the right to life, food, water and health in the cases of *Shell v Ambah*,[645] *Seismograph Services v Mark*,[646] *Ogiale v Shell*,[647] *Shell v Isaiah*[648] and *Shell v Tiebo VII*.[649] What all these cases have in common is that they are all cases of human rights violations committed by oil TNCs operating in their local communities; they concern frequent oil spills cases for loss of income from fishing and farming, contamination of drinking water, destruction to farmlands and crops, damage to health due to water-borne diseases, displacement of residents and the disruption of their lives.[650] In all these cases, the courts refused to grant reparations for injuries sustained as a result of these exploitations and violations by oil TNCs.

By contrast, the claimants in the case of *Shell v Farah*[651] did not only seek damages for injuries sustained as a result of corporate activities but also requested the court to make a declaration for the remediation of polluted land. The case laid an important judicial precedent as it was the first where apart from the damages which the company paid earlier for the crops and economic trees destroyed during the incident, the court awarded the sum of 4.6 million Naira (approximately US$210,000 according to the official exchange rate) as compensation to the plaintiffs for the pollution caused by the oil spill.[652] Although the compensation awarded *Farah* marked a significant departure from earlier court decisions, the damages awarded were insignificant compared to the billions of dollars paid as damages by BP for its

[645] *Shell v Ambah* [1991] 3 NWLR pt 593 1.
[646] [1993] 7 NWLR 203.
[647] [1997] 1 NWLR pt 480 148.
[648] [2001] 11 NWLR pt 723 168.
[649] [2005] 3-4 SC.
[650] Abdulkadir Bolaji Abdulkadir, 'Gas Flaring in the Niger Delta of Nigeria: A Violation of the Right to Life and Comment on The Case of *Johnah Gbemre v. Shell Petroleum Development Company of Nigeria Limited'* (2014) 22(1) *IIUM Law Journal* 76, 87.
[651] [1995] 3 NWLR pt 382 148.
[652] Jedrzej George Fryna, 'Social and Environmental Litigation against Transnational Crimes in Africa' (2004) 42(3) *Journal of Modern African Studies* 365, 371-2; Kaniye SA Ebeku, 'Judicial Attitudes to Redress for Oil-related Environmental Damage in Nigeria' (2003) 12(2) *Review of European Community and International Environmental Law* 199, 205.

oil well which exploded and sank into the Gulf of Mexico killing eleven people and causing long-lasting environmental damage that the corporation struggled to contain.[653]

The recent case of *Gbemre v SPDC, NNPC and the Attorney General of the Federation*[654] indicates the possibility of using human rights provisions for the purpose of regulating the activities of TNCs in Nigeria. In the case, the plaintiff instituted an action in a representative capacity alleging *inter alia* that flaring of gas as a result of Shell's oil exploration activities within the Iwherekan community in Delta State constituted a violation of fundamental rights guaranteed by both the Nigerian Constitution and the *African Charter on Human and People's Rights*. The plaintiff also alleged that specifically gas flaring violated their rights to life and the dignity of the human person under sections 33(1) and 34(1) of the Constitution and articles 4, 16 and 24 of the *African Charter on Human and Peoples' Rights*. The plaintiffs claimed that the constant gas flaring by the company has had adverse effects on both the people and the environment, and has led to convulsions, premature death, respiratory diseases, and destruction to farm land and produce, thus negatively affecting their food security.[655]

The defendant for its part argued the case on various grounds, namely that those articles of the African Charter did not establish justiciable rights under the Nigerian fundamental rights enforcement process. The defendant further maintained that gas flaring was lawfully allowed by sections 1 and 3 of the *Associated Gas Re-Injection Act (Continued Flaring of Gas)*

[653] Bradley Blackburn, 'BP Oil Spill: Families Gathered to Honour Eleven People Who Died, Expressed Frustrations with BP Transocean.' *ABC News* (*New York*, 25 May 2010); Rachel Anderson, 'Reimaging Human Rights Law: Toward Global Regulation of Transnational Corporations' (2010) 88(1) *Denver University Law Review* 183, 186.

[654] *Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd and Ors* [2005] suit no FHC/ B/CS /53 /05, para 4-5; Bas de Gaay Fortman, 'Adventurous Judgments: A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law Development' (2006) 2(2) *Utrecht Law Review* 22, 41.

[655] *Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd and Ors* [2005] *Ibid.,*; Kaniye SA Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell Revisited'* (2007) 16(3) *Review of European Community & International Environmental Law* 312, 317.

Regulations 1984.[656] In its ruling, the Federal High Court which is a trial court, found that the continued gas flaring by Shell in the course of their operations in the plaintiffs' community violated the fundamental right to life and dignity of the human person guaranteed by the Nigerian Constitution and the African Charter.[657] The court also ordered SPDC and NNPC to take necessary steps to stop gas flaring in the Iwherekan community of the Niger Delta.

This was a landmark case in Nigeria as it was the first to affirm that flaring of gas is unlawful, unconstitutional and a violation of the fundamental human right to life.[658] However, the judgment thus far has had little practical effect because it appears that imposing the court order in the near future is unlikely. Unfortunately, an inadequate enforcement mechanism coupled with the corruption prevalent in the legal system, which was proven by the removal and transfer of the trial judge, shows that a more robust enforcement mechanism is required to prevent and remedy human rights violations committed by TNCs in Nigeria.[659]

The case of *Zango v Pfizer International Inc.*,[660] in Kano had already generated a handful of litigations or attempted litigations in Nigeria. In this case, a group of Nigerians brought an action against Pfizer at the Federal High Court, Kano alleging that Pfizer's drug trials on children in Kano during the meningitis outbreak were illegal under Nigerian law.[661] However, after lengthy delays, the case was dismissed following voluntary withdrawal by the plaintiffs from the suits after the removal from the bench of the first judge allocated to the case and the second judge's decision not to hear the case for personal reasons. In May 2007, the Kano State government also initiated criminal charges and civil claims against Pfizer, seeking the

[656] Amy Sinden, 'An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria' in William CG Burns and Hari M Osofsky (eds), *Adjudicating Climate Change* (CUP 2009) 173, 179.
[657] *Jonah Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd and Ors* [2005] *Ibid.;* Amao, (2008) *op. cit.* p. 113.
[658] Abdulkadir, (2014) *op. cit.* p. 88.
[659] Palomaki, (2013) *op. cit.* p. 520.
[660] [2001] Suit No. FHC/K/CS/204/2001 (Nigeria).
[661] 'Pfizer lawsuit (re Nigeria)' Business and Human Rights Resource Centre, <https://business-human rights.org/en/pfizer-lawsuit-re-nigeria#c59576> accessed 25 August 2015; *American International Law Cases Fourth Series 2009*, Vol 1 (OUP 2011) 6.

sum of $2 billion in damages and restitution concerning the companies alleged drug trials.[662] During the same period, the federal government of Nigeria instituted a claim against Pfizer and some of its personnel, seeking almost $7 billion in compensation.[663] In 2009, while the case was still awaiting a hearing at the Federal High Court, the federal government of Nigeria, the Kano State government and Pfizer agreed to settle the case out-of-court.[664] This led to Pfizer agreeing to pay about $75 million as damages to over 200 persons affected by the illegal Trovan test.[665]

This case was remarkable as it was the first time the Nigerian state instituted a legal action against a TNC for human rights violations it committed as a result of its business activities in the country. Although Nigeria has taken a creditable step, which in the long run will lead to the out-of-court settlement of all pending cases against Pfizer both in Nigerian and American courts, the case is still dogged by issues that usually characterise the Nigerian justice system. Besides the huge costs in pursuing the case, including filing fees, service fees and lawyers' fees, the case was fraught with inordinate administrative delays as the plaintiffs had to wait for a total of 13 years. It can be noted that during the ATCA litigations in the American courts, the plaintiffs stated their lack of faith in the integrity of the Nigerian justice system.[666] They did this by citing the dismissal of *Zango v Pfizer* in Nigeria and the underlying grounds for the dismissal as proof of corruption in the Nigerian judicial system.[667] Further evidence

[662] Nwoye Ikemefuna Stephen, 'Litigating Abuse of Human Rights by Transnational Corporations: A Nigerian Perspective' (2015) *SSRN 2015* 14.
[663] Joe Stephens, 'Pfizer Faces Criminal Charges in Nigeria' *Washington Post* (30 May 2007); 'Nigeria Sues Drugs Giant Pfizer' *BBC News* (London, 5 Jun 2007).
[664] Douglas S Malan, 'Attorney Continues Long Battle with Pfizer over Nigerian Drug Experiments' Connecticut Law Tribune (USA, 12 February 2009).
[665] Tide (Nigeria) Fed Govt, 'Pfizer opt for out-of-court settlement' (*Business and Human Rights Resource Centre*, 29 January 2009) https://business-humanrights.org/en/fed-govt-pfizer-opt-for-out-of-court-settlement-nigeria> accessed 25 August 2015.
[666] *Abdullahi v. Pfizer*, Inc., [2d Cir. 2009] 562 F.3d 163, 169 cert. denied mem., [2010] 130 S. Ct. 3541; Amy F. Wollensack, Closing the Constant Garden: The Regulation and Responsibility of US Pharmaceutical Companies Doing Research on Human Subjects in Developing Nations (2007)6 *Washington University Global Studies Law Review* 747, 758; Tiffany A. Hetland, '*Alvarez-Machain, Sosa v. Abdullahi v. Pfizer* & the Alien Tort Statute: Kicking Open a Door Left Slightly Ajar By'(2011) 4 *Saint Louis University Journal of Health Law & Policy* 427, 439.
[667] *American International Law Cases Fourth Series 2009*, Vol 1 (OUP 2011) 6.

can be given here to this effect, such as the parent who lost a child during the Pfizer tragedy who stated that: 'Our children are dead and some are maimed. We want to end this matter now, but some people are being opportunist for riches.'[668]

This section has argued that, despite the well-established legal and institutional framework aimed at regulating the activities of TNCs in Nigeria, the courts in Nigeria have not adequately resolved the issues of human rights abuses by TNCs due to various practical and procedural challenges.

6.5. Factors Hindering Access to Justice and Remedies in Cases of Human Rights Violations by Transnational Corporations in Nigeria

Previous sections evaluated the legal and institutional framework aimed at regulating the activities of TNCs in Nigeria. This section will examine the various factors that continue to undermine the capability of the judiciary to provide effective remedies and justice for victims of human rights violations by TNCs in Nigeria. Some of these difficulties include the strict interpretation of *locus standi* rules, delay in the administration of justice, ignorance and illiteracy, the cost of legal procedures, corruption, executive control, and manipulation of the court system.[669] This section will examine these problems to see how they have continued to impede access to effective remedy and justice for victims of corporate human rights abuses in Nigeria.

6.5.1. *Locus Standi*

One of the defences raised frequently by TNCs in Nigeria to impede access to courts for victims of corporate human rights abuses is the overused concept of *locus standi* which

[668] David Smith, 'Pfizer Pays out to Nigerian Families of Meningitis Drug Trial Victims' *The Guardian* (UK, 12 August 2011).
[669] Okechukwu Oko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria' (2005) 31(1) *Brooklyn Journal of International Law* 9, 14.

literally means 'standing to sue'.[670] This refers to the legal capacity of a person to appear and be heard in a proceeding before a competent court of law or tribunal or the legal right to initiate or commence a proceeding in a court or tribunal without any difficulty, inhibition or obstacle.[671] In other words, in order to institute an action, the claimant must show s/he has 'special interest' in the matter or his civil rights and obligations have been violated.[672] In order to determine the sufficient interest of a person in a matter, two tests have to be applied, namely that the party is a necessary party to the proceedings and the party has suffered damages arising from the lawsuit.[673] For instance, in cases of corporate human rights abuses, the plaintiff must show that s/he personal interest or property has been damaged by the TNC as a result of the negative effect of its activities.

In Nigeria, the issue of *locus standi* is a jurisdictional one, which as a matter of law the court must decline jurisdiction.[674] The rule of *locus standi* was strictly applied in the case of *Senator Abraham Adesanya v President of the Federal Republic*[675] where the court stated that where a matter concerns the community, it is only the Attorney General that has the right or capacity to bring such an action because it is regarded to be a crime in nature. The court further held that where a party intends to pursue such cases, he/she must gain the consent of the Attorney General or show to the court the injuries suffered by him/her and beyond that

[670] Frynas, (1999) *op. cit.* p. 132.
[671] Nlerum S Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' (2005) 2(3) *Sur International Journals on Human Rights* 94, 103-4.
[672] *Senator Abraham Adesanya v The President of Nigeria* [2002] 44 WRN 80; *Fawehinmi v Col Akilu* [1987] 4 NWLR pt 67 797.
[673] Justice Niki Tobi in *Pam v Mohammed* [2008] 40 NWLR 67 123.
[674] *Abraham Adesanya v The President of Nigeria* [1981] 2 NCLR 358; *Adenuga v Odemeru* (2003) FWLR pt 158 1258; *Attorney General of Kaduna State vs Hassan* [1985] 2 NWLR (Pt 8) 483; *Akilu v Fawehinmi* (No. 2) [1989] 2 NWLR pt 102 122.
[675] *Senator Abraham Adesanya v The President of Nigeria* [2002] 44 WRN 80. In the case the court specifically stated that: I take significant cognizance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumour-mongering is a pastime of the market places and the construction sites. To deny any member of such society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution … access to the Court of Law to air his grievance on the flimsy excuse (of lack of sufficient interest) is to provide a ready recipe for organized disenchantment with the judicial process.

suffered by other members of the community.[676] This has created major obstacles for human rights advocates and non-governmental organisations (NGOs) in filing a claim to seek redress on behalf of victims of corporate human rights abuses in Nigeria.[677]

This situation is reflected in the Supreme Court decision in *Shell BP v Otoko* where the court rejected the alleged class party lawsuit against Shell BP in which it was held that: (a) it is important that the party suing in a representative capacity of himself should have common interest in the cause of action with the person(s) he/she is representing; and (b) apart from the common interest and a common damages shared in a representative lawsuit if in addition to the relief sought it is in its nature advantageous to all whom the plaintiff intends to represent.[678] In the case, the respondents who were claimants at the trial court sued Shell BP for damages suffered as a result of its spillage of crude oil, claiming the sum of N499, 855 as fair and adequate compensation. The same was held in *Amos v Shell BP PDC Ltd* where the court denied the victims' access to justice on the grounds that the nature of the injuries suffered was one of public nuisance which required more than a mere manifestation of damages.[679]

The rule of *locus standi* was put to rest in the case of *Adediran and Another v Interland and Transport Limited*.[680] In this case, the court broadened the scope of *locus standi* in an action concerning the right of the general public to sue. The verdict of the court in *Adediran's* case was based on section 6(6)(b) of the 1999 Constitution which provides that:

> The judicial powers vested in accordance with the foregoing provisions of this section, shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

[676] Muhammed Tawfiq Ladan, 'Access to Environmental Justice in Oil Pollution and Gas Flaring Cases as a Human Right Issue in Nigeria' (Paper Presented at a Training Workshop for Federal Ministry of Justice Lawyers, 2011) 26; See also, *Shell Petroleum Development Company Nig Ltd v Chief Otoko and Others* [1990] 26 NWLR 159-693.
[677] *Senator Abraham Adesanya v The President of the Federal Republic of Nigeria* [1981] 1 All NLR (pt I) 1.
[678] *Shell Petroleum Development Company Nig Ltd v Chief Otoko and Others* [1990] 6 NWLR 159-693*; NNPC v Sele* [2004] All FWLR pt 223 1859 CA.
[679] [1991] 9 NWLR pt 214 155; *Seismograph Service (Nigeria) Limited v Ogbeni* [1976] 4 SC 85.
[680] *Adediran and Anor v Interland Transport Ltd* (1991) 9 NWLR pt 214 155.

The Supreme Court construed the above Constitution provision as granting private persons the *locus standi* to institute an action over allegations of public nuisance without obtaining the consent of the Attorney General as long as they showed sufficient interest in the matter.[681] Although in Nigeria today the requirement for Attorney General consent is no longer the law, the issue still remains whether a representative or class action can be claimed in public interest proceedings.[682] It is on this ground that the issue of *locus standi* creates a hurdle in seeking justice in cases of corporate human rights violations. For this reason, this study recommends liberalisation of the law to allow for public interest litigation whereby any individual or organisation with sufficient interest may pursue an action for redress on behalf of a third party with communal damages.[683]

6.5.2. Lack of Communication, Ignorance of the Law and Illiteracy

The high level of illiteracy predominant in Nigeria today, the lack of communication and ignorance of the law are major impediments to the realisation of access to effective remedies and justice by victims of human rights violations by TNCs in Nigeria. [684] UNESCO National Programme Advisor on Education in Nigeria noted that, out of the 170 million Nigerians, 65 million Nigerians remain illiterate.[685] According to Galadima JCA, 'The Constitution may be a common document to those in the course of whose activities it is a regular feature. However,

[681] *Ibid,*.
[682] Ainul Jaria Maidin and Abdulkadir Bolaji Abdulkadir, 'Issues and Challenges in Environmental Justice Delivery System in Malaysia and Nigeria: The Need for Liberalising the Strict Rules of Locus Standi'(2012) 6 *Current Law Journal, Malaysia* 1, 22.
[683] Liberalization started with the *locus classicus* (an important and often cited judicial authority) decision in *SP Gupta v Union of India* (*SP Gupta*) [1981] supp SCC 87, AIR 1982 SC 149, popularly known as the *Judges' Transfer* case, which upheld the *locus standi* of citizens to institute public interest cases before the Supreme Court.
[684] Michael Watts, 'Sweet and Sour', in Michael Watts (edn) *Curse of the Black Gold. 50 Years of Oil in the Niger Delta* (Powerhouse Books, New York**,** 2008)40.
[685] Muhtar Bakare, '65 million Nigerians are illiterates – UNESCO' *Vanguard* (Nigeria, 17 December 2015).

it is no gainsaying that a majority of Nigerians do not know what rights they have, enshrined in the Constitution.'[686]

It is most unfortunate that the social and economic situation of the country has made it difficult for a lot of Nigerians to have access to education, despite the various development strategies and programmes by successive governments, which emphasize the importance of education.[687] Despite the Nigerian wealth of resources and the government's policies to improve the living condition of citizens, about 70 percent of Nigerians are living on less than a dollar per day.[688]The poor lack information with regard to their legal rights and how to seek redress if their rights have been violated has meant that few Nigerians know about how to seek accountability for violations. Furthermore, difficulties arise when powerful actors like TNCs demand relief from the government while at the same time the latter, due to *esprit de corps*, inadequate enforcement tools and corruption, is unwilling to provide remedies and justice to victims of corporate human rights violations.[689] To date, the *Nigerian Constitution*, the *grundnorm* of the land, is written in English, the official language of the country, and has not been translated into any of the major local languages spoken by Nigerian citizens.[690] Given the high level of illiteracy in the country, many Nigerians are not aware of their fundamental rights as provided in the 1999 Constitution or have no knowledge of human rights generally. This viewpoint was re-emphasised in the 2006 sixth periodic report to the *Committee on Elimination of Discrimination Against Women* (CEDAW Committee) where it was stated that 'the use of the English language instead of the local languages as the means of communication in court, as well as the complex nature of the court system, are barriers to

[686] Olisa Agbakoba and Stanley Ibe 'Travesty of Justice: An Advocacy Manual against the Holding Charge' (The Human Rights Law Service 2004) 4.
[687] Muhtar Bakare, '65 million Nigerians are illiterates – UNESCO' *Vanguard* (Nigeria, 17 December 2015).
[688] Levinus Nwabughiogu, 'Over 100m Nigerians living below poverty line – Osinbajo' *Vanguard* (Nigeria, 20 August 2015).
[689] Eva Brems and Charles Olufemi Adekoya, 'Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria' (2010) 54(2) *Journal of African Law* 258, 264.
[690] Kola Odeku and Sola Animashaun, 'Poverty, Human Rights and Access to Justice: Reflections from Nigeria' (2012) 6(23) *African Journal of Business Management* 6754, 6758.

women accessing justice in Nigeria'.[691] It is sufficient to note that the obstacle is not only confined to women but applies to men and victims of human rights by TNCs in Nigeria. Victims of corporate human rights abuses who are ignorant can hardly enforce their rights or take up the cause of others without being aware of those rights.

6.5.3. Inordinate Delays in the Administration of Justice

Unnecessary and protracted proceedings are major obstacles inhibiting the disposition of justice in Nigeria.[692] It is a well-known dictum that justice delayed is justice denied.[693] This delay in the disposition of justice is caused by a number of factors, in particular, lawyers using delaying tactics to impede victims who ordinarily might be persuaded to accept payment of moderate amounts offered as damages instead of hearing the matter to its final determination.[694] These strategies include filing court processes out of time, thus leading to inadmissible situation whereby the issuance and service of court process, which can be done in a very short space of time, takes months and even years in many Nigerian courts.

Lack of adequate numbers of judges is another cause of inordinate delays in the administration of justice. While some of them are stressed due to heavy workloads, others lack adequate technological gadgets such as computers, assistants and workplaces, and if they are available, a lot of them are ignorant about how to use modern equipment. The lack of a steady electricity supply makes the working environment less than conducive. The few workstations that exist are obsolete, and libraries are equipped with out-dated books. In short,

[691] Nigeria's 2006 sixth periodic report to the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/NGA/6 (5 October 2006).

[692] Hurilaws, Legislative Agenda for Good Governance in Nigeria 1999- 2004, (1999) 9. For example, Hurilaw, a Nigerian nongovernmental organization found that, '[e]xtreme delay in litigation in the courts is routine. On the average, hearing in a case at first instance in a Nigerian superior court can take as long as 5-6 years with another 3-4 years consumed in appellate proceedings.'

[693] Wole Olanipekun, 'Access to Justice and Legal Process: Making the Legal Institutions Responsive' (Paper delivered at a Public Lecture Organized by the Honourable Justice Kayode Eso Chambers, Faculty of Law, University of Lagos, Nigeria, 17 June 2009) 9-10; UN Office on Drugs and Crime 'Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States' (Technical Assessment Report, January 2006) 20.

[694] Halima Doma, 'Enhancing Justice Administration in Nigeria through Information and Communications Technology' (2016) 32(2) *John Marshall Journal of Information Technology & Privacy Law* 89, 95.

the judiciary is deteriorating. The report found that unnecessary adjournment of cases also causes inordinate delays.[695]

According to the *Technical Report on the Nigerian Court Procedures 2001*, civil cases such as personal injury or tort claim takes at least 3 to 4 years to be decided while matrimonial cases take between 2 to 5 years to be resolved.[696] The report also stated that a lot of inordinate delays in civil cases can cause a matter to be prolonged to between 7 and 20 years.[697] Moreover, the *Constitution of Nigeria* provides for the right to a fair hearing within a reasonable time. Unfortunately, legal proceedings in Nigeria are not always speedy or dealt with within a reasonable time.[698] For example, the case of *Wilson Bolaji Olaleye v NNPC* was bogged down for 13 years before it was concluded with the issuing of damages granted to a deceased victim of a kerosene explosion and his dependants.[699] Similarly, *Ariori v Elemo*[700] took about 22 years to get to the Supreme Court of Nigeria whereupon it referred the case back to the lower court for a retrial of proceedings on the ground that the trial court's protracted delay (of 15 years) had led to an error of justice.[701] To reduce the delays in the administration of justice in Nigeria, the 1999 Constitution requires judgments to be delivered within ninety days after the conclusion of evidence and final address by counsel.[702] However,

[695] Roberto Gargarella, 'Too Far Removed from the People: Access to Justice for the Poor: The Case of Latin America' (2002)18 *Chr Michelsen Institute Workshop, United Nations Development Programme Oslo Governance Centre* 1, 5.
[696] IA Ayuna and DA Guobadia (eds), *Technical Report on the Nigerian Court Procedures Project, Including Proposal for Reform of the High Court of Lagos State Civil Procedure Rule*s (Nigerian Institute of Advanced Legal Studies 2001) 23.
[697] *Ibid*,.
[698] The right to a fair trial in Nigeria is guaranteed by the Constitution, which provides in Section 36(1): 'In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law'.
[699] Reported summarily in *The Guardian* (Nigeria, 3 July 1997); Brems and Adekoya, (2010) *op. cit.* p. 272.
[700] *Ariori and Ors. v Muraino BO Elemo and Ors* [1981] 1 SCNL; *Wakino v Ade John* [1999] NWLR 9 619, 11.
[701] See also *Nwadiogbu v Nnadozie* [2002] 12 NWLR pt 727 315 (Nigeria) which took about 23 years to finish. In *Maja v Samouris* [2000] 7 NWLR pt 765 78 (Nigeria) took the Supreme Court nine years to resolve the case; in *Ekpe v Oke* [2001]19 NWLR pt 721 341 lasted 17 years; in *Onagoruwa v Akinyemi* [2001] 13 NWLR (pt 729) 38 (Nigeria) took 21 years to finish; in *Obasohan v Omorodion* [2001] 13 NWLR pt 728 298, 36 took 16 years.
[702] See 294(1) (1999) of the 1999 Constitution of the Federal Republic Nigeria which provides that: Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.

the relevance of this laudable provision was drained by the Supreme Court in *Egbo v Agbara* where it stated that the delay in making a decision within the ninety-days as provided by the Constitution was not an issue if the matter was exclusively documentary or rested largely on interpretation of some document where the demeanour or credibility of witnesses was not involved.[703]

In general, the backlog of unresolved matters becomes a deadlock for the even flow and logical determination of cases as these keep accumulating and the period between filing of a process to final determination keeps increasing.[704] An up-to-date statistic conveyed by a judge of the FCT High Court shows that in the 2009/2010 end of legal year, a total of 6,109 impending cases were recorded while at the close of the 2010/2011 legal year there was a total of 9,083 unresolved cases (an increase of 30%). He added that in the same 2010/2011 legal year the court had a total of 17,269 lawsuits to dispose of compared to 12,269 in the preceding year (5000 claims more).[705] The Supreme Court and Court of Appeal offer even more startling statistics. As a result of the bulk of appeals overwhelming the two apex courts, especially on interlocutory matters, the dockets of these courts are overfull. Other commercial towns such as Kano, Lagos and Rivers are also faced with the same backlog.[706]

The 2006 UN report found that prolonged delay in proceedings was the most serious problem of the country's justice system when compared with other factors hampering justice delivery. In its conclusions, the report found that:

> Court users, who had more negative perceptions and experience when it came to seeking access to justice, were likely not to use the courts when needed, and that inefficient courts are likely to encourage citizens not to seek solutions in accordance with the law but to resort to other, often illicit, means including corruption.[707]

[703] *Egbo v Agbara* [1997] 1 NWLR 293.
[704] Doma, (2016) *op. cit.* p. 95.
[705] Hon Justice LH Gumi, 'National Judicial Policy: An Imperative for the Sustenance of Judicial Ethics' (National Judicial Institute, Abuja, Nigeria, 2011).
[706] *Ibid,.*
[707] UN Office on Drugs and Crime, 'Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States' (Technical Assessment Report, January 2006) 20-22.

This is the true situation in the Nigerian judicial system and is certainly not going to improve in the short or medium term unless there is political will and rigorous effort by people responsible for the disposition of justice to re-organise and transform the justice system.

6.5.4. Litigation Cost and Legal Fees

Apart from the inordinate delays, another indicator of the ineffectiveness and inadequacy of the administration of justice in Nigeria is the restricted access to justice. Access to legal remedies and justice largely depend on the ability of the claimant to procure adequate financial resources to file legal processes as well as to afford the services of a legal practitioner.[708] Generally, the high cost of litigation, including counsel fees and the lack of accessibility of courts because of their locations, are major factors that prevent victims of corporate human rights violations gaining access to justice in Nigeria.[709] These problems are prevalent in all countries and affect all sorts of people. However, they seem more serious in developing countries and impact poorer people to a disproportionate extent.

In Nigeria, the cost of filing fundamental rights enforcement cases are very high which means that it is difficult for poor litigants to have access to the justice system. This is particularly so in the case of the Federal High Court where the filing fees are associated with the amount of damages claims made by plaintiffs.[710] For instance, under the present *Rules of the Federal*

[708] Michael Anderson, 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC' (Paper for Discussion at WDR Meeting, 16-17 August 1999) 9 and 18; Roberto Gargarella, 'Too Far Removed from the People, Access to Justice for the Poor: The Case of Latin America' (Chr. Michelsen Institute Workshop, United Nations Development Programme Oslo Governance Centre 2002, vol 18) 3.

[709] Nigeria's 2006 Sixth Periodic Report to the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/NGA/6 of 5 October 2006.

[710] Order 53 Rule 1 (1) and Appendix 2 of the Federal High Court (Civil Procedure Rules), 2000. In respect of the recovery of a specified sum not exceeding N20,000 (approx $160), a filing fee of N1,000 (approx $8) is payable; for claims exceeding N20,000 but not exceeding N100,000 (approx $800), the sum of N1,500 (approx $12) is payable, while for claims exceeding N100,000 but not above N1,000,000 (approx $8,000) a filing fee of N2,500 (approx. $20) is payable, up to a maximum filing fee of N50,000 (approx $400). An originating summons costs about N680 (approx $5), while a motion on notice costs about N330 (approx $3), and an *ex parte* motion costs as much as that on notice. All fees exclude the costs of service, which is calculated by distance, but is not less than N100 (approx $0.80) each. In other cases, the fees for different motions may increase, depending on the type of application being filed, so that an application for a writ of *habeas corpus* is

High Court, for a monetary claim of 10 million Naira, the plaintiff must pay a filing fee of about 50,000 Naira before the proceedings.[711] Also, for cases that rely on survey plans and valuation reports, the plaintiff is required to make sure that at the time of filing they are already attached to the Statement of Claim even when it is known that the complainants cannot afford to pay the fees of these experts. Moreover, securing the services of a competent legal practitioner will not cost less than 50,000 Naira (approximately $400). The consequence of this is that Nigerians, especially victims of corporate human rights violations, find it very hard to seek to enforce their legal rights. Nigeria is a country where the minimum wage is 18,000 Naira monthly (about $56), and the majority of the population lives on less than a dollar a day.[712]

In the Technical Report on Nigerian Court Procedures Project published in 2001, many of the plaintiffs articulated that lawyers' fees are unduly high for the poor litigants. Plaintiffs are also expected pay numerous unofficial fees as bribes for different administrative activities in the court process. Otherwise, the suit will not be listed in the case list for trial.[713] The Nigerian justice system is heavily weighted in favour of the powerful TNCs as they can afford the best legal representatives and advice, whereas the poor claimant may be barred from his rights unless he is prepared to face bankruptcy.

In view of the high costs of litigation, especially litigation for environmental and corporate human rights violations, this study proposes that an accessible and effective legal aid scheme in Nigeria becomes one of the important elements in the right to access justice. Any democratic society that respects and follows the rule of law must provide all its peoples with both equal and effective access to justice. Access to justice ensures adequate protection of

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N500 (approx $4). The aggregate of these fees may be payable by a party filing a suit for the enforcement of his fundamental rights, if he is claiming damages for the violation of his rights.

[711] Okogbule, (2005) *op. cit.* p. 101.

[712] Brems and Adekoya, (2010) *op. cit.* p. 265.

[713] Ayua and Guobadia (eds), (2001) *op. cit.* p. 43.

human rights and promotes the rule of law.[714] The aim of the scheme created under the *Legal Aid Council Act 2004,* by the federal government was to provide free legal aid services and access to justice to poor Nigerians at the expense of the state.[715] However, the ability of the scheme to assist indigent rural victims of corporate human rights abuses to gain access to an effective remedy and justice is limited as the Legal Aid Council which runs the scheme has not been able to establish enduring structures in all the local government areas in Nigeria.[716] The factors that contribute to the ineffectiveness of the legal aid scheme include chronic underfunding and lack of priority on the national agenda.[717] Another factor that rendered the legal aid service inaccessible to underprivileged rural victims of corporate human rights violations is the lack of awareness of their legal rights and inadequate information on access to justice.[718] Many victims of corporate human rights abuses with either legal problems or in need of legal support are not aware of the legal aid assistance.

6.6.5. Corruption in the Justice System and Manipulation by the Executive

Corruption is endemic in Nigeria and it has plagued all government institutions.[719] The terrifying magnitude of corruption in Nigerian society appears to have encouraged the drafters of the 1999 Constitution to state that 'the state shall abolish all corrupt practices and abuse of office'.[720] A recent survey of nations on the Corruption Perception Index by a Berlin-based NGO, *Transparency International*, regarded Nigeria as among the most corrupt

[714] Engobo Emeseh, The Niger Delta Crises and The Question of Access to Justice, in Cyril Obi & Siri Aas Rustad (edn) *Oil Insurgency in the Niger Delta: Managing the Complex Politics of Petro-Violence (*University of Chicago Press 2011) 65, 214.
[715] Legal Aid Act (2011) Repealed the Legal Aid Act, CAP L9 LFN 2004.
[716] Uju Aisha Hassan Baba, 'An Overview of the State of Legal Aid Scheme in Nigeria – Pre-1991' (Paper Presented at Open Society Justice Initiative Legal Aid Meeting, London, 18 January 2007) 1.
[717] David Mcquoid-Mason, 'Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council' (2003) 47(1) *Journal of African Law* 107, 116; See also, the Website of the Legal Aid Council of Nigeria <http:// ww w.legalaidcouncil.gov.ng/> accessed 23 June 2016.
[718] Baba, (2007) *op. cit.* p.1.
[719] Okechukwu Oko, *Key Problems for Democracy in Nigeria, Credible Elections, Corruption Security, Governance and Political Parties* (Edwin Mellen Press 2010) 495.
[720] 1999 Constitution of the Federal Republic of Nigeria, sec 15(5).

countries in the world, ranking it 136 out of 168 countries. On a scale of 100, Nigeria scored 26 in 2015.[721] According to the Index, if a country scored below 50, it shows that the public sector needs to be more transparent and officials more accountable.[722] In 2006, Nigeria's Chairman of the Economic and Financial Crime Commission told BBC News that more than $380 billion in oil proceeds have been embezzled by Nigerian government officials since independence in 1960.[723] Corruption is part of society in Nigeria, especially in dealings with the government, and is practised in both the public and private sector. A lot of government officials enriched themselves at the slightest opportunity and as a result the country is impoverished. No government contract is awarded in Nigeria without officials benefiting.[724] Nigerian government establishments have had more incidents with corruption than most, and the judiciary is no exception. The Nigerian judiciary has failed to live up to its responsibility to advance beyond the corrupt environment in which it exists and functions.[725] Corruption in the disposition of justice for personal gain is no longer aberrant behaviour in Nigeria. It is, unfortunately, an overriding and persistent feature of the Nigerian court system.[726] Judicial corruption often involves judges or magistrates receiving gratifications or other considerations to influence justice.[727] For their part, judicial officers tend to do what numerous government officials do in Nigeria: exercise their official positions to increase their incomes and influence in society. Judicial officers are not well paid, which makes them vulnerable to accepting bribes.

[721] Transparency International, *Corruption Perception Index* (2015).
[722] Transparency International, *Corruption Perception Index* (2014).
[723] Standing, (2007) *op. cit.* p. 4.
[724] Nuhu Ribadu, 'Nigerian leaders "stole" $380bn' *BBC News Channel* (London, 20 October 2006); Robert I Rotberg, 'Council on Foreign Relations, Nigeria: Election and Counting Challenges' (CSR, 27 April 2007) 23.
[725] FAR Adeleke and OF Olayanju, 'The Role of the Judiciary in Combating Corruption: Aiding and Inhibiting Factors in Nigeria (2014) 40(4) *Commonwealth Law Bulletin* 589, 589.
[726] Petter Langseth, 'Judicial Integrity and its Capacity to Enhance the Public Interest' (Paper presented at the IIPE Biennial Conference, Brisbane, Australia, 4-7 October 2002) 20.
[727] Adeyemi Adedokun, 'The Impact of Corruption on the Administration of Justice in Nigeria' in IA Ayua and DA Guobadia (eds), *Political Reform and Economic Recovery in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2001) 681.

The plague of corruption in Nigeria has affected all facets of the judicial process despite the provisions of the *Code of Conduct for Judicial Officers* which requires that judicial officers desist from becoming involved in illegal and disreputable activities.[728] In recent times, four panels of judges sitting in election petition tribunals were held liable for corruption and eventually dismissed.[729] In a similar case, two judges of the Court of Appeal were accused of collecting the sum of fifteen million Naira (approximately $47,619) and twelve million Naira (approximately $38,095) as bribes, and ruling in favour of their patrons whereas the third judge rejected the bribe and gave a dissenting opinion.[730] The two judges were accordingly dismissed by the National Judicial Council. In addition, the National Judicial Council sacked two judges of the Federal High Court for corruption and abuse of office.[731]

The result of this is that the average Nigerian, especially the poor who lack the resources and social connections to affect the outcome of legal proceedings, believe that the Nigerian justice system is no longer a genuine avenue for seeking justice. Rather, the Nigerian judiciary is perceived as an 'auctioneer' ready to change legal principles and give judgement to the advantage of the highest bidder.[732] For instance, when the Supreme Court declared that the son of the former dictator Abacha was not a party to the assassination of the late Alhaja Kudirat Abiola, there was dismay across the country that such influence had been exerted.[733]

The intimidation of judicial officers has also been a factor in the quality and dispensation of justice. The murder case of the late Attorney General of the Federation, Bola Age,[734] was delayed for a long period because three judges discretely declined to continue hearing the

[728] Oko, (2006) *op. cit.* p. 25.
[729] Lillian Okenwa, 'Election Petition: NJC Probes Appeal Court Judges', *Thisday* (Nigeria, 7 June 2004); Soni Daniel et al, 'Alleged Corruption: Justices Okoro, Ademola, Ngwuta Risk 58 Years in Jail', *Vanguard* (Nigeria, 1 November 2016).
[730] *Gani Fawehinmi,* 'The Role of the Election Tribunals' *Nigerian Muse* (2 May 2007).
[731] Lemmy Ughegbe, 'Chinyere Amalu & Ise-Oluwa Ige, Nigeria: Obasanjo Okays Dismissal of Federal High Court Judge' *Vanguard* (Nigeria, 26 February 2004).
[732] Okechukwu Oko, 'The Problems and Challenges of Lawyering in Developing Societies' (2004) 35(2) *Rutgers Law Justice* 569, 605-06.
[733] Louis Odion, 'Beatification of Corruption' *Thisday* (Nigeria, 4 October 2002).
[734] Ademola Adeyemo and Hammed Shittu, 'Omisore's Acquittal & Police Investigation' *Thisday* (Nigeria, 16 November 2004).

matter, citing pressure from anonymous, highly influential people.[735] The presiding justice of the Court of Appeal openly stated that he had been intimidated by people interested in the matter. He declared that, 'before I move further, I want to say my mind and that is my personal opinion. I am under pressure: there are request and threats. But I have to go on with this case'.[736]

Similarly, the reckless and unprecedented suspension of Justice Ayo Salami, President of the Court of Appeal (PCA) by the National Judicial Council (NJC) which the then President of Nigeria endorsed for allegations of misconduct and perjury against the Chief Justice of Nigeria (CJN), indicates the presence of longstanding acts of corruption within the Nigeria judiciary system.[737] The allegation became public when Salami turned down his promotion to the Supreme Court by the CJN which, according to him, was to get him out of the way for refusing to influence the outcome of an Appeal sitting, as the final court for the resolution of gubernatorial election petitions for a part of the country, in order to favour the ruling party. He regarded his elevation as a demotion from the privileged PCA to an ordinary seat in the Supreme Court. He contended that the CJN and NJC had sold out to the Executive and interfered in the handling of the 2007 election tribunal.[738] According to Salami, the CJN mandated him to dissolve the panel he had instituted for the appeal concerning the election tribunal on the ground that if the panel allowed the appeal and removed the Governor, the domino effect would lead to the removal of the revered Sultan of Sokoto and with the

[735] Samson Ojo, 'Third Judge Abandons Omisore's Case' *Daily Trust* (Nigeria, 31 July 2003); Babs Ajayi, 'Omisore: A Disgraceful Soft-Landing' *Nigerian World Feature Article* (30 June 2004).
[736] Okechukwu Oko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of The Judiciary in Nigeria' (2006)31(1) *Brooklyn Journal of International Law* 9, 31; Ikechukwu Nnochiri, 'NJC Fires 2 Judges, 2 Others to Refund 10 Months' Pay', *Vanguard* (20 April 2016).
[737] Hakeem O Yusuf, 'Post Authoritarianism and the Judiciary in Africa – The Case of Nigeria' (Paper presented at the 2014 ECPR Annual Conference, University of Glasgow, Glasgow, 3-6 September 2014) 30-1.
[738] Tunji Dare, 'Salami: An Epic Injustice' *The Nation* (Nigeria, 13 August 2013); Eric Ikhilae, 'My Colleagues, Friends Betrayed Me, Says Salami' *The Nation* (Nigeria, 1 November 2013).

prospect of leading to a breach of the peace.[739] The Salami saga clearly demonstrates the highpoint of the falling institutional integrity and independence of the Nigerian justice system. As observed by one reporter, it is 'one of the ugliest episodes in Nigeria's judicial history'.[740] Corruption is not only widespread in Nigeria but is a global phenomenon which all countries are facing. Its peculiarity is solely based on the extent to which countries operate and the applicable punishment, which differ from one country to another.[741] Corruption has been heavily criticised by the United Nations, which in 2003 adopted the *United Nations Convention against Corruption* and to which Nigeria is a party.[742] All the countries in the world including Nigeria have tried to combat corruption. In the same vein, Nigeria in 2004 launched the *Nigerian Extractive Industries Initiative* (NEITI) to deal with the massive misuse of the country's oil revenue.[743] This initiative is part of the larger *Extractive Industries Transparency Initiative* (EITI), a global coalition of government, companies and civil society organisations working together to improve transparency and accountability of revenues from natural resources.[744] In 2006, as a Member of the AU, Nigeria signed and ratified the *African Union Convention on Prevention and Combating Corruption* accepting on legal obligations to implement its provisions.[745] Pursuant to its commitment to combat corruption, Nigeria, as a member of ECOWAS, joined the Attorney General and Ministers of

[739] Ajepe Taiwo Shehu and MK Tamim, 'Suspension of Justice Isa Ayo Salami: Implications for Rule of Law, Judicial Independence and Constitutionalism' (2016) 9(1) *African Journal of Criminology and Justice Studies* 41, 50.
[740] Tunji Dare 'Salami: An Epic Injustice' *The Nation* (Nigeria, 13 August 2013).
[741] Adeleke and Olayanju, (2014) *op. cit.* p.590; *Muhammad Mustapha Adebayo Akanbi*, 'The Challenges and Prospects of Anti-Corruption Crusade' in Yemi Akinseye-George and Gbolahan Gbadamosi (eds), *The Pursuit of Justice and Development: Essay in Honour of Hon Justice M Omotayo Onalaja* (Diamond 2004) 120.
[742] (2003), UN Doc A/58/422. Nigeria signed the Convention on 9 December 2003 and ratified it on 14 December 2004.
[743] EITI, 'Nigeria EITI: Making Transparency Count, Uncovering Billions' (2012) 1.
[744] *Ibid*,.
[745] African Union Convention on Preventing and Combating Corruption (2003), 43 ILM 5.

Justice *Accra Declaration on Collaboration against Corruption* issued in 2001, whose objective was to strengthen efforts by the countries to fight corruption.[746]

In addition, several agencies, various laws, regulations and initiatives have been enacted or implemented by numerous governments in Nigeria in an effort to fight corruption. These laws and instruments comprise the *Code of Conduct Bureau and Tribunal Act 1999* creating the Code of Conduct Bureau and Code of Conduct Tribunal respectively; the *Corrupt Practices and other Related Offences Act*, Cap C 31 Laws of the Federation of Nigeria 2004, which created the Independent Corrupt Practices and other related offences Commission (ICPC); the *Money Laundering Act of 2004*; and the *Economic and Financial Crimes Commission (Establishment) Act 2004* which created the Economic and Financial Crimes Commission (EFCC).[747] Despite the well-established legal and institutional framework capable of addressing corruption in Nigeria, these instruments have been consistently ignored, left dormant or not vigorously enforced to combat corruption.[748] No anti-corruption laws or initiatives will be successful without strong governance and political will. Therefore, for Nigeria to effectively implement and enforce anti-corruption laws, this study proposes that Nigeria needs political will and a strong leadership to lead the way and show that no one is above the law. Positive and unequivocal signals of support start from the superior, those in charge of implementing and enforcing anti-corruption laws of the country may feel inhibited.[749] Hence, political will is an essential starting point to realise a viable and successful anti-corruption scheme. As stated in the Tanzania Enhance National Anti-

[746] Ijeoma Opara, 'Nigerian Anti-Corruption Initiative' (2007) 6(1) *Journal of International Business and Law* 65, 78.
[747] Bright Bazuaye and Desmond Oriakhogba, 'Combating Corruption and the Role of the Judiciary in Nigeria: Beyond Rhetoric and Crassness' (2016) 42(1) *Commonwealth Law Bulletin* 125, 126; Musa Idris and Shehu Jafaru Salisu, 'Corruption and Infrastructural Development in Nigeria' (2016) 7(5) *International Journal of Arts & Sciences* 135, 136.
[748] Opara, (2007) *op. cit.* p. 78; Nlerum S Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria' (2006) 13(1) *Journal of Financial Crime* 92, 101; Pope Jeremy, *TI Source Book 2000: Confronting Corruption: The Elements of a National Integrity System* (Transparency International 2000) 47.
[749] Osita Nnamani Ogbu, 'Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will' (2010) 14(1) *Survey of International & Comparative Law* 99, 135.

Corruption Strategy and Action Plan, political will includes establishing justice, integrity and a broad spectrum of political support and compliance by the people and the government.[750] Although political will and leadership are generally regarded as including leaders from every walk of life – political leaders, the private sector, the public sector, professional groups and trade unions, the main focus is on the executive, legislative, and judicial branches of government.

Owing to the foregoing, Nigeria's justice system is facing a number of formidable obstacles to the realisation of this highly anticipated goal of increasing access to justice for victims of human rights violations by TNCs. While some of the problems are procedural, others are practical. Furthermore, a lack of transparency, credibility, shortages of resources and lack of guarantee in the enforcement and compliance with court decisions are other obstacles facing the Nigerian justice system.[751] The collective implication of these formidable obstacles is a lack of faith and trust by the public in the Nigerian justice system.[752] Although the role of any court in determining what the law is, and how it applies to a specific case is essential and the lack of enforcement devices rendered those decisions futile.

6.6. Prospects and Proposals for Reform

Attention has been drawn in this chapter to the role of courts within developing host states in adjudicating human rights violations by TNCs, and a number of obstacles that undermine their effectiveness. Ways and means of tackling these problems must therefore be designed in

[750] President's Office (Tanzania), 'The National Anti-Corruption Strategy and Action Plan for Tanzania' (2008-2011) 16-17.

[751] Chidi Anselm Odinkalu, 'The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights' in Varun Gauri & Daniel M Brinks (eds), *Courting Social Justice, Judicial Enforcement of Social and Economic Rights in Developing Countries* (CUP 2009) 190.

[752] The former Chief Justice of Nigeria, Hon Justice Musdapher in his speech at a special session of the Supreme Court to mark the commencement of the 2011 legal year stated that: 'It follows therefore that where public confidence in the judicial system is high; the incidence of people taking the law into their own hands would be very low indeed. Whereas the reverse would be the case where public confidence is low.' Accordingly, De Balzac quite aptly asserted that 'the lack of public confidence in the judiciary is the beginning of the end of society'.

order for courts within developing host states to provide effective remedies and justice in this area. The following proposals are made with the aim of overcoming the aforesaid obstacles.

6.6.1. Rule of Law

For developing host states to overcome the challenges concerning access to justice for victims of human rights abuses by TNCs, the government should fully recognise and implement the principles of rule of law and separation of powers between the three branches of the government (legislative, executive and judiciary). The UN Secretary-General defined rule of law in a report on the topic as:

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[753]

The principle of the separation of powers is an important component of the rule of law and remains fundamental to good governance.[754] In keeping with this principle, the legislative, executive and judiciary should have well-defined roles and work independently without interfering in the activities of on one another.[755] It is through this that judicial independence will be realised, and courts will become capable of discharging their role in ensuring that all persons have access to effective, efficient, fair, credible and affordable justice and remedy.

[753] UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies – Report of the Secretary-General' (2004), UN Doc S/2004/616, para 6.
[754] Julian Mukwesu Nganunu, 'Judicial Independence and Economic Development in the Commonwealth' (2014) 40(3) *Commonwealth Law Bulletin* 431, 432; Elijah Okon John, 'The Rule of Law in Nigeria: Myth or Reality' (2011) 4(1) *Journal of Politics and Law* 211, 212.
[755] Adeleke and Olayanju, (2014) 40(4) *op. cit.* p. 606.

6.6.2. Building a Robust Judicial System

The judicial system of developing host states needs to be restructured to reflect the universal concern for human rights protection. This is essential as the judiciary plays an essential role in ensuring a fair and accessible justice system to victims of corporate human rights abuses. Therefore, this study proposes that such reform should begin with a review of the relevant court rules that obstruct access to effective remedy and justice. In this regard, the rules that prevent many plaintiffs of corporate human rights abuses from seeking justice and remedies due to excessive litigation costs and procedures need to be revised, with filing fees reduced.[756] In Nigeria, it is remarkable that the Attorney-General of the Federation has recently noted the effort of the government to encourage the review of the Rules of Court. He pointed out that the purpose of such review is to reduce litigation costs, inordinate delay in disposition of justice and to ensure equal access to justice to litigants irrespective of their status and to make the legal regime understandable to litigants.[757] It is also crucial that a careful attempt is made to reduce the inordinate delay in the administration of justice in the developing host state.

6.6.3. Public Interest Litigation

This study recommends that developing host countries should relax their laws to allow for active participation by public interest organisations with sufficient interests in seeking justice and redress on behalf poor victims of corporate human rights violations. This approach has yielded beneficial results in other developing states that have been looking for avenues to enhance such access to justice. The public interest litigation (PIL) practice in India is particularly encouraging[758] as it can be been regarded as a principle of procedural

[756] In Nigeria, for example, the Federal High Court.
[757] Akinlolu Olujinmi, 'Agenda for Reforming the Justice Sector in Nigeria' (Federal Ministry of Justice, 2004) 6.
[758] Vandenhole Wouter, 'Human Rights Law, Development and Social Action Litigation' (2002) 2 *Asia-Pacific Journal on Human Rights and the Law* 136, 144; Talbot D'Alemberte, 'The Role of the Courts in Providing Legal Services: A Proposal to Provide Legal Access for the Poor' (1989-90) 17 *Florida State University Law Review* 107, 108.

liberalisation in issues of human rights abuses with the aim of enhancing access to justice.[759] Therefore, the Indian PIL can be construed as an avenue for protecting poor people from human rights violation by TNCs. The main characteristics of public interest litigation include the relaxation of *locus standi* rules and the liberalisation of procedural conditions of access. Although PIL is a contemporary exercise in judicial power, it is a good example of the justice system participating directly in resolving the issue of access to legal services for the deprived through the court rules.

6.6.4. Establishment of Special National Human Rights Courts

There is also need for the establishment of special national human rights courts across the states or district to be run by experienced judges in human rights law and assisted or advised by competent human rights experts. This would ensure more efficient and speedier responses to the need to protect human rights, gain greater familiarity with evolving international human rights laws, and establish adequate standards and aid enforcement of those laws. The specialised human rights courts could establish its own procedures to facilitate the investigation of human rights cases. The courts could benefit more from increased awareness of the need for social justice, and ought to be given the authority to provide more extensive and advance access to effective remedies to victim of corporate human rights abuses. The need for human rights courts, as practiced in New Zealand[760] and New South Wales in Australia, [761] is premise on the fact that human and environmental claims are very complicated and technical and need special bodies for the evaluations of the issues and the

[759] PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1984-85) 23 *Columbia Journal of Transnational Law* 561, 572.

[760] Environment Court New Zealand (Māori: Te Kooti Taiao o Aotearoa); Under the Resource Management Act 1991, the Environment Court can determine issues such areas as traffic congestion, noise/pollution emissions and social and commercial consequences.

[761] Land and Environmental Court of New South Wales in Australia, The Court has a wide jurisdiction to hear and determine many different types of case including civil enforcement and judicial review of decisions under planning or environmental laws, mining matters and claims for compensation by reason of the compulsory acquisition of land.

evidence.[762] This is also the practice embraced in India where states have an option of creating human rights commissions and courts with regard to their region.[763]Recognising the need for human rights courts tribunals or commissions in India was suggested in the case of *Andhra Pradesh Pollution Control Board v Prof M V Nayudu & Others*[764] where the court held that the Law Commission should review Indian human rights laws to consider the creation of human rights courts comprising experts in human rights laws, and judicial offices, taking into consideration the practice in other jurisdictions.

6.6.5. Enhancement of the Legal Aid Council Scheme

It is suggested that developing host countries such as Nigeria should reorganise and re-equip the Legal Aid Council to be more proactive to assist indigent victims of human rights violations who would then be able to secure the services of private legal practitioners to enforce their legal rights. In Nigeria for instance, the existing Legal Aid scheme has not been able to make substantial impact in this endeavour relatively due to structural and operational difficulties. It is recommended that the scheme should be developed and strengthened to be more effective and accessible to such indigent victims because the scheme will work to enhance the right to access to justice.

6.7. Conclusion

In seeking to draw conclusions, it can be questioned whether domestic courts within developing states (host countries) have the potential to provide means through which to seek remedies for victims of corporate human rights abuses. Given that both the victim and the entity are resident or domiciled in the host state where the alleged violation took place, the

[762]George Rock Pring and Catherine Kitty Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunal (The Access Initiative 2009).
[763] Ovunda VC Okene, *National Human Rights Commission and the Promotion and Protection of Human Rights in Nigeria – Reflections, Emerging Challenges and Suggestions for Effectiveness* (Selected Works 2010) 15.
[764] [2001] 4 LRI 657, para 74 (Supp. Ct India).

witnesses or evidence required to institute an action are where the alleged abuse occurred, and possibly the litigation costs of the case would be cheaper in the host country. To this end, this study argues that despite various serious challenges, it would nonetheless be desirable for domestic courts within host countries provide remedies and justice for victims of corporate human rights abuses for the reasons mentioned above. Also, if domestic courts within host countries are efficacious - they may be relied upon to prevent and punish corporate human rights abuses. This is based on international human rights law principle of access to justice for victims seeking remedies for corporate human rights abuses. The principle requires all states to provide all potential victims of corporate human rights violations access to adequate and effective domestic judicial remedy and justice in relation to the harm suffered.[765] Hence, if a host state's judiciary and enforcement mechanism worked to protect the rights and interests of victims of corporate human rights violations, the development of international standards for norms and forums to vindicate these interests would not be necessary.[766]

Nonetheless, the effect of these impediments is reflected in the frequent inability and a lack of political will or interest to offer a remedy for the victims of corporate human rights abuses, lack of enforcement of rulings, or more generally, decisions, coupled with public corruption which is prevalent in developing host countries. In evaluating Nigeria's legal and institutional mechanism in the quest for access to justice by the Nigerian victims of corporate human right violations, it is clear that there are various factors that seriously undermine the ability of the judiciary to provide effective remedies and justice to victims of human rights violations by TNCs. These factors stem from the bureaucratic legacies of the military regime in Nigeria, particularly corruption, power and manipulation of the judiciary by the executive and the lack of judicial independence which continue to weaken the ability of the judiciary to ensure

[765] UN Guiding Principles, para 25.
[766] Bridgeman and Hunter, (2008) *op. cit.* p. 195.

effective remedies and justice for victims of human rights violations by TNCs.[767] The administration of justice in Nigeria is also dogged by other practical and procedural issues – social, economic, cultural and institutional issues – that make it extremely hard for victims of corporate human rights abuses to access effective judicial remedies and justice.[768]

It is, however, worth mentioning that procedural obstacles are not peculiar to the Nigerian justice system and developing host states but have also affected developed countries. However, the solution to the challenges obstructing access to effective remedy within domestic courts of developing host countries for victims of human rights violations by TNCs is that the proposal for reform put forward in this thesis must be intensely and consistently pursued and enforced. It will require developing countries to undertake deep structural reforms, alongside vigorous involvement of several actors including the state, related agencies, the judiciary and public interest organisations. Developing host countries should also adequately fund and equip the Legal Aid Council to effectively discharge their duties to enhance access to justice for victims of corporate human rights violations. Government could Fund the Legal Aid Council by allocating certain percentage of tax paid from the accessible profit of TNCs registered in Nigeria. To achieve this objective, developing states should consider the importance of rule of law whereby every person, institution and company whether private or public are subject to and accountable to laws that are publicly applied, fairly enforced and adjudicated independently and in accordance with international human rights laws and standards.They should also take appropriate measures to effect other recommendations stated above. This way, domestic courts within developing states (host countries) will have the potential to provide effective means through which to seek remedies for victims of corporate human rights abuses.

[767] Oko, (2005-6) *op. cit.* p. 14; Hakeem Yusuf, 'Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, With Specific Reference to Nigeria' (2008) *8 African Human Rights Law Journal* 79, 85.

[768] Fedrzej George Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publisher Rutgers) 106.

CHAPTER 7
CONCLUSION

7.1. Introduction

This research was motivated by the fact that transnational corporations (TNCs) have the ability to commit grave human rights violations especially in host states that are developing countries through their business operations, and by the fact that, for a number of reasons, many developing host states have been unable to create a robust legal and regulatory regime to prevent and punish such violations when they occur. As a result, this creates a regulatory vacuum.

Moreover, victims of human rights abuses have the right under international law to access an effective remedy through recourse to judicial remedies where other remedial schemes, such as administrative remedies, are not sufficient.[1] One underlying basis of the thesis is that an effective and fair judicial system remains key to ensuring access to adequate remedies.[2] In view of this, the overriding purpose of this thesis was to consider the role of various courts at international, regional and domestic level; in the intergovernmental, home as well as in the developing host state, to remedy and hold to account human rights violations by TNCs and to hold them to account. The hypothesis accepts that the judiciary are not the ideal forum for improving human rights, due to the nature of problems that prevent full access to legal remedies. However, the existence of judicial systems and remedies stemming for them is nonetheless believed to remain the essential, if not an effective forum based for victims

[1] UNGA, 'United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law' (2006), UN Doc A/RES/60/147 (Principles and Guidelines on Reparation); ECOSOC, 'United Nations Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (2005), UN Doc E/CN.4/2005/102/Add.1., Principle 31 (Impunity Principles); 'Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator'.

[2] UNHRC, Report of the UN Special Representative of the Secretary-General on the issue of human rights and Transnational Corporations and Other Business enterprises; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (2011), A/HRC/17/31, Commentary on Principle 26.

seeking remedies for corporate human rights abuses. To achieve that goal, this thesis sought to examine the underlying concepts concerning accountability for human rights violations by TNCs, deriving these from academic literature and from established and emerging international standards. This was followed by a critical study on the courts, commencing from the international, through to the regional court systems. In this analysis, this body of work sought to understand the question as to adequate forum for accountability, assessing the efforts made in home states, where the TNCs are headquartered, and in host countries, where they operate, and where practice shows many of the unremedied human rights violations persist. Although, the emphasis for host states is on potential accountability. Nigeria was used as a case study in the final substantive chapter, to assess the extent of human rights violations committed by TNCs in a developing host state like Nigeria, have been dealt with by the courts at the domestic level.[3] In order to do this, it was necessary to ascertain the role of international courts in adjudicating human rights violations by TNCs and the manner in which these entities have been dealt with by international, regional and judicial authorities. This chapter begins with a summary and the recommendations of the thesis; it highlights the main contributions and the limitations with suggestions for future research. And lastly, it concludes by seeking to extrapolate the implications of this thesis concerning the importance of courts, for law, policy and practice.

7.2. Thesis Summary

Chapter 1 sought to set the stage for the analyses of the topic. It provided the general background on which the discussions of the remaining chapters are based, by considering the

[3] *Abdullahi 1 v Pfizer, Inc* [SDNY, 2002] US Dist LEXIS 17436 at 1; *Abdullahi II v Pfizer, Inc* [2d Cir NY, 2003] *77* Fed Appx 48, 2003 US App LEXIS 20704; *Abdullahi III v Pfizer, Inc* [SDNY, 2005] US Dist LEXIS 16126. all arose from this incident; *Irou v Shell-BP* (Unreported Suit No. W/89/71 in the Warri High Court; *Chinda v Shell-BP* [1974] 2 RSLR 1; *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited, the Nigerian National Petroleum Corporation and the Attorney General of the Federation* [2005] Unreported Suit No FHC/B/CS/53/05.

issue of business and human rights in addition to the aims, significance and scope of the study. It argued that TNCs through their business operations have the ability, and do commit serious human rights violations, especially in host states that are developing countries.[4] The chapter presented an overview of this trend, the impact of TNC activities on human rights highlighting the ensuing regulatory gap that resulted in impunity for corporate human rights violations. The chapter then analysed the theoretical background on which the discussion of the subsequent chapters was based. It also described the research method adopted for the study which includes doctrinal, comparative and socio-legal approaches.

In Chapter 2, this thesis attempted to analyse the existing international instruments and normative frameworks that were designed to regulate the activities of TNCs. The chapter considered the issue of legal subjectivity of TNCs in international law and the doctrine of the state's *duty to protect* in the business and human rights sphere. The chapter supported the argument in the literature that TNCs could not be regarded as subjects of international law in the sense of being conferred with international legal obligations to promote the enjoyment of human rights. Equally, it emphasized that TNCs are neither bound by international law nor do they have binding obligations under international human rights law. In addition, the thesis found that under international human rights law, the state bears the 'duty to protect' its citizens against human rights violations by third parties including TNCs, whereby they have a duty to take adequate measures to regulate and punish the private sphere either through judicial or non-judicial means.[5] When such violations occur, states are required to act with due diligence to investigate, prosecute and punish such actions and provide effective remedy

[4] David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003-4) 44 *Virginia Journal of International Law* 933, 933; also, Dejo Olowu, *An Integrative Right-based Approach to Human Development in Africa* (PULP 2009) 269.

[5] Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 1, 11; Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 84; Humberto Cantú Rivera, 'From General "Responsibility" to Context-Specific "Duty": The Role of The State in Ensuring Corporate Compliance with International Human Rights Law' (2015) 1(1) *Revista Mineira de Direito Internacional e Negócios Internacionais* 190, 191.

for the victims.[6] The chapter analysed various initiatives and international normative frameworks in the form of 'soft-law' instruments which have been established to control the activities of TNCs and the current international treaty initiative to regulate the activities of TNCs to respect and protect human rights. The chapter argues that although an array of 'soft-law' initiatives such as the UN Draft Code,[7] the OECD Guidelines,[8] the ILO Declaration,[9] the Global Compact[10] and the UN Draft[11] play a vital role in encouraging businesses to behave in a socially responsible manner, their voluntary and non-binding nature does not address the serious weakness of a lack of a compliance-oriented regime. Moreover, the activities of TNCs in developing host states like Nigeria have clearly shown that they are not sufficient to prevent human rights violations by TNCs, and as a consequence many human rights violations remain without remedy. The UN Guiding Principles offer some guidance on what states and TNCs can do within the framework of business to promote and protect human rights.[12] However as highlighted, since these principles are not legally binding, their implementation and enforcement largely depends on the respective states and TNCs. While many advocate for the establishment of an internationally legally binding corporate accountability instrument, the current call for a legally binding treaty on business and human rights issues appears an unlikely prospect at present, given the complexity of TNCs, the range of possible national approaches, and contemporary challenges to human rights issues.[13]

[6] UN Guiding Principles 1.
[7] ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1983) UN Doc E/1983/17/Rev 1; ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1988), UN Doc E/1988/39/ Add 1; ECOSOC, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations' (1990), UN Doc E/1990/94.
[8] OECD, 'Guidelines for Multinational Enterprises' (2000), OECD Doc DAFFE/IME/WPG 20.
[9] International Labour Organisation (ILO), *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006), 4th edn, ILO.
[10] United Nations Global Compact, 'The Ten Principles of the UN Global Compact.
[11] UNSUBCOM, Draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003), E/CN.4/Sub.2/2003/12/Rev.2. para 20. The UN Draft Norms were adopted in August 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights.
[12] United Nation Guiding Principles 1-21.
[13] UNHRC, Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights (2014), A/HRC/ 26/L.22/Rev.1.

In realisation of one of the primary objective of the thesis, Chapter 3 examined the role of the courts in enforcing human rights standards against TNCs by examining the use of litigation by victims of corporate human rights abuses. The first objective of the chapter was to evaluate whether the courts have a role to play in holding TNCs liable for human rights violations that they have committed in the course of their operations. The chapter argued that, although other non-judicial instruments which aim to redress human rights abuses are also available, courts have an important, if residual role to play, in providing remedies and justice for victims of human rights abuses. The importance of courts in providing remedies for victims cannot be disregarded because peaceful resolution of disputes through the courts, whether international, regional or national, assists parties to set out their respective standpoints.

The chapter mainly used statutes, case law, treaties and judicial decisions to evaluate the manner in which issues of business and human rights have been dealt with by international, judicial authorities such as the ICJ and ICC and also judicial regional bodies including the CJEU, ECtHR, IACHR, IACtHR, ACHPR and the ACrtHPR. The chapter highlighted that the ICJ and the ICC were not successful in holding TNCs liable for human rights violations they committed in the course of their operations. It is proposed that broadening the jurisdiction of these courts to include legal persons will provide a deterrent effect and hold TNCs liable for their actions and omissions. The chapter argued that until the issue of whether international human rights law directly places legal obligations on corporate actors has been legally resolved, the conflicting discussion over business and human rights will probably not end.[14] It proposed broadening the jurisdiction of the ICJ on advisory opinions together with expanding the possible parties who might be allowed to file such a claim as two ways in which Court proceedings could be advanced to handle the growing number of

[14] Jean-Marie Kamatali, 'The New Guiding Principles on Business and Human Rights' Contribution In Ending The Divisive Debate Over Human Rights Responsibilities of Companies: Is It Time For an ICJ Advisory Opinion' (2012) 20 *Cardozo Journal of International & Comparative Law* 437, 454.

complex cases, including international corporate human rights violations. The chapter submitted that an advisory opinion could be sought of the ICJ, to provide a definitive answer to the question of whether international human rights law directly places legal obligations on corporate actors. The chapter contended that such an ICJ advisory opinion would have the advantage of consolidating different opinions that exist at the international level on the question of whether private actors including businesses are bound by international human rights law and also to gain a definitive legal answer to the question which has occupied many scholars, and for which we see do not see consistent *opinio juris*. The chapter further asserted that the involvement of corporate officials in international crimes should be a condition for the criminal liability of corporate entities, challenged the well-known dictum of the International Military Tribunal at Nuremberg,[15] and supported the French proposal for its reconsideration. [16] Real international criminal justice involves not only prosecuting individuals but also the TNCs that are part of the web of international violence.

At the regional judicial level, the chapter found out that TNCs have actually been held responsible for their actions and omissions by the CJEU and some remedies have been given to the European victims. However, the case of European countries is not the same as that of developing countries. It argued that Euopean countries with developed economies do not depend as heavily on TNCs as the economies of developing countries do.[17] In this way, it is proposed that the European Commission, with the help of the CJEU, develop stricter rules and regulations for the TNC which are necessary for them to follow extraterritorially. If these rules are violated and human rights are abused, these TNCs will be held accountable. By

[15] Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013)12(1) *Chinese Journal of International Law* 43, 77.

[16] United Nations Working Group on General Principles of Criminal Law, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Working Paper on Article 23, Paragraphs 5 And 6: Draft Statute of an International Criminal Court' (1998), UN Doc A/ Conf./183/WG GP/L.5/Rev.2.

[17] Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1, 3.

doing so, the CJEU could play a significant role in holding European companies accountable for human rights violations and abuses committed in developing host states. It further established that the ECtHR has been successful to some extent in dealing with issues of business and human rights transgressions but is limited by the fact that the European Convention offers very little scope for this. Hence, it is proposed that the Court expand its jurisdiction over such instances by seeking to amend the European Convention, perhaps through an additional protocol. An examination of the IACtHR found that it is burdened by the problem of lengthy trials which leads to a state of injustice for the aggrieved. Hence, the main recommendation in that case was for the Court opens up separate channels so litigants could directly approach the Court.

Despite the attempt of the ACHPR to hold TNCs accountable for their wrongdoing, it remained less efficient because of issues of jurisdiction. It is therefore, suggested that the Protocol to the African Charter that created the African Court of Human Rights be amended so that the judgment of the Court could be implemented in the highest national court of the affected state. In addition, the thesis argued that the Inter-American system and the African system needed to be developed beyond their current state-centred approach of international law to protect human rights. The chapter found that, despite their potential, the ACrtHPR and the African Court of Justice (which is yet to be operational) may be less efficient because of the obstacles in accessing the Courts. Since individuals and NGOs are the most likely contenders to utilise the court system against corporate entities, the access hurdle needs to be overcome by the AU to make the Courts more effective and accessible to individuals and NGOs. Similarly, expanding the jurisdiction of the ECOWAS Community Court of Justice to cover corporate actors would sustain its substantive focus.[18]

[18]*Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* [2012], Case No. ECW/CCJ/APP/08/09, Judgment.

Chapter 4 described the limits of the theory of jurisdiction as it applies to the regulation of TNCs in more detail, within the scope of public and private international law. The chapter offered a brief definition of jurisdiction, which is more generally described as the power of a state under international law to regulate or otherwise impact upon people, property and circumstances, and also reflects the basic principles of sovereignty of states, equality of states and non-interference in domestic affairs.[19] Accordingly, the chapter reiterated that the exercise of jurisdiction by each state under public international law was primarily territorial. Thus, as a matter of policy, assertions of 'extraterritorial' jurisdiction are generally prohibited unless they can be justified by reference to one or more of the established principles of customary international law. These include the (i) territoriality principle; (ii) the active personality or nationality principle; (iii) the passive personality and the (iv) universality principle and, most controversially, (v) acts which have effects within that territory.[20] This canonical rule has been examined in three forms of jurisdiction which exist across general public international law: jurisdiction to prescribe (to make law); jurisdiction to adjudicate (to subject persons or things to its law); and jurisdiction to enforce (to compel compliance or punish non-compliance with its law).[21] The chapter found that home states could regulate and adjudicate human rights violations committed abroad by TNCs registered in their territory, through enhanced extraterritorial tools.

Further, the chapter established that nothing in the rules of public international law prohibits a state from extending the reach of its private laws extraterritorially any more than it imposes limits on states in the exercise of extraterritorial jurisdiction. Private international law is concerned with issues of jurisdiction of municipal courts, such as whether or not it is appropriate for a court to assume jurisdiction in a case with foreign elements, the domestic

[19] Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 645.
[20] Vaughan Lowe and Christopher Staker, "*Jurisdiction"* in Malcolm D Evans, International Law, (3rd edn. OUP 2010) 315; Shaw, (2008) *op. cit*., p. 652-673; Brownlie, (2008) *op. cit*., p. 301-306.
[21] John B Houck, 'Restatement of Foreign Relations Law of the United State (Revised): Issues and Resolution, Section 401' (1986) 20 *International Lawyer* 1361.

law applicable to the case, the rights and liabilities of the parties, and the extraterritorial recognition and enforcement of judgements in international private law disputes before national courts.[22] On the liability of TNCs for violations of international human rights norms, the chapter argued that, insofar as the violation at issue is recognised under the domestic law of a given state, the fact that the specific conduct is at the same time a violation of international law norms cannot be used to shield corporations from liability in domestic courts.

The chapter found that, as a consequence, each state has the propensity to approach issues of jurisdiction differently, depending on whether the rule is derived from public law (e.g. a legal obligation in anti-competitive behaviour) or from a private relationship between parties (e.g. based on negligence in tort or in contract).[23] For municipal courts to be able to determine private disputes with a foreign element, some degree of direct extraterritorial civil, jurisdiction is often necessary.[24]The chapter asserted that in common a law country, such as Canada, extraterritorial jurisdiction is established in civil claims if plaintiffs can show a 'real and substantial connection' between the parties, the claim, and the forum.[25] In the USA extraterritorial jurisdiction is established in private law cases if the defendant has minimum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.[26] Foreign businesses are subject to the general jurisdiction of the United States courts if they do business in the forum, that is, if they have

[22] *Ibid.*, 113.
[23]Zerk, (2006) *op. cit.*, p. 113.
[24] Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Responsibility Initiative Working Paper No 59, Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010)144.
[25]Francois Larocque, 'Recent Development in Transnational Human Rights Litigation: A Postscript to Torture as Tort' (2008) 46 *Osgoode Hall Law Journal* 605, 630.
[26]*International Shoe Co v Washington* [1945] 326 US 3106 (quoting *Milliken v Meyer* [1940] 311 US 457; Jonathan Spencer Barnard, 'Brave New Borderless World: Standardization Would End Decades of Inconsistency in Determining Proper Personal Jurisdiction in Cyberspace Cases' (2016) 40 *Seattle University Law Review* 449, 454.

substantial, ongoing business in the forum.[27] Likewise in the EU, the rules in which State Parties approach issues of private law claims and of jurisdiction have been harmonised by treaties and subsequent EU regulation. Thus the 'Brussels I Regulation', provides a framework detailing the bases of jurisdiction in civil and commercial matters to domicile of the defendant, including businesses in Europe.[28] In matters relating to contract, the defendant may be sued in the court of the state party where the contract is to be performed.[29] In matters relating to tort, delict or quasi-delict, the defendant may be sued in the contracting state 'where the harmful event occurred'.[30] In *Kalfelis*[31] the CJEU defined this as an expression covering 'all actions which seek to establish the liability of the defendant which are not related to a "contract" within the meaning of Article 5(1)'.[32] With regard to extraterritorial corporate activities, the Brussels regime is a possible instrument for the assumption of jurisdiction over a European parent corporation implicated in the extraterritorial activities of its foreign subsidiary.

Chapter 5 assessed the emerging regulatory technique proposed or already in use by home states to control and punish harmful activities of their TNCs abroad. The chapter examined the practice in a few states that has stemmed from the discourse on state extraterritorial obligations to prevent and remedy human rights violations perpetrated by TNCs abroad. The chapter contends that in international law a home state may incur an obligation to regulate extraterritorial activities of its businesses operating abroad or operating under the command, direction or control of the home state.[33] Likewise, under current international human rights

[27]Sarah Joseph, *Corporation and Transnational Human Rights Litigation* (Hart 2004) 83.
[28]Regulation (EU) No 1215/2012 the European parliament and the Council of 20 December 2012 on Jurisdiction and Recognition and Enforcement of Judgement in civil and Commercial Matters (2012), OJ L351/1(recast).
[29] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001), OJ L12/1 (Brussels 1), art 5.
[30]*Ibid.,* Article 5(3).
[31]*Bier v Mines de Potasse* Case 189/87 [1988] ECR 5565.
[32]*Ibid* paras 15-16.
[33] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *The Modern Law Review* 598, 605.

law, although there is no clear state obligation to regulate the activities of their TNCs extraterritorially, current practice by treaty bodies makes it clear that there is an emerging requirement on home states to control the activities of their TNCs abroad. It asserted the argument that home states have a role to play in holding TNCs accountable for human rights violations they commit abroad through some form of extraterritorial tool. The recent attempts made by some home states to enact legislation designed to regulate their TNCs' foreign operations with a view to protecting human rights has been observed.The chapter mainly embraced a comparative approach. Having found that victims of human rights violations by TNCs have increasingly utilised home state courts through tort law approaches in seeking remedies and justice, litigation in home state courts has not been an easy process for the victims. Access to justice in home state courts of TNCs is blocked by various procedural, jurisdictional and practical factors.

The chapter therefore recommended the adoption of an international instrument by states which illuminates extraterritorial home state obligations to prevent and remedy human right violations committed by their TNCs abroad.[34] This could be followed by the adoption of a domestic legislation imposing liability on a parent company for human rights violations committed by its subsidiaries abroad.[35] Once it is recognised as a matter of law, most of the problems that have been presented against extraterritorial home state regulation of TNC activities may be overcome more easily. Recent attempts by some countries to develop the National Action Plans (NAPs) for the implementation of Ruggie's Guiding Principles and Framework at the domestic level are a first step in the right direction.[36]

[34] See, for example, 'Binding Treaty, UN Human Rights Council (*Business and Human Rights Resource Centre*) sessions'<http://business-humanrights.org/en/binding-treaty> accessed 4 November 2016.

[35] For instance, the Alien Tort Claims Act (1789) (ATCA) in the USA is a piece of legislation upon which, since the late 1990s, victims of transnational corporate human rights abuses increasingly rely to obtain justice for the negative human rights impacts of US companies abroad. To date, however, this has had little success.

[36] For example, the UK developed National Action Plans (NAPs) entitled, Good Business: Implementing the UN Guiding Principles on Business and Human Rights 2013. Other countries that have issued the NAPs include the Netherlands, Italy and Denmark. See generally, United Nation Human Rights Office of the High

Chapter 6 addressed the second aim of the thesis when it considered the potential of domestic courts within developing host countries provide effective forum for victims of corporate human rights abuses to seek remedies based on the principle of access to justice. The chapter used Nigeria as a case study with particular attention paid to the landmark Nigerian cases of *Shell*[37] and *Pfizer*[38] to assess both the extent of human rights violations committed by TNCs in developing host states like Nigeria and how these entities have been dealt with by the courts at the domestic level. The chapter found that the regulation of TNCs by host states – more often than not developing countries – does not work for a number of reasons. The perceived inadequacy of developing host states is caused by various factors including the absence of strong legal mechanisms; a lack of capacity to implement human rights norms; a lack of political will or interest; a lack of financial, human and institutional resources; and public corruption which is prevalent in developing host countries. All these obstacles can arise to hamper the success of host-state regulation of TNC activities which violate human rights.

The chapter concluded that to overcome the various challenges which can arise to hamper and compromise the potential of domestic courts within developing states to provide means through which to seek effective remedies for victims of corporate human rights abuses, the proposal for reform put forward in this thesis must be intensely and consistently pursued and enforced by developing host countries. This is based on proximity - the fact that both the victim and the entity are resident or domiciled in the host state where the alleged violation took place, the witnesses or evidence required to institute an action are where the alleged abuse occurred, and the possibly that the litigation costs of the case are cheaper in the host

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Commissioner (OHCHR), 'State National Action Plans' <http://www.ohchr.org/ EN/Issues/Business/Pages/ NationalActionPlans.aspx> accessed 7 November 2016.

[37] *Irou v Shell-BP* [Unreported Suit No. W/89/71]; *Gbemre v Shell and Others*, [2005] Unreported Suit No FHC/B/CS/53/05.

[38] *Abdullahi 1* [SDNY, 2002] US Dist LEXIS 17436 at 1; *Abdullahi II* [2d Cir NY, 2003] 77 Fed. Appx 48, 2003 US App LEXIS 20704; *Abdullahi III* [SDNY, 2005] US Dist LEXIS 16126.

country. The chapter proposed that developing countries should undertake deep structural reforms, alongside vigorous involvement of several actors including the state, related agencies, the judiciary and public interest organisations. Developing host countries should also adequately fund and equip the Legal Aid Council to effectively discharge their duties to enhance access to justice for victims of corporate human rights violations. It also suggested that developing states consider the importance of the rule of law whereby every person, institution and company, whether private or public, are subject to and accountable to laws that are publicly applied, fairly enforced and adjudicated independently and in accordance with international human rights laws and standards.

7.3. Research Contribution and Policy Implications

This thesis has aimed to make two primary contributions to the ongoing business and human rights debate. First, it has aimed to highlight the strength of the domestic courts in developing host states' ablity to remedy and punish human rights violations by TNCs. Most previous research has examined the liability of TNCs for human rights violations they have committed when carrying on business in countries with weak legal and regulatory institutions.[39] Few have considered in-depth, and there is very little literature on how domestic courts within developing states could be strengthened to provide access to effective remedies and justice to victims of corporate human rights abuses. The study shows that strengthening the role of domestic courts of developing host states will also provide an opportunity for the domestic legal and regulatory instruments to be developed and made to work effectively to prevent and punish corporate human rights abuses. Besides, if a host state's judiciary and enforcement mechanism worked to protect the rights and interests of victims of corporate human rights

[39] Kinley and Tadaki, (2003-4) *op. cit.*, at 933; Joseph, (2004) *op. cit.*, at 9.

violations, the development of international standards for norms and forums to vindicate these interests would not be necessary.[40]

Secondly, the research provided an insight into how human rights claims would be more empowering for claimants than dry personal injury claims, by disentangling the link between tort litigation and human rights litigation. The thesis found that the idea of human rights will, however, presents a more effective way of holding TNCs liable for human rights violations than the notion of tort liability. Although tort law has a role to play in regulating and punishing the activities of TNCs that amount to human rights violations abroad, the capability of tort law to facilitate corporate accountability for human rights violations is limited by several factors such as corporate veil, access to courts and applicable law. Using human rights norms in holding TNCs liable presents the potential of universal international norms on business and human rights and provides a greater standard that can undermine the problems posed by procedural issues.[41]

7.4. Limitations of the Study and Suggestions for Future Research

Like any other research, this research is not without its limitations, some of which can be used as building blocks for future research. The first pertains to the use of Nigeria as a single case study to assess the extent of human rights violations committed by TNCs in developing host states. Clearly issues concerning corporate human rights abuses are not pertinent to Nigeria alone, but impact many other emerging economies notably Sudan,[42] Ecuador[43] and

[40] Natalie L Bridgeman and David B Hunter, 'Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism' (2008) 20(2) *Georgetown International Environmental Law Review* 187, 195.

[41] UNHRC, Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights (2014), A/HRC/ 26/L.22/Rev.1.

[42] *Presbyterian Church of Sudan, et al. v Talisman Energy, Inc. and Republic of the Sudan* (SDNY 2003) 244 F. Supp. 2d 289.

[43] *Maria Aguinda, et al. v Texaco, Inc* [SDNY 2001] 142 F. Supp. 2d 534 *and Gabriel Ashanga Jota, et al., v Texaco, Inc* [2d Cir 1998] 157 F.3d 153.

South Africa[44] who are confronted with similar problems. Similar violations can also be discerned in other countries in Africa, Asia, and South and Central America. For example, Anvil Mining Ltd, a Canadian Corporation with headquarters in Australia, was accused of complicity in human rights violations in the Democratic Republic of Congo (DRC). Coca-Cola has been accused of complicity in torture, kidnapping, unlawful detention and the killing of a trade-union leader as well as systematic intimidation of other employees by paramilitaries in Colombia.[45] It would thus be fruitful to conduct a comparative assessment of how these entities were dealt with in other jurisdictions.

Secondly, while the research has its strengths, the inability to consider the role of the Public Complaints Commission (PCC) and the National Human Rights Commission (NHRC) in the protection of human rights in Nigeria has been another limitation of the study. The Public Complaints Commission, popularly known as the Ombudsman,[46] and the National Human Rights Commission[47] are quasi-legal bodies involved in the promotion of social justice for the victims of human rights abuses in Nigeria and seek appropriate remedies on their behalf. It may be worthwhile to include the role of such administrative institutions such as the PCC and NHRC in future research.

A final limitation of the study was the inability to consider other non-judicial remedies such as arbitration, mediation and other formal alternative dispute resolution mechanisms. Sometimes, victims of corporate human rights abuses prefer to seek redress for their

[44] Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11*Yale Human Rights & Development Law Journal* 127, 133-4.
[45] *Sinaltrainal v Coca-Cola Co* [11th Cir, 2009] 578 F.3d 1252; Roger P Alford, 'The Future of Human Rights Litigation after Kiobel' (2013-2014) 89(4) *Notre Dame Law Review* 1749, 1761.
[46] KO Osakede and SO Ijimakinwa, 'The Role of Ombudsman as a Means of Citizen Redress in Nigeria' (2014) 3(6) *Review of Public Administration and Management* 120, 121; Sylva Manti Ngu, *The Ombudsman in Theory and Practice: the Nigerian and Comparative Perspective* (Ahamadu Bello University Press 1992) 29.
[47] Rachel Murray, 'National Human Rights Institutions: Criteria and Factors for Assessing their Effectiveness' (2007) 25(2) *Netherlands Quarterly of Human Rights* 186, 194; Obiora Chinedu, Okafor and Shedrack C Agbakwa, 'On Legalism, Popular Agency and Voices of Suffering: The Nigerian National Human Rights Commission in Context' (2002) 24(3*) Human Rights Quarterly* 662, 668.

criticisms through the informal justice sector.[48] This does not mean that the court system is inadequate, but this may partly offset the problems of access to justice associated with the judicial system for victims of corporate human rights. In addition, the non-confrontational mode of informal justice mechanisms for resolution of legal issues may have greater success and ought to be encouraged as a complement to court remedies. These are essential in maintaining a good relationship between victims of corporate human rights abuses and the TNCs, and may also satiate developing countries need for investment. As noted by Ruggie: 'Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms such as mediation and/or by adding a new mechanism'.[49] Future research may need to consider the development of alternative dispute resolution mechanisms which is nonetheless meaningful and effective in developing host countries like Nigeria for resolving issues of business and human rights. Having pointed out these limitations, from the researcher's point of view none of them undermines the validity of the present study.

7.5. Implications of the Thesis for Law and Policy Practice

This study has some implications for the developing host countries, policy-makers, lawmakers and the judiciary. In the first place, the recommendations made in this study concerning the inadequacies in some legal frameworks regulating the activities of TNCs may assist lawmakers in modifying their legal regimes to ensure better protection of human rights. The suggestion made will also aid policymakers in taking bold steps to make some important treaties entered into by their governments to be transposed into domestic laws to ensure their enforceability.

[48] James D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative & International Law* 77, 107; Natalya S Park and James P Nussbaumer, 'Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses' (2009) *Working Papers* 45/2009, 24.
[49] United Nations Guiding Principles, Commentary to Principles 27.

Concerning the judiciary, the study may serve as an important instrument that is within their reach for resolving the challenges posed by TNCs in the human rights sphere. This research may also assist the judiciary in taking steps to develop the ability of judges and other legal officers to effectively dispense justice in developing countries. Lastly, it will assist the whole of the human rights community in establishing and stimulating an applicable legal regime in order to enhance the adequate protection and promotion of human rights.

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